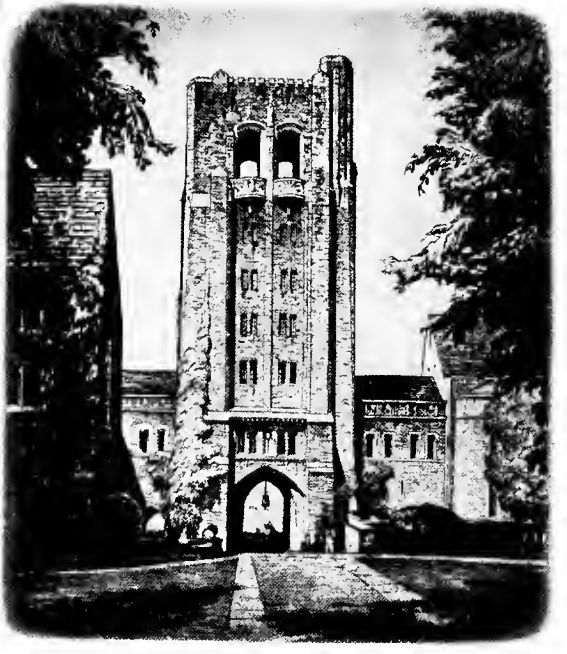

A TREATISE

ON THE LAW OF

EVIDENCE IN CRIMINAL ISSUES

BY

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A TREATISE ON THE CONFLICT OF LAWS, ETC.

TENTH EDITION BY

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PREFACE TO THE TENTH EDITION.

IN the twenty-seven years which have elapsed since the publication of the ninth edition of this work, more than ten thousand criminal cases have been reported, bearing on many of the topics discussed therein, and, with but rare exceptions, they are all affirmatory of the positions taken by Mr. Wharton,—a remarkable tribute to the genius and ability of this wonderful jurist and law-writer, who has been so appropriately named "the Gamaliel of the legal profession."

Mr. Wharton in his preface to the ninth edition, with delightful optimism, prepared the way for the adoption of a general national system of criminal law, to be embodied in a national code; and while we have not as yet obtained such a national criminal jurisprudence, nevertheless many important and significant signs now seem to point to such an accomplishment of his dream in the near future.

In the preparation of this work—which I earnestly hope may be of interest and value to my professional brethren—I have been greatly aided by the zeal and enthusiastic co-operation of Cæsar A. Roberts, of the Denver Bar, without whose aid any particular merit in the tenth edition would have been well-nigh lacking.

O. N. HILTON.

Denver, Colo., January 15th, 1912.

PREFACE TO THE NINTH EDITION.

IN the four years which have elapsed since the publication of the eighth edition of this volume, nearly one thousand cases have appeared, bearing on the particular topics it discusses. Most of these cases are affirmatory of the positions taken in the text, and are noted as such; but many of them present new distinctions which it has been necessary to introduce in detail. The task has been laborious; but it has not been without interest. The vast increase of reported cases, while adding to the value of treatises in which these cases are cited and classified, is preparing the way for the adoption of a general national system of criminal law in which local peculiarities will be gradually absorbed. Of this an interesting illustration will be found in a case hereafter noticed,* in which the Supreme Court of Massachusetts, a state remarkably retentive of judicial traditions, has abandoned, on a question of great importance, in deference to the opinions of other courts and of the profession at large, a position which that court previously had zealously vindicated. It is only by this gradual process of systematization and assimilation that, in the necessary absence of a national criminal code, we can obtain a national criminal jurisprudence. And the importance of this result may afford an additional stimulus to the labors of those who, in collecting the decisions of the courts, endeavor to combine these decisions in a harmonious system.

F. W.

Narragansett Pier, R. I.,
July 15, 1884.

*Infra, § 83.

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CRIMINAL EVIDENCE.

CHAPTER I.

PRELIMINARY CONSIDERATIONS.

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§ 1. Proof of guilt must be beyond a reasonable doubt.—Subject to exceptions to be hereafter specifically noticed, the tests for the admission of evidence are the same in criminal as in civil issues. As to the weight of evidence,

however, when admitted, a fundamental distinction exists. In civil suits both parties are subjects of the State, with equal rights in the eye of the law. For the one or the other a verdict must be found, and this verdict must be on a preponderance of proof, however slight, no matter how long a jury may hesitate, no matter how evenly the scales may for a time hang The parties, viewing them in the aggregate, enter the contest with advantages about equal, and are entitled to equal privileges. On the other hand, in a criminal prosecution, the State is arrayed against the subject; it enters the contest with a prior inculpatory finding of a grand jury in its hands; with unlimited command of means; with counsel usually of authority and capacity, who are regarded as public officers, and therefore as speaking semi-judicially, and with an attitude of tranquil majesty, often in striking contrast to that of a defendant engaged in a perturbed and distracting struggle for liberty if not for life. These inequalities of position the law strives to meet by the rule that there is to be no conviction when there is a reasonable doubt of guilt. What is reasonable doubt, in this sense, has been greatly discussed. Without attempting to examine in detail the mass of cases in which this discussion has been pursued, we may say, as a general rule, that in criminal trials there should be acquittals in all cases in which, if the issue were in a civil suit, the verdict on the one side or the other would rest on a bare preponderance of proof. The rule is not that there must be an acquittal in all cases of doubt, because, as we shall presently see, this would result in acquittals in all cases, since there are no cases without doubt. Doubt, of the character that requires an acquittal, must be far more serious than the doubt to which all human conclusions are subject. It must be a doubt so solemn and substantial as to produce in the jury grave uncertainty as to the verdict to be given.[1] "It is

[1] Post, § 300; *Reg.* v. *Tichborne*, Cockburn, C. J., ii. 816; *United States* v. *Foulke*, 6 McLean, 349, Fed. Cas. No. 15,143; *Com* v. *Stur-*

not mere possible doubt; because," says Chief Justice Shaw,[2] "everything relating to human affairs and depending upon moral evidence is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the

tevant, Wharton, Homicide, 742, Appx.; *Com.* v. *Harman,* 4 Pa. 270; *Com.* v. *Drum,* 58 Pa. 9; *Green* v. *Com.* 83 Pa. 75; *Holloway* v. *Com.* 11 Bush, 344; *Giles* v. *State,* 6 Ga. 285; *Malone* v. *State,* 49 Ga. 210; *Moughon* v. *State,* 57 Ga. 102; *Brewster* v. *State,* 63 Ga. 639; *Bush* v. *State,* 65 Ga. 658; *Farrish* v. *State,* 63 Ala. 164; *Winter* v. *State,* 20 Ala. 39; *Williams* v. *State,* 52 Ala. 411; *Owens* v. *State,* 52 Ala. 400; *Ray* v. *State,* 50 Ala. 104; *Cohen* v. *State,* 50 Ala. 108; *Bowler* v. *State,* 41 Miss. 570; *Garrard* v. *State,* 50 Miss. 147; *Hawthorne* v. *State,* 58 Miss. 778; *State* v. *Schoenwald,* 31 Mo. 147; *State* v. *Gann,* 72 Mo. 374; *Hiler* v. *State,* 4 Blackf. 552; *Sumner* v. *State,* 5 Blackf. 579, 36 Am. Dec. 561; *Line* v. *State,* 51 Ind. 172, 1 Am. Crim. Rep. 615; *Jarrell* v. *State,* 58 Ind. 293; *Earll* v. *People,* 73 Ill. 329; *People* v. *Finley,* 38 Mich. 482; *People* v. *Niles,* 44 Mich. 606, 7 N. W. 192; *State* v. *Collins,* 20 Iowa, 85; *State* v. *Dineen,* 10 Minn. 407, Gil. 325; *State* v. *Rover,* 13 Nev. 17; *State* v. *Hamilton,* 13 Nev. 386; *Shultz* v. *State,* 13 Tex. 401; *State* v. *Glass,* 5 Or. 73; *People* v. *Shuler,* 28 Cal. 493; *People* v. *Ah Sing,* 51 Cal. 372, 2 Am. Crim. Rep. 482; *People* v. *Beck,* 58 Cal. 212; *People* v. *Hardisson,* 61 Cal. 378; *Jackson* v. *State,* 9 Tex. App. 114; *King* v. *State,* 120 Ala. 329, 25 So. 178; *Roberts* v. *State,* 122 Ala. 47, 25 So. 238; *Brown* v. *State,* 121 Ala. 9, 25 So. 744; *Pitts* v. *State,* 140 Ala. 70, 37 So. 101; *Jones* v. *State,* 141 Ala. 55, 37 So. 390; *State* v. *Collins,* 5 Penn. (Del.) 263, 62 Atl. 224; *State* v. *Brinte,* 4 Penn. (Del.) 551, 58 Atl. 258; *State* v. *Emory,* 5 Penn. (Del.) 126, 58 Atl. 1036; *State* v. *Pratt,* 3 Penn. (Del.) 264, 51 Atl. 604; *State* v. *Walls,* 4 Penn. (Del.) 408, 56 Atl. 111; *State* v. *Carr,* 4 Penn. (Del.) 523, 57 Atl. 370. (All Delaware cases in accord.) *State* v. *Levy,* 9 Idaho, 483, 75 Pac. 227; *Miller* v. *State,* — Miss. —, 35 So. 690; *Bannen* v. *State,* 115 Wis. 317, 91 N. W. 107, reversed on rehearing in 115 Wis. 330, 91 N. W. 965; *State* v. *Abbott,* 64 W. Va. 411, 62 S. E. 693; *Brantley* v. *State,* 133 Ga. 264, 65 S. E. 426; *United States* v. *Guthrie,* 171 Fed. 528; *State* v. *Anderson,* — Del. —, 74 Atl. 1097; *State* v. *Ryan,* — Del. —, 75 Atl. 869.

[2] Wigmore, Ev. § 2497; *Bemis's Webster Case,* 190; *Com.* v. *Webster,* 5 Cush. 320, 52 Am. Dec. 711; *Com.* v. *Goodwin,* 14 Gray, 55. See *Reg.* v. *White,* 4 Fost. & F. 383. See *Buel* v. *State,* 104 Wis. 132, 80 N. W. 78, 15 Am. Crim. Rep. 175.

jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge." [3] Serious doubt on the part of a single juror is not,

[3] See also 1 Phillipps, Ev. 156; 1 Starkie, Ev. 478; 3 Greenl. Ev. § 29; *People* v. *Bennett,* 49 N. Y. 144; *Donnelly* v. *State,* 26 N. J. L. 601; *French* v. *State,* 12 Ind. 670, 74 Am. Dec. 229; *Castle* v. *State,* 75 Ind. 146; *State* v. *Ostrander,* 18 Iowa, 435; *State* v. *Sloan,* 55 Iowa, 217, 7 N. W. 516; *State* v. *Richart,* 57 Iowa, 245, 10 N. W. 657; *James* v. *State,* 45 Miss. 572; *Pilkinton* v. *State,* 19 Tex. 214; *Territory* v. *Owings,* 3 Mont. 137; *Territory* v. *McAndrews,* 3 Mont. 158; *People* v. *Beck,* 58 Cal. 212. See *Miles* v. *United States,* 103 U. S. 304, 26 L. ed. 481; *Wright* v. *State,* 69 Ind. 163, 35 Am. Rep. 212. See *Wade* v. *State,* 71 Ind. 535; *State* v. *Willingham,* 33 La. Ann. 537.

See remarks of Gray, Ch. J., in *Com.* v. *Costley,* 118 Mass. 21.

"A reasonable doubt must be an honest and conscientious difficulty in believing; one not merely subtle or ingenious; it must arise out of the evidence, and not be fanciful, or be conjured up to escape consequences; it must strike the mind with such force as to compel it to pause in yielding belief." Agnew, Ch. J., *Meyers* v. *Com.* 83 Pa. 131, 9 Mor. Min. Rep. 32.

That an omission to charge as to reasonable doubt is not error unless such a charge is required by the particular case, see *Colee* v. *State,* 75 Ind. 511; *People* v. *Marble,* 38 Mich. 117; *Hutto* v. *State,* 7 Tex. App. 44; *Frye* v. *State,* 7 Tex. App. 94. And see generally, *Garfield* v. *State,* 74 Ind. 60; *People* v. *Ah Chung,* 54 Cal. 398; *People* v. *Brown,* 56 Cal. 405.

That the attempt to define "reasonable doubt" should be discouraged, see *McAlpine* v. *State,* 47 Ala. 78; *Turbeville* v. *State,* 40 Ala. 715.

As to burden of proof see post, §§ 319 et seq. As to *corpus delicti* see post, §§ 324 et seq. As to alibi see post, § 333. Provocation, see post, § 334. Necessity, see post, § 335. Insanity, see post, § 336.

As will be seen (post, §§ 333 et seq.) the rule as to reasonable doubt applies to the whole of the prosecution's case. Thus, where it is doubtful which of two persons, between whom there was no concert, shot the deceased, the doubt must operate to work an acquittal. *People* v. *Woody,* 45 Cal. 289.

The remarks on this topic in the charge of Cockburn, Ch. J., in the *Tichborne Case* (Trial, etc. ii. 816), are peculiarly worthy of consideration. *People* v. *Morino,* 53 Cal. 67; *State* v. *Evans,* 1 Marv. (Del.) 477, 41 Atl. 136; *State* v. *Harmon,* 4 Penn. (Del.) 580, 60 Atl. 866; *State* v. *Fahey,* 3 Penn. (Del.) 594, 54 Atl. 690; *Com.* v. *Devine,* 18 Pa. Super. Ct. 431; *State* v. *Williamson,* 22 Utah, 248, 83 Am. St. Rep. 780, 62 Pac. 1022; *Bryant* v. *State,* 116 Ala. 445, 23 So. 40;

however, to be regarded as requiring from the jury as a body

Pitts v. *State,* 140 Ala. 70, 37 So. 101; *Bradley* v. *State,* 31 Ind. 492.

It is a serious question with many courts as to whether or not a definition should be given of the words "reasonable doubt," holding that the words are their own best definition, and are comprehended by any person of average intelligence. Nevertheless, definitions of the phrase are admitted in many cases.

The definition most seriously criticized is that which defines a reasonable doubt in these words: "By the term 'a reasonable doubt' is meant a doubt that has a reason for it; it is a doubt you can give a reason for." *Abbott* v. *Territory,* 20 Okla. 119, 16 L.R.A.(N.S.) 260, 94 Pac. 179. And in an Indiana case (*Siberry* v. *State,* 133 Ind. 677, 33 N. E. 681) the court condemns that definition upon this ground: "A juror may say he does not believe the defendant is guilty of the crime with which he is charged. Another juror answers that, if you have a reasonable doubt of the defendant's guilt, give a reason for that doubt. And under the instruction given in this cause, the defendant should be found guilty unless every juror is able to give an affirmative reason why he has a reasonable doubt of the defendant's guilt. It puts upon the defendant the burden of furnishing to every juror a reason why he is not satisfied of his guilt, with the certainty which the law requires before there can be a conviction. There is no such burden resting on the defendant or a juror in a criminal case." This is the doctrine in the following cases: *State* v. *Cohen,* 108 Iowa, 208, 75 Am. St. Rep. 213, 78 N. W. 857; *State* v. *Lee,* 113 Iowa, 348, 85 N. W. 619; *Carr* v. *State,* 23 Neb. 749, 37 N. W. 630; *Childs* v. *State,* 34 Neb. 236, 51 N. W. 837. See *State* v. *Sauer,* 38 Minn. 438, 38 N. W. 355; *Morgan* v. *State,* 48 Ohio St. 371, 27 N. E. 710; *Owens* v. *United States,* 64 C. C. A. 525, 130 Fed. 279. See *Griggs* v. *United States,* 85 C. C. A. 596, 158 Fed. 572; *Cowan* v. *State,* 22 Neb. 519, 35 N. W. 405.

The following cases criticize the definition, but do not give it the force of reversible error: *Klyce* v. *State,* 78 Miss. 450, 28 So. 827; *People* v. *Stubenvoll,* 62 Mich. 329, 28 N. W. 883; *Darden* v. *State,* 73 Ark. 315, 84 S. W. 507; *People* v. *Manasse,* 153 Cal. 10, 94 Pac. 92. See *State* v. *Sheppard,* 49 W. Va. 582, 39 S. E. 676; *Jordan* v. *State,* 130 Ga. 406, 60 S. E. 1063; *Vann* v. *State,* 83 Ga. 44, 9 S. E. 945. See *State* v. *Wolfley,* 75 Kan. 406, 11 L.R.A.(N.S.) 87, 89 Pac. 1046, 12 A. & E. Ann. Cas. 412, 75 Kan. 413, 93 Pac. 337.

In Alabama there are many cases, but the decisions are not harmonious, the late cases seeming to hold that it is not error to refuse a charge containing such a definition. Compare *Ray* v. *State,* 50 Ala. 104; *Cohen* v. *State,* 50 Ala. 108. The later cases seem to hold that an instruction charging "that a reasonable doubt is a doubt growing out

a verdict of acquittal.[4] It is more proper, unless this doubt amount to a clear conviction of innocence, that the minority

of the evidence, for which a reason can be given," is calculated to confuse the jury; and a refusal to so charge at request of the defendant is not error. See *Harvey* v. *State,* 125 Ala. 47, 27 So. 763; *Mitchell* v. *State,* 140 Ala. 118, 103 Am. St. Rep. 17, 37 So. 76; *Leanard* v. *State,* 150 Ala. 89, 43 So. 214.

The following decisions approve of the definition of a reasonable doubt as a doubt for which a reason can be given: *People* v. *Guidici,* 100 N. Y. 503, 3 N. E. 493, 5 Am. Crim. Rep. 455; *State* v. *Rounds,* 76 Me. 123; *State* v. *Jefferson,* 43 La. Ann. 995, 10 So. 199.

In some cases it has been held that the objection to this definition is removed where the entire charge to the jury emphasizes the presumption of innocence which attends the defendant throughout the trial. See *Wallace* v. *State,* 41 Fla. 547, 26 So. 713; *Secar* v. *State,* 118 Wis. 621, 95 N. W. 942; *Emery* v. *State,* 101 Wis. 627, 78 N. W. 145.

[4] As to the doubts of individual jurors, the line is very clearly drawn, but often confused in expression. The law is that it is a reasonable doubt entertained by the jury, and not by any one member thereof, that justifies an acquittal. *State* v. *Rorabacher,* 19 Iowa, 154; *Brawn* v. *State,* 23 Tex. 195. See *Rains* v. *State,* 137 Ind. 83, 36 N. E. 532; *State* v. *Rathbun,* 74 Conn. 524, 51 Atl. 540; *Hortan* v. *United States,* 15 App. D. C. 310; *Keesier* v. *State,* 154 Ind. 242, 56 N. E. 232; *State* v. *Lagan,* 73 Kan. 730, 85 Pac. 798.

But where an instruction singles out and directs each juror, as an individual, that if such juror entertains a reasonable doubt of the guilt of the accused it is the duty of the jury to acquit, such instruction does not state the law, because it does not address the jury as a whole, and is apt to mislead and to prevent consultation with the others whenever a juror has reached a conclusion that the guilt of the accused is not established beyond a reasonable doubt in the mind of such juror. *Bayd* v. *State,* 33 Fla. 316, 14 So. 836. See *Swallow* v. *State,* 20 Ala. 30; *Evans* v. *State,* 62 Ala. 6; *Fogarty* v. *State,* 80 Ga. 450, 5 S. E. 782; *Little* v. *People,* 157 Ill. 153, 42 N. E. 389; *State* v. *Hamilton,* 57 Iowa, 596, 11 N. W. 5; *People* v. *Wood,* 99 Mich. 620, 58 N. W. 638; *State* v. *Taylor,* 134 Mo. 109, 35 S. W. 92; *State* v. *Bowman,* 80 N. C. 432. See *State* v. *Smith,* Tappan (Ohio) 143; *Outler* v. *State,* 147 Ala. 39, 41 So. 460; *Price* v. *State,* 114 Ga. 855, 40 S. E. 1015, 12 Am. Crim. Rep. 203; *Lewis* v. *State,* 121 Ala. 1, 25 So. 1017; *Holmes* v. *State,* 136 Ala. 80, 34 So. 180.

But this qualification does not mean that each juror sits as an individual so far as his individual verdict is concerned, and that each should be governed by his own con-

should yield to the majority than that the majority should yield to the minority. On the other hand, when the doubts of a strong minority are grave and persistent, it should be proof to a majority of the jury that the case as a whole is beset with such uncertainty as to make a conviction improper.

§ 1a. Measure of proof of criminal act in civil case.—The rule as to a reasonable doubt applies to misdemeanors [1] equally with felonies; but where a criminal act is alleged in a suit that is civil in its nature and purpose, proof of the criminal act beyond a reasonable doubt is not required to sustain a verdict in favor of the party making the allegation.[2] Thus, where an action is brought for a statutory penalty, proof beyond a reasonable doubt is not required to warrant a verdict against the accused.[3]

science. *Simon* v. *State,* 108 Ala. 27, 18 So. 731.

It is true that if any juror, after having duly considered all the evidence, and after having consulted with his fellow jurymen, entertains a reasonable doubt of the defendant's guilt, the jury cannot find him guilty. *Castle* v. *State,* 75 Ind. 146; *Fassinow* v. *State,* 89 Ind. 235; *Parker* v. *State,* 136 Ind. 284, 35 N. E. 1105.

And it is error to refuse a charge that each juror must be satisfied beyond a reasonable doubt that the accused is guilty before he can convict. *Carter* v. *State,* 103 Ala. 93, 15 So. 893; *Grimes* v. *State,* 105 Ala. 86, 17 So. 184; *Whatley* v. *State,* 144 Ala. 68, 39 So. 1014; *People* v. *Dole,* 122 Cal. 486, 68 Am. St. Rep. 50, 55 Pac. 581.

[1] *Vandeventer* v. *State,* 38 Neb. 592, 57 N. W. 397; *State* v. *King,* 20 Ark. 166; *State* v. *Murphy,* 6 Ala. 845.

[2] *United States* v. *Shapleigh,* 4 C. C. A. 237, 12 U. S. App. 26, 54 Fed. 126.

[3] *Sparta* v. *Lewis,* 91 Tenn. 370, 23 S. W. 182; *Campbell* v. *Burns,* 94 Me. 127, 46 Atl. 812; *Proctor* v. *People,* 24 Ill. App. 599; *Palmer* v. *People,* 109 Ill. App. 269; *Montana C. R. Co.* v. *United States,* 90 C. C. A. 388, 164 Fed. 400; *Southern P. Co.* v. *United States,* 96 C. C. A. 256, 171 Fed. 364; *New York C. & H. R. R. Co.* v. *United States,* 91 C. C. A. 519, 165 Fed. 833; *Louisville & N. R. Co.* v. *United States,* 98 C. C. A. 664, 174 Fed. 1021.

The cases in Federal courts are in accord where the suit is to recover a penalty for the violation of the safety appliance act prescribed for railroads. *Louisville*

§ 2. Proof is the sufficient reason for a proposition.—Proof is the sufficient reason for assenting to a proposition as true. It is a reason, because our whole system of jurisprudence rests on the assumption that the person to whom, as a juror or judge, is committed the determination of a litigated issue, is governed by his reasoning faculties in coming to the decision he is to give. It in no way derogates from this position that in many cases we are led, and led correctly, to conclusions by the authority of others; since there is no higher exercise of reason than that of deciding, in matters in which we have not ourselves the materials or aptitude for forming a judgment, to what sources we shall resort for advice, and then, when we have made this decision to the best of our powers, adopting and acting on the advice given. And the reason must, at the same time, be sufficient; it must not be a whim, known by us to be such. We must feel it to be strong enough to justify us in the conclusion we adopt. And in criminal trials this conclusion, as we have seen, must be beyond a rea-

& N. R. Co. v. *Hill,* 115 Ala. 334, 22 So. 163; *State* v. *Chicago, M. & St. P. R. Co.* 122 Iowa, 22, 101 Am. St. Rep. 254, 96 N. W. 904; *Toledo, P. & W. R. Co.* v. *Foster,* 43 Ill. 480; *Roberge* v. *Burnham,* 124 Mass. 277; *Hitchcock* v. *Munger,* 15 N. H. 97; *Hawlowetz* v. *Kass,* 23 Blatchf. 395, 25 Fed. 765; *Jordan* v. *Mann,* 57 Ala. 595; *United States* v. *Brown,* Deady, 566, Fed. Cas. No. 14,662; *Munson* v. *Atwood,* 30 Conn. 102; *Havana* v. *Biggs,* 58 Ill. 483; *Sloan* v. *People,* 108 Ill. App. 545; *People* v. *Briggs,* 114 N. Y. 56, 20 N. E. 820; *Kerin* v. *New York City R. Co.* 53 Misc. 568, 103 N. Y. Supp. 769; *Deveaux* v. *Clemens,* 17 Ohio C. C. 33, 9 Ohio C. D. 647; *Cox* v. *Thompson,* 37 Tex. Civ. App. 607, 85 S. W. 34. See s. c. 202 U. S. 446, 50 L. ed. 1099, 26 Sup. Ct. Rep. 671.

However, it is held in some cases that an action for a penalty, though civil in form, is for the violation of a statute, and requires the same application of the rules of criminal law, including presumption of innocence and proof beyond a reasonable doubt, and that every element of the offense charged must be established. *United States* v. *Louisville & N. R. Co.* 157 Fed. 979. See *Riker* v. *Hooper,* 35 Vt. 457, 82 Am. Dec. 646; *United States* v. *Illinois C. R. Co.* 156 Fed. 182; *United States* v. *The Burdett,* 9 Pet. 682, 9 L. ed. 273; *White* v. *Comstock,* 6 Vt. 405.

sonable doubt. A juror—to state the proposition before us in the concrete—is bound to take into consideration, in making up his judgment, only two classes of facts: First, those that are put in evidence in the case; and, secondly, those of common notoriety. In arguing from these facts he must act according to his own lights, and must not agree to a verdict of conviction unless he conscientiously holds that guilt is proved beyond a reasonable doubt. The conscience under which he acts must be his own conscience; the reason his own reason. But among the arguments he is bound to consider are the inferences drawn from these facts by those persons to whom the law requires him to listen on the trial of the cause. These persons are counsel engaged in arguing the case; the judge, to whom belongs the office of adjudicating the law, and, in most jurisdictions, of summing up the facts; and his fellow jurors, with whom it is his duty to deliberate. Keeping this distinction in mind, two important sanctions are preserved. The first is that no case is to be decided on facts which are not either of common notoriety, or are not proved in open court according to the rules of law. The second is that while each juror finds his verdict according to his own lights and in obedience to his own conscience, he is aided in coming to his conclusion, not merely by professional and judicial advice, but by consultations with his associates. The verdict may be a compromise. But it is not a compromise adopted unreasonably, or under coercion. It is a compromise which is reasonable and conscientious, so far as concerns each party assenting to it, because authority, in the sense in which it is above defined, is here, as well as in multitudinous analogous cases, one of the legitimate arguments by which a conclusion is reasonably and conscientiously reached.

§ 3. **Evidence is proof admitted on trial.**—"Proof," in the sense in which the term is here used, has a wider meaning than "evidence." Evidence includes the reproduction, be-

fore the determining tribunal, of facts either notorious or verified in open court. Proof, in addition, includes presumptions either of law or fact, and citations of law,[1] and comprehends all the grounds on which a conclusion in a litigated case may be reached. Evidence, when not matter of notoriety, recognized as such by the court, is adduced only by the parties, through witnesses, documents, or inspection. Proof may be adduced by counsel in argument, or by the judge in summing up a case.[2]

§ 4. Object of evidence is juridical conviction.—For the purposes of public justice, it is essential to maintain with rigor the distinction between juridical (*veritas juridica, forensis*) and moral truth. I may have, for instance, as a juror, a moral conviction of the guilt of a defendant on trial. He may have confessed his guilt to me; or I may have learned, from persons not called as witnesses, facts inconsistent with his innocence. This, however, is not to be permitted to have the slightest effect on my juridical reasoning; for, to punish even a guilty man without juridical certainty of his guilt would be recognizing a principle fatal to public justice. The defendant is a bad man, it may be argued, and it is better for the community that he should be put in prison; or he belongs to a political or religious party which it is important to suppress; or we have private information convincing us of his guilt; or he has acted so fraudulently or oppressively in cases not in proof that it may be inferred that he acted fraudulently or oppressively in those under investigation; and hence he should be convicted. If such considerations are to be received to affect the judgment of court or jury, there would

[1] See *Harvey* v. *Smith*, 17 Ind. 272.

[2] Mr. Livingston (Works, 1873 ed. i. 419) defines evidence to be "that which brings, or contributes to bring, the mind to a just conviction of the truth or falsehood of the fact asserted or denied."

be no case tried in which some prejudice, popular or personal, on the part of the adjudicating tribunal, would not be made the basis of a verdict. If so, not only would innocent men be convicted in consequence of prejudices extrajudicially invoked against them, but guilty men would escape in consequence of prejudices extrajudicially invoked in their favor. The only safe course, therefore, is to found the verdict exclusively on evidence duly received, and on inferences logically to be drawn from such evidence. The issue in this way is made dependent upon the best proof that can be obtained, and the defendant is able to meet the evidence adduced against him, to overcome it, if he can, by counter testimony, and to have notice of, and refute if he can, the inferences drawn from the case of the prosecution. The distinction before us is illustrated in criminal prosecutions by the exclusion from the jury box of all persons who have formed such an opinion on the case as will interfere with their coming to an unbiased conclusion on the proofs admitted on the trial, and by the direction of the court to the jurors to be influenced by no considerations not sustained by such proofs. And a still more complete exhibition of the principle is to be found in the great exclusionary tests adopted in this respect by all jurisprudences. No evidence is to be admitted, in a criminal issue, which does not bear on the question whether the defendant did a particular act specifically charged against him. And no evidence is to be received which is a secondhand rendering of testimony not produced, though producible, by which a higher degree of certainty could be secured.

§ 5. Analogy the means of juridical proof.—Jurisprudence, as we are reminded by Mr. Bentham, is the science of conflicting analogies; the object of proof is to show what analogies are, and what are not, applicable. "The inference of analogy is an inference from particulars or individuals to

a co-ordinate particular or individual. Its scheme is the following:

M is P.
S is similar to M.
S is P.

Or more definitely, since it also gives that in which the similarity consists, the following:

M is P.
M is A.
S is A.

S is P."[1]

In other words, we say:

M, who fled from trial, was guilty;
S is similar to M in fleeing from trial:
Therefore S is guilty.

But to test the force of such an argument we must first inquire how far we can, by induction, reach a general proposition which can be a sound basis for a conclusion affecting S with the same taint as is attached to M. If, for instance, our induction is sufficiently extensive to enable us to say, "All persons who flee from justice are guilty," we can then conclude that, because S flees from justice, S is guilty. But if the general proposition which we reach is nothing more than this,

[1] Ueberweg's System der Logik. Bonn 1857, § 132. I have consulted Lindsay's translation in the above rendering. Mr. Lindsay refers to Mill's Logic, ii. 122, ff.; De Morgan's Formal Logic, or Calculus of Inference, Necessary and Probable, pp. 170–210; and Boole's Laws of Thought, pp. 243–399.

"the chances are one to three that a person fleeing from justice is guilty," then all that we can conclude as to S, who flees from justice, is that it is one to three that S is guilty.

§ 6. Conclusion reached by a cumulation of probabilities.—Hence it is that when we reach a conclusion as to the guilt or innocence of a person on trial it is by the cumulation of probabilities, of which one alone is inadequate (unless in very exceptional cases) to sustain a conclusion. Thus, to take a case of larceny for illustration, it is one to five that, because A was seen prowling about the premises a short time before, he is guilty; it is one to five that, because at the time he had a sudden accession of unexplained wealth, he is guilty; it is one to five that, because he displayed peculiar tremor when arrested, he is guilty; it is one to two that, because he was unable to explain his possession of some parts of the stolen property, he is guilty.

It is true that we may suppose a case in which there is what is called "direct" testimony to the fact of guilt; but when we examine this testimony, as will be presently done, we find that it derives its weight from circumstances.[1]

§ 7. No evidential fact can be demonstrated.—No evidential fact, therefore, we may broadly state, can be demonstrated.[1] The most that we can reach is a high probability that the fact in question is true. "I conceive that it is impossible even to expound the principles and method of induction, as applied to natural phenomena, in a sound manner, without resting them upon the theory of probability. Perfect knowledge alone can give certainty, which is clearly beyond our capacities. We have, therefore, to content ourselves with partial knowledge,—knowledge mingled with ignorance produ-

[1] See *Com.* v. *Costley*, 118 Mass. 1.

[1] Jevon's Principles of Science, i. 239.

cing doubt." [2] "Inferences which we draw concerning natural objects are never certain except in a hypothetical point of view. . . . Even the best established laws of physical science do not exclude false inference." [3] "Like remarks may be made concerning all other inductive inferences." [4] "No matter of fact, that is to say, no actual phenomenon of external nature, can, in any possible state of human knowledge, be

[2] Ibid. i. 224.

[3] Ibid. i. pp. 271 et seq.

[4] Ibid. i. p. 274.

"Probable evidence is essentially distinguished from demonstrative by this, that it admits of degrees, and of all variety of them, from the highest moral certainty to the very lowest presumption. We cannot, indeed, say a thing is probably true upon one very slight presumption for it; because, as there may be probabilities on both sides of a question, there may be some against it; and though there be not, yet a slight presumption does not beget that degree of conviction which is implied in saying a thing is probably true. But that the slightest possible presumption is of the nature of a probability appears from hence; that such low presumption, often repeated, will amount even to moral certainty. Thus a man's having observed the ebb and flow of the tide to-day affords some sort of presumption, though the lowest imaginable, that it may happen again to-morrow; but the observation of this event for so many days and months and ages together as it has been observed by mankind gives us a full assurance that it will." Butler's Analogy, Int., adopted by Gray, Ch. J., 118 Mass. 21. Compare also Balfour's Defense of Historic Doubt, London, 1879.

"The proposition of Bishop Butler, that probability is the guide of life, is not one invented for the purposes of his argument, nor held by believers alone. Voltaire has used nearly the same words in an essay not on religion, but on judicial inquiries, Essai sur les Probabilites en fait de Justice, and the statement of principle which it propounds is perhaps on that account even more valuable.

"If we consider subjectively the reasons upon which our judgments rest, and the motives of our practical intentions, it may in strictness be said that absolutely in no case have we more than probable evidence to proceed upon; since there is always room for the entrance of error in that last operation of the percipient faculties of men, by which the objective becomes subjective; an operation antecedent, of necessity, not only to action, or decision upon acting, but the stage at which the perception becomes what is sometimes called a 'state of consciousness.' " Gladstone, Gleanings of Past Years, vol. vii. p. 154, London, 1879.

a matter of demonstration." [5] There is no statement, however simple, as will presently be seen more fully, that does not contain at least four elements of incertitude: (1) Language in itself more or less ambiguous; (2) doubt as to the identity of the subject; *e.g.,* W testifies that A did a particular thing, and the question is whether A was the person whom W really saw; [6] (3) doubt as to the copula; *i. e.,* it can never be perfectly demonstrated whether what A did was a real or only an apparent act; (4) doubt as to the object; *i.e.,* whether the object operated upon was or was not B.

§ 8. Even scientific conclusions cannot be demonstrated.—Undoubtedly scientific conclusions, so far as they deal with abstractions, can be demonstrated. It is demonstrable, for instance, that a straight line is the shortest distance between two points; but no particular road between two places (*e. g.,* New York and Boston) can be demonstrated to be perfectly straight.[1] If we assume a perfectly unresisting medium, and a perfectly constructed pistol, we can determine beforehand what will be the course of a ball sent by such pistol through such a medium; but we cannot beforehand determine

[5] Mansel on the Limits of Demonstrative Science, Letters, Lectures, etc., 1873, p. 98; and see *Coleman* v. *State,* 59 Ala. 52.

[6] See, as illustrating the fallibility of human testimony in this relation, Ram. Facts, 3d Am. ed. 291.

[1] "In measurement we can never attain perfect coincidence. Two measurements of the same base line in a survey may show a difference of some inches, and there may be no means of knowing which is the better result. A third measurement would probably agree with neither. To select any one of the measurements would imply that we know it to be the most nearly correct, which we do not. In this state of ignorance, the only guide is the theory of probability, which proves that in the long run the mean of different quantities will come nearly to the truth. In all other scientific operations whatsoever, perfect knowledge is impossible, and when we have exhausted all our instrumental means in the attainment of truth, there is a margin of error which can only be safely treated by the principles of probability." Jevon's Principles of Science, i. 230, 231.

absolutely the course of a pistol ball which passes through the human frame.[2] It is a demonstrable conclusion that two bodies equal to a third are equal to each other, and on this our whole system of measurement and weight rests. The proposition, however, as we now give it, is an abstraction, touching in no respect our practical life. When we come to the concrete question whether, for instance, two yards of cloth, separately measured by the same standard, have the same length, or whether two pounds of coffee, weighed separately in the same scales, have the same weight, then a conclusion can be only approximately reached.

§ 9. Even the highest expert testimony fails in this respect.—We may turn for further illustration to physical science in her most solemn attitude, when she stands with uplifted hand in the witness box, and swears, by the most sacred sanctions that the law can propose, to tell, as to the particular matters propounded to her, the truth, the whole truth, and nothing but the truth. The cases in which she is thus required to speak are not rare or exceptional. There is no topic, humble or sublime, within the whole range of physical investigation, as to which she is not called upon to testify. Wherever there is a specialty in which there is an expert, there the expert may be examined as to the specialty. Hence we have had experts examined as to the measurements by astronomers of the stars, and as to the measurements by tailors of coats. We have had experts examined as to the habits of fish seeking to ascend, in the spring, in Maine rivers, and as to the habits of cattle as they sweep in droves over the Texas plains. We have had them examined as to whether sewerage produces certain infusoria, and whether these infusoria produce pestilence. There is not a poison as to which their testimony is not

[2] See *Saunders* v. *State*, 37 Tex. 710; post, § 771; 3 Wharton & S. Med. Jur. §§ 666, 807, 809

invoked; there is not a wound whose effects they may not be called to detail. What the telescope can assure us of, what the microscope can assure us of, what we can be assured of by chemical tests, what we can be assured of by careful induction produced by long and accurate observation,—as to all these lines of information experts are summoned to give their testimony under oath. They are, in the main, highly cultivated men, sensitively conscientious. They are usually selected from among the front ranks of their class. They have ample time given to them for their investigations. They are liberally paid for their services, so as to enable them to take any trouble requisite for their special inquiries. Yet, notwithstanding this, there is scarcely a case in which expert testimony is summoned where we do not find, after two or three experts have testified on one side, about the same number ready to testify on the other side. Not only do they give us in their evidence, however positive may be their assertions, probable proof as distinguished from absolute demonstration, but when we weigh their testimony, we find that we have to add to the doubt incident to all probable proof a new set of doubts as to the authority of the several experts.[1]

[1] See post, § 420.

Human disease, to take a prominent illustration, is an object to which physical science has been directed for centuries, and is the topic in which, of all that concern it, society feels the deepest interest. On the education of those devoting themselves to this study the greatest care and expense have been lavished; they have been protected by legislation from the intrusion of impostors or of persons imperfectly trained; they constitute a profession not only highly honorable and generously remunerated, but embracing some of the most intelligent, cultivated, benevolent, and high-minded men who adorn society. Yet not only does medical science in our generation reject the remedies which in a previous generation it regarded as indispensable, but in every litigated issue of medicine or surgery eminent specialists are found to testify on either side. Is it material to determine, as in Fisk's Case, whether death was caused by the assassin's pistol or by the maltreatment of the attending surgeon? Two or three specialists are called by the defense

to swear that it was maltreatment that caused the death, and then about as many by the prosecution, to swear that the death followed in immediate sequence from the pistol wound. Is it essential to know whether certain symptoms in a sick person were produced by a particular poison? Then, as in Palmer's Case, we have the same inevitable conflict. That such should be the case; that physical science should be elastic and progressive; that it should move onward, as do all other sciences, with fluctuating step; that its advance should be attended with collision in its ranks; that it should be incapable of demonstrating any fact which touches moral agency so as to make that fact appear absolutely true,—in this it answers the conditions of all sciences affecting humanity, which, the moment they penetrate the atmosphere that encompasses moral action, are enveloped in the hazes of that atmosphere, and move tremulously, and occasionally with mistaken step. They can, therefore, only reach results which, however probable, are open to doubt and contradiction.

The microscope, also, is supposed to give exact results, and the discoveries of the microscope, as well as of the telescope, are frequently spoken of as demonstrations. Yet what more important question can the microscope approach than that which relates to the distinguishing qualities of human blood, and what more important issue can there be than that which is presented when the life of a human being on trial is made to depend upon the testimony of a microscope! But when entering this critical region, the microscopist, no matter how exquisite his instruments, and no matter how ostensibly exhaustive and decisive his tests, finds that he is beset with the infirmities affecting other specialists when deposing as to the application of theory to human life. His sight becomes uncertain, and his utterance indistinct. Sometimes, indeed, we have displayed to us experts boldly swearing on the one side that certain dry blood is human, and experts on the other side swearing with equal boldness that it is not human. But, as a general rule, the accomplished and conscientious expert is obliged to admit that, no matter how accurate may be his tests speculatively, they are not such as to produce that certainty which would make them a safe basis for conviction. See post, § 777.

A suit was brought, in 1868, in the United States circuit court in Boston, by a lady of New York, to recover her deceased aunt's estate, amounting to two millions of dollars. The plaintiff's case rested on two writings by which it was alleged the aunt agreed, in consideration of a will concurrently executed by the niece in favor of the aunt, to leave her entire estate to the niece, and to do nothing to revoke a prior will to that effect in the niece's hands. The defendant set up a subsequent will by the aunt, by which half of the aunt's property was given to the niece, the remainder being distributed among the testator's relatives and friends; and it was maintained by the defendant that the alleged writ-

ings on which the plaintiff relied as binding the testator to make no subsequent will were forgeries. Upon this issue a vast amount of evidence was taken. The defendant's case was that the signatures to the contested documents not only bore on their face, in the shape of the letters, the marks of forgery, but that they were evidently produced by being traced over the signature to the prior undisputed will in the niece's possession. Three distinct lines of expert testimony were involved. The first was as to whether the contested signatures, compared with other signatures of the testator, were on their face forgeries; and whether (apart from the question of tracing) they bore the marks of the constraint and hesitancy which distinguish forged writings. The testimony being before an examiner, who had not power to exclude on the ground of cumulativeness, the parties ransacked the land for witnesses whose authority, in this respect, would be likely to have weight. Photographers and other artists were employed to reproduce, in various exaggerated scales, the signatures, and then testimony was taken by each side to prove and to disprove the allegation that the photographers employed on the other side were not reliable. Presidents of commercial colleges and teachers of penmanship gave weeks of uninterrupted study to the contested writings, and the standards with which they were to be compared. Bank presidents and bank tellers were examined and cross-examined for the same purpose. Engravers, who had spent years in poring over lines of writings and of drawings, and whose eyes were trained to such exquisite delicacy of perception that the faintest aberrations could be discovered by them, were also summoned to give their aid. The result of the combination of testimony was that about as many experts were produced to swear that the contested signatures were forged as there were to swear that they were genuine.

But this was followed by a still more extraordinary conflict. If there is anything demonstrable, we should hold that whether one line coincides with another could be demonstrated. In the case before us a million dollars hung upon the question whether the words of the testator's name, in the contested writings, exactly coincided with the same name in the uncontested will held by the plaintiff. Upon this question an eminent professor of Harvard College, deservedly one of the most authoritative of living mathematicians, was called, and testified that the chance of the genuine production of such a coincidence as that of the three signatures was that of one to two thousand six hundred and sixty-six millions of millions of millions of times (2,666,000,000,000,000,000,000). He naturally added that "this number far transcends human experience. So vast an improbability is practically an impossibility. Such evanescent shadows of probability cannot belong to actual life. . . . Under a solemn sense of the responsibility involved in the assertion, I declare that the coincidence which has here

occurred must have had its origin in an intention to produce it." He added that there were other conditions which multiplied the improbability of undesigned coincidence by at least two hundred millions. His testimony was sustained by that of another distinguished mathematical professor, and by that of microscopists and experts in penmanship, who swore that the two signatures alleged to be spurious coincided exactly with the standard from which it was assumed they were copied. On the other side, to meet this testimony, the plaintiff produced a series of signatures of John Quincy Adams, of George C. Wilde, of C. A. Walker, and of the examining magistrate, F. W. Palfrey, in which, even when greatly enlarged by photographs, there were many cases of coincidence sworn by experts to be far more exact than those to which had been assigned so high a standard of improbability. And as to the particular signatures immediately in dispute, there was a mass of expert testimony to the effect that, so far from coinciding, no single letter in them exactly covered the alleged standard. Yet this is a question on which, beyond all others, we might suppose it possible to obtain demonstration.

The remaining conflict is, if possible, even still more extraordinary. Were the marks of tracing discoverable under the ink of the disputed signatures? If such tracing is apparent to one microscopist, we would suppose that it would be apparent to the other microscopists, using instruments of similar grade, and with the same power of eyesight. Yet we have Dr. Charles T. Jackson, a specialist in this line, of extraordinary skill and reputation, backed by other experts of distinction, testifying positively and unreservedly that under the ink of the disputed signatures the microscope brought to light marks of tracing; while Professor Agassiz and Professor Oliver Wendell Holmes testified that the microscope brought to light no such marks. It would be impossible to select experts more eminent and more unimpeachable. Yet on a question which we should suppose to be peculiarly susceptible of demonstration,—whether a particular microscope can detect certain marks,—these experts, in the most unqualified manner, testified to contradictory opposites. Of this contradiction there is but one explanation. When even the most exact of physical sciences undertakes to enter into practical life, it is beset with the same incertitudes that beset whatever appeals to our moral judgment. It can demonstrate only things that do not affect our action. As to things that affect our action, or concern litigated issues, the best it can do is to establish a preponderance of proof.

For an interesting review of this important case, see 4 Am. L. J. 625; and for the ruling of the circuit court of the United States, by which the case was dismissed on technical grounds, see *Robinson* v. *Mandell,* 3 Cliff. 169, Fed. Cas. No. 11,959. Compare article in Princeton Review for July, 1878, and rul-

ings in *Belt* v. *Lawes,* as cited post, § 420.

It is very curious how often the most acute and powerful intellects have gone astray in the calculation of probabilities. Seldom was Pascal mistaken, yet he inaugurated the science with a mistaken solution. Montucla, Histoire des Mathematiques, vol. iii. p. 386. Leibnitz fell into the extraordinary blunder of thinking that the number twelve was as probable a result in the throwing of two dice as the number eleven. Leibnitz Opera, Duten's edition, vol. vi. part i, p. 217; Todhunter's History of the Theory of Probability, p. 48. In not a few cases the false solution first obtained seems more plausible to the present day than the correct one since demonstrated. James Bernouilli candidly records two false solutions of a problem which he at first thought self-evident (Todhunter, pp. 67, 69); and he adds an express warning against the risk of error,—especially when we attempt to reason on this subject without a rigid adherence to the methodical rules and symbols. Ibid. p. 63. Montmort was not free from similar mistakes (Ibid. p. 100); and as to D'Alambert, great though his reputation was, and perhaps is, he constantly fell into blunders which must diminish the weight of his opinions. Ibid. pp. 258, 286. He could not perceive, for instance, that the probabilities would be the same when coins are thrown successively as when thrown simultaneously. Todhunter, p. 279. Jevon's Principles of Science, i. 244. Compare to the same effect an article by Dr. Peabody in the Princeton Review for March, 1880.

"Absolute language, by which is meant language which absolutely expresses all that is to be expressed, neither more nor less, for every mind, is possible in mathematics only; and mathematics move within a narrow circle of ideas." Lieber's Hermeneutics, 3d ed. 15. To this Mr. Hammond adds a learned note showing that even the exception of mathematical and algebraic signs is illusory. He illustrates this by *Smith* v. *Wilson,* 3 Barn. & Ad. 728, 1 L. J. K. B. N. S. 194, where a "thousand" rabbits were construed to mean twelve hundred when used in a lease, and *Slater* v. *Cave,* 3 Ohio St. 80, where "twenty-one" years of age was interpreted to mean eighteen. As to explaining the meaning of "double" shares, see *Millard* v. *Bailey,* L. R. 1 Eq. 382, 35 L. J. Ch. N. S. 312, 13 L. T. N. S. 751, 14 Week. Rep. 385. On the inexactitude of measurements, see cases in Wharton, Ev. § 947. "What words are more plain than 'a thousand,' 'a week,' 'a day.' Yet the cases are familiar in which 'a thousand' has been held to mean twelve hundred; 'a week' only a week during the theatrical season; 'a day' only a working day." Coleridge, J., *Brown* v. *Byrne,* 3 El. & Bl. 703, 2 C. L. R. 1599, 23 L. J. Q. B. N. S. 313, 18 Jur. 700, 2 Week. Rep. 471. "Square yard" also may be explained by parol proof. *Walls* v. *Bailey,* 49 N. Y. 467, 10 Am. Rep. 407, and other cases cited in Wharton on Evidence, § 961a.

§ 10. Fallacy of distinction between "direct" and "circumstantial" evidence.—Much embarrassment has arisen from the position advanced by two eminent text writers,[1] that, to justify the inference of legal 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 reasonable hypothesis than that of his guilt. Judges, on hearing these expressions, have been apt, in the hurry of a trial, to accept and apply them; and hence have sprung up a series of *dicta* to the effect that circumstantial evidence is to be viewed with distrust, and that, to justify a conviction on circumstantial evidence, it is necessary to exclude every possible hypothesis of innocence.[2] It may

[1] Wills, Circumstantial Ev. p. 149; Starkie, Ev. p. 838.

[2] See *Algheri* v. *State,* 25 Miss. 584; *Houser* v. *State,* 58 Ga. 78; *Otmer* v. *People,* 76 Ill. 149; *Mickle* v. *State,* 27 Ala. 20.

In Georgia it is provided by the Constitution that a conviction on "circumstantial" evidence may be commuted. *Merritt* v. *State,* 52 Ga. 82; *Regular* v. *State,* 58 Ga. 264.

Judge Story, while admitting the distinction, argues that it is merely one of logic. *United States* v. *Gibert,* 2 Sumn. 27, Fed. Cas. No. 15,204. See *Moore* v. *State,* 2 Ohio St. 500; *State* v. *Norwood,* 74 N. C. 247.

To the same effect is the language of Chief Justice Whitman, of Maine. "Circumstantial evidence," he said, "is often stronger and more satisfactory than direct, because it is not liable to delusion or fraud. It was not strange," he said, "that in the vast number of persons who had suffered the penalties of the law, some should have suffered wrongfully." *Thorn's Case,* 6 Law Rep. 54.

"Circumstantial evidence," said Gibson, Ch. J., in a capital case, in his charge to the jury, "is in the abstract nearly, though perhaps not altogether, as strong as positive evidence; in the concrete it may be infinitely stronger. A fact positively sworn to by a single eyewitness of blemished character is not so satisfactorily proved as a fact which is the necessary consequence of a chain of other facts sworn to by many witnesses of doubtful credibility. Indeed, I scarcely know whether there is any such thing as evidence purely positive. You see a man discharge a gun at another; you see the flash, you hear the report, you see the person fall a lifeless corpse, and you infer from all these circumstances that there was a ball discharged from the gun, which entered his body and caused his death, because such is the usual

relieve some difficulty, in meeting such points as these, to keep

and natural cause of such an effect. But you did not see the ball leave the gun, pass through the air, and enter the body of the slain; and your testimony to the fact of killing is thereby only inferential,—in other words, circumstantial. It is possible that no ball was in the gun, and we infer that there was, only because we cannot account for the death on any other supposition. In cases of death from the concussion of the brain, strong doubts have been raised by physicians, founded on appearances verified by post-mortem examinations, whether an accommodating apoplexy had not stepped in at the nick of time to prevent the prisoner from killing him, after the skull had been broken into pieces. I remember to have heard it doubted in this court room, whether the death of a man whose brains oozed through a hole in his skull was caused by the wound or a misapplication of the dressing. [A remarkable illustration of this will be found in *Mitchum* v. *State*, 11 Ga. 615.] To some extent, however, the proof of the cause which produced the death rested on circumstantial evidence.

"The only difference between positive and circumstantial evidence is . . that the former is more immediate, and has fewer links in the chain of connection between the premises and conclusion; but there may be perjury in both. A man may as well swear falsely to an absolute knowledge of a fact as to a number of facts from which, if true, the fact on which the question of innocence or guilt depends must inevitably follow. No human testimony is superior to doubt. The machinery of criminal justice, like every other production of man, is necessarily imperfect; but you are not therefore to stop its wheels. Because men have been scalded to death, or torn to pieces by the bursting of boilers, or mangled by wheels on a railroad, you are not to lay aside the steam engine. Innocent men have doubtless been convicted and executed on circumstantial evidence; but innocent men have sometimes been convicted and executed on what is called positive proof. What then? Such convictions are accidents which must be encountered; and the innocent victims of them have perished for the common good, as much as soldiers who have perished in battle. All evidence is more or less circumstantial, the difference being only in the degree; and it is sufficient for the purpose when it excludes disbelief,—that is, actual, and not technical, disbelief; for he who is to pass on the question is not at liberty to disbelieve as a juror while he believes as a man. [See comments on this expression by Dillon, J., 20 Iowa, 90.] It is enough that his conscience is clear. Certain cases of circumstantial proofs to be found in the books, in which innocent persons were convicted, have been pressed on your attention. These, however, are few in number, and they occurred in a period of

in mind, in addition to the remarks made in the sections immediately preceding, the following propositions:

§ 11. All evidence is circumstantial.—There is no evidence admissible in a court of justice that does not depend

some hundreds of years, in a country whose criminal code made a great variety of offenses capital. The wonder is that there have not been more. They are constantly resorted to in capital trials to frighten juries into a belief that there should be no conviction on merely circumstantial evidence. But the law exacts a conviction wherever there is legal evidence to show the prisoner's guilt beyond a reasonable doubt, and circumstantial evidence is legal evidence. If the evidence in this case convinces you that the prisoner killed her child, although there has been no eyewitness of the fact, you are bound to find her guilty." *Com.* v. *Harman,* 4 Pa. 269. See also *McCann* v. *State,* 13 Smedes & M. 471; and the judicious remarks of Shaw, Ch. J., in *Com.* v. *Webster,* 5 Cush. 29, 52 Am. Dec. 711; *Bemis's Webster Case,* 462–464. See, as to rule laid down in Texas, *Hunt* v. *State,* 7 Tex. App. 212.

As agreeing in the main with the text may be cited the following criticism of Sir J. Stephen (Crim. Law, p. 266): "The distinction which writers on circumstantial evidence have in their minds is, in fact, a double distinction. In some crimes the whole transaction is continuous, in others it is discontinuous; and of course where it is discontinuous, the different items of evidence are proportionately numerous, and require a greater degree of inference and combination than where all the facts lie together in one group. The indiscriminate application of the phrase 'circumstantial evidence' to cases of discontinuous crimes, and to the cases in which the evidence of the transaction, continuous or not, is incomplete, conceals the distinction between continuous and discontinuous crimes, which is not without importance, and slurs over the fact that juries may have to act on incomplete evidence."

Indications, under which head all incidental facts may be grouped, have been variously classified. By some of the older Roman law authorities they are spoken of as either causal or coexistential. Glaser, Beiträge zur Lehre vom Beweis in Strafprozess, Leipzig, 1883. In another aspect, to which we shall recur when we treat distinctively of presumptions, they may be viewed as physical or psychical. The more prevalent division among Roman lawyers is into antecedent (*judicia antecedentia*), concurrent (*coexistentia, concurrentia*), and subsequent (*subsequentia*). To this, however, Glaser objects on the ground that the causal relation, viewed in this connection, has two distinct sides, the "indication" be-

more or less on circumstances for credit.[1] Let us, as the simplest illustration, suppose that an eyewitness testifies that he saw A kill B by a gunshot. Now, in order to sustain a con-

ing in one sense the cause of the "event," the "event," in another sense, the cause of the indication.

[1] See *Com.* v. *Malone,* 114 Mass. 295. Compare, on the topic in the text, the introductory sections discussing presumptions in the closing chapter of this volume, §§ 707et seq.

In the first place, as has been already explained, all circumstantial evidence must be proved by direct evidence. Hence, whatever infirmities may be incidental to direct evidence must, in the nature of things, be incidental to circumstantial evidence also. In the next place, it is easy to show that these infirmities are so great that it is nearly impossible to put a case in which direct evidence can be acted upon in a satisfactory way, unless it is supported by circumstantial evidence to a greater or less extent. The inference from these two propositions is that the supposed opposition between direct and circumstantial evidence is a mere superficial error, and that the phrases ought to be dismissed from both legal and popular language.

That circumstantial evidence has to be proved by direct evidence is self-evident (when the clumsy phrase is understood), and requires no illustration; though we may just observe that a policeman who proves that as he was taking the prisoner to the station the prisoner said to him, "I was drunk when I did it" (which, being direct evidence of an admission, is circumstantial evidence), is quite as likely to be discredited as if his evidence was direct, and for the very same reasons.

The weakness of direct evidence, if wholly unsupported by circumstantial evidence, is less obvious, and may therefore justify a little more illustration. Suppose a respectable man were to tell this story: "I saw A, the prisoner, cross the bridge over the Severn, at Gloucester. The river was in flood, and was rushing furiously down towards the sea. There was no one else on the bridge. A had with him a little girl, apparently about four or five years old. When he got to the middle of the bridge he took her up in his arms, and threw her over into the river, where she instantly disappeared. A, being a much younger man than I, I was afraid to arrest him, but I followed him to the next police station, and gave him at once into custody on the charge of murder." Suppose, further, that no girl was missed, no body found, that there was no single circumstance to corroborate B's evidence. Here is a case of direct evidence unsupported by any circumstance (unless the fact that B gave A into custody is considered as one), but also uncontradicted by any circumstance. The alleged facts would account for the absence of the body. The nature of the crime might account for the difficulty of

finding any other traces of the fact. It cannot be said that the intrinsic improbability of the story itself is greater than the intrinsic improbability that a rational man would falsely tell such a tale without a strong motive, but in such a case is it possible to suppose that any jury would convict the accused man, though he might say nothing except that he was not guilty? Anyone who has had any experience, either of the common affairs of life or of the administration of justice, would say at once that the matter was far too doubtful for one to take the responsibility of action upon such evidence. Here is one instance in which direct evidence, which may be supposed, by slightly varying circumstances, to be as strong as such evidence given by a single person could be, would be felt to be insufficient to warrant a belief of its truth, and action upon that belief.

Endless instances of the same kind may be given. No class of cases is so unsatisfactory as cases where the crime alleged to be committed consists of words spoken, or of acts done, of such a nature as to leave no material traces behind them. A charge of rape or indecent assault preferred by a woman against a man who happens to have been alone with her is an instance. In cases of this kind, it is true that juries do at times convict on the wholly uncorroborated evidence of the woman. It is another question whether they ought to be allowed to do so. Almost the only artificial rules of evidence known to our law apply to cases of this sort. In actions for breach of promise of marriage, and in applications for bastardy orders, it is necessary that the evidence of the plaintiff or of the mother, as the case may be, should be corroborated in some material particular. By a practice having nearly the force of law, though not amounting to absolute law, the same rule applies to cases in which the only evidence sufficient, if true, to convict the accused, is that of an accomplice. Everyone, indeed, who has much practical acquaintance with such matters must, we think, be of opinion that the problem which taxes most severely the wisdom and the firmness of everyone whose duty is to determine upon matters of fact is this: How much weight ought to attach to the mere oath of an unknown person that he has seen or heard this or that? The very simplicity of the question increases its difficulty. When there are facts to be compared, arranged in order of time and place, and made the subject of a variety of inferences, there is something for the mind to do. But when the question resolves itself into this, "Aye or no, shall I believe this to be true because A says he saw it, and sticks to it under cross-examination?" the difficulty of deciding is small, but the difficulty of deciding with any confidence on the truth of the decision arrived at ought to be at its height for a person who has studied the principles of the subject.

There are instances of the occasional weakness of direct evidence, and of the great difficulty which there is in acting upon it

viction on such evidence, the following conditions must be established:

§ 12. Causation always an inference.—First, it must appear that the deceased died from the shot.[1] "I saw the gun aimed; I heard the report; I saw the man fall; I saw the wound." But what are these, argues Chief Justice Gibson, in a remarkable opinion just quoted,[2] but circumstances from which you infer a certain result? The deceased may have expired from fright, as has been sometimes the case in executions, before he was struck by the fatal shot. He may have only been in a trance, and was killed really by the surgeon who probed the wound. Among cases of violent deaths, perhaps only one in ten thousand may have been thus caused. But if it is one to ten thousand that the death may be traced to such a cause, then there is a possible, though improbable, hypothesis inconsistent with the defendant's guilt.[3]

§ 13. And so of identity of party charged.—But another step is necessary to produce a conviction of the party charged. It is necessary to prove not only that the deceased died by violence from the hand of a person having a specific appearance, but that the defendant at the bar is the person by whom the death of the deceased was caused.[1] But here comes another

with satisfaction when it is absolutely uncorroborated by circumstances. As to strength and weakness of circumstantial evidence, it would be impossible in any moderate compass to attempt even to illustrate the subject. In a very few words it may be said that the question whether it is safe to infer one fact from another or others is the great problem of science, and that the only answer to it is to be found in the study of inductive logic, the logic of facts as distinguished from the logic of words. Pall Mall Gazette, Dec. 1881. See *Collins* v. *People,* 98 Ill. 584, 38 Am. Rep. 105; *State* v. *Russell,* 33 La. Ann. 135.

[1] See supra, § 9.

[2] *Com.* v. *Harman,* 4 Pa. 269.

[3] See *Campbell* v. *State,* 23 Ala. 44; *Mitchum* v. *State,* 11 Ga. 615.

[1] As to identity, see post, §§ 27, 807. That such proof is inferential

question of inference. Is the defendant the person by whom the shot was fired? Supposing that the day was clear, and the witness near at hand; supposing that the witness was dispassionate, collected, observant, and unbiased,—points which will be hereafter discussed,—are men always so distinctly individuated that one can under no circumstances be mistaken for another? Men's faces and figures, like their handwritings, may sometimes be so similar that the keenest observer is baffled when seeking to discover a difference.[2] The witness is asked how he knows that the prisoner at the bar is the person who fired the fatal shot, and his answer is, "I infer it from a similarity of eyes, of hair, of height, of manner, of expression, of dress." Human identity, therefore, is an inference drawn from a series of facts, some of them veiled, it may be, by disguise, and all of them more or less varied by circumstances. In addition, therefore, to the inference drawn as to the connection of the shot and the death, we have another inference to be made circumstantially, as to the identity of the shooter with the defendant on trial. "As Mr. Mill remarks, it is too much to say, 'I saw my brother.' All I positively know is that I saw someone who closely resembled my brother as far as could be observed. It is by judgment only I can assert he was my brother, and that judgment may possibly be wrong." [3]

see *Reg.* v. *Cheverton,* 2 Fost. & F. 833; *McCulloch* v. *State,* 48 Ind. 109, 1 Am. Crim. Rep. 318. As to identification by voice, see *Com.* v. *Scott,* 123 Mass. 222, 25 Am. Rep. 81; *Brown* v. *Com.* 76 Pa. 319. As to identification of deceased person, see post, §§ 326, 804.

[2] See, on this point, 3 Wharton & S. Med. Jur. §§ 620, 627, 674; post, §§ 803 et seq.

[3] Jevon's Logic, Less. xxvii. 6. As to *Tichborne Case* on this point, see Wharton, Ev. § 9.

A mother's testimony in identification of her son might be considered direct in the strongest sense. Yet Lady Tichborne's recognition of the claimant as her son was so weakened by the circumstances of the case—her own passionate desire to recover her lost child, and the arts shown to have been resorted to by the claimant to deceive

§ 14. And so of his free agency.—But to justify a conviction, a step further must be taken. One who performs a guilty act under compulsion is not amenable to punishment. It is necessary, therefore, to distinguish the case before us from that of a public execution, or that of a man pressed to the wall by an assailant. "The prisoner," says the witness, "shot the deceased without necessity, and without compulsion."

her—that it was in an eminent degree open to the criticism which is applied to "circumstantial" evidence by those who hold to the distinction between "direct" and "circumstantial." The fact is that in both the Tichborne trials the testimony for the claimant was mainly what is called "direct," consisting of testimony by witnesses, most of whom were unimpeachable, that he was Roger Tichborne. The effective testimony on the other side was mainly "circumstantial," *e. g.,* proof of the disparity between the size of the claimant's feet and that of Roger, as given by the latter's shoemaker, the claimant's ignorance of Roger's early history, and the absence on his person of certain marks that were on the person of Roger. But what is called "direct" testimony as to identity is really only secondary circumstantial evidence. In other words, it is the opinion of a witness drawn from certain circumstances. The same criticism is applicable to the testimony of accomplices to identity. It is called "direct" by those who hold to the distinction here excepted to; yet no testimony depends for credit more exclusively on circumstances. See *Com.* v. *Cunningham,* 104 Mass. 548, which held that where the only question is as to the identity of the prisoner with the guilty party, the jury may be justified in returning a verdict of guilty, although no witness will swear positively to the identity. Compare post, § 806, as to presumption of identity.

See Harris, Identification, §§ 4–6 inclusive.

Having in view the caution that should always be exercised in questions of personal identification, it is competent to make proof of identity by any of the physical characteristics that differentiate individuals from each other. But proof must be made in such cases, as inferences are not sufficient. See *Barbot's Case,* 18 How. St. Tr. 1267; *Rex* v. *Brook,* 31 How. St. Tr. 1124; *Hoag's Case,* 5 N. Y. City Hall Rec. 124; *Brown* v. *Com.* 76 Pa. 319; *Com.* v. *Scott,* 123 Mass. 222, 25 Am. Rep. 81; *State* v. *Folwell,* 14 Kan. 105.

As evidence of identity is but an expression of the opinion of the witness, he should always be required to give the facts upon which his statement is based, as the jury has a right to such aid in determining the question submitted to them. See post, § 807; *State* v. *Morris,* 47 Conn. 179.

But how do you know this? Can a conclusion as to such an issue be reached except by inference? And yet, does not such an issue arise, explicitly or implicitly, in every criminal trial? We have, therefore, another inference to add to those already enumerated; an inference drawn only from circumstances.

§ 15. **And so of his sanity.**—Then comes another step; was the defendant responsible? It is true that the law presumes sanity from every rational act. But was the homicide in question a rational act? Are there not some homicides—*e. g.*, a wife and mother, in her own home of comfort, killing her newborn child—which on their face are insane acts; and is there anyone who would question Judge Story's humane declaration that in such a case we must infer insanity? In other words, in certain acts we infer sanity; in other acts, insanity, but it is inference in either case. Of course, when we invoke the prisoner's past history, and collect facts from which to draw our conclusions, then the evidence must on all sides be admitted to be what is called "circumstantial." But even as to the conclusion of the eyewitness of the homicide, and as to the conclusion we draw from his conclusion, the process also must be circumstantial. It is an inference drawn from circumstances, from a narrow range of circumstances, but from circumstances still. Here, then, is a fourth inference to be made, and a fourth possibility of innocence to be set aside, before we can convict upon what is called direct testimony.

§ 16. **And so of his intent.**—Yet there is another constituent of guilt to be proved; and this a constituent which, as all parties agree, the prosecution must make out,—the constituent of intent. In most indictments intent is averred or implied; in all such cases it must be proved by the prosecution. Yet what human eye has witnessed the processes of intent

in another's mind? It may be said that intent is to be inferred from an intelligent act, and so it is; but so far as concerns the question before us, this is a *petitio principii;* because if you ask the witness how he knows the act was intelligent, or if you ask yourself why you infer it was intelligent from what the witness says, the answer is, circumstances. Add to a shooting certain circumstances,—*e. g.,* a furtive or an angry approach, a careful aim, an accurate use of the weapon, a threat, a subsequent attempt at flight,—and you make out the homicidal intent. Divest the killing of such circumstances, assume a weapon lifted on the spot without aim, an approach purely fortuitous or friendly, a manner from which no suspicion of attempt can be extracted; let the case come to you in such shape, with no effort on the part of the prosecution to make out malice or passion, or to show subsequent consciousness of guilt, and you have a case on which no conviction of malicious homicide could be sustained. Here, then, we have a fifth and most important inference, namely, that of intent, which must be made before conviction.[1]

§ 17. Witnesses dependent on circumstances for credibility.—Yet even at this point we have not exhausted the inferences to be drawn before the testimony of an eyewitness can be regarded as sufficient to sustain a verdict of guilty. The conditions we have just noticed are those which concern the person charged with a crime; and it has been seen that even if the evidence be that of eyewitnesses, pure and simple, a conviction that he is guilty can only be reached by probable reasoning; by reasoning consisting, as does all other probable reasoning, of logical induction from circumstances. This, indeed, is a condition necessarily emanating from the subject-matter of trial, namely, a supposed moral agent charged with

[1] *Reg.* v. *Hincks,* 24 Lower Can. Jur. 116, 10 Cent. L. J. 127. See *Robbins* v. *People,* 95 Ill. 175.

voluntary intentional crime. Let us see how the same condition results from the necessary character of all witnesses.[1]

Now, to exclude from the issue all evidence that is called "circumstantial" we have to suppose the case of a witness who appeals to our credence simply and merely because he is a witness. He is known by no antecedents; there is nothing before us by which his veracity can either be sustained or disputed. For the moment you add to him such circumstances, the testimony becomes, on all showing, "circumstantial." Suppose, then, we have present a witness of whom nothing can be known or inferred except that he claims to have seen a certain guilty act; is this testimony on which a conviction can be satisfactorily rested? Strip the major premise in Paley's famous syllogism of the statement it contains as to the pure characters and holy lives and deaths of the evangelic historians; make it simply read: "No man can assert a falsehood; Matthew was a man; therefore Matthew could not assert a falsehood,"—and to what does the conclusion amount? The whole force of the reasoning rests upon the character of Matthew and his cohistorians; their simplicity, their uniform heroism and coherence in their narration of the disputed facts; the improbability that ethics so lofty and conceptions so sublime should have sprung from men who were consciously fabricating falsehoods; the further improbability that for the sake of such fabrications such men would expose themselves to the infamy and ruin which the promulgators of such statements would invoke. So it is with all other forms which the testimony of eyewitnesses assumes. Suppose the question to be whether it is more probable that a given abstract man (the witness) should have committed one crime, that of perjury, than that another given abstract man (the defendant) should have committed another crime, that of murder; here, if we divest the issue of all circumstances on either side, there is

[1] See post, §§ 369 et seq.

simply a balance of improbabilities, in weighing which the mind must incline, if it incline at all, to the acquittal of the darker crime.[2]

§ 18. Perjury always possible.—But here, as it was in scanning the probabilities of guilt in reference to the offender himself, there are other steps to be taken before we can discharge the possibilities of innocence with which the issue is beset. Even supposing we could rest a conviction upon the statement, unsustained by circumstances, of an alleged eye-witness, could we do so without, in the next place, remembering the possibility that such witness may have testified falsely? Perjury, indeed, is never to be presumed; but we cannot shut our eyes to the fact that convictions have sometimes been based on perjured testimony; and though the probability of perjury may be but one to a hundred, yet this is only another way of saying that it is probable to a very high degree, but not certain, that there is no perjury in the testimony brought before us in any given case.[1] It is true that there may be forgery of facts, as well as falsification by witnesses; and it is true, also, that, with the exception of such objects as can be brought into court on trial, the adjudicating tribunal must become cognizant of indicatory facts through witnesses who may be as much tempted to perjure themselves in giving this kind of testimony as in giving other kinds of testimony. But it cannot be denied that perjury in respect to that of which a witness says he was the only observer is more easy than perjury in respect to extrinsic facts open to common observation, and, *a fortiori,* more easy than the forgery of such facts. Perjury of the first class is skilful in eluding detection; is self-contained and self-verifying; it can be consummated without observation and without machinery; it is thus easily concocted,

[2] See Ram, Facts, 3d Am. ed. 291.

[1] See post, §§ 373 et seq., as to influences leading to perjury.

and not easily exposed. On the other hand, extrinsic facts cannot be forged without attracting more or less attention, nor testified to without that possibility of exposure inherent in all fabrications of matters extrinsic. False "direct" testimony, also, hangs ordinarily on a single link, and if that link is sufficiently strong the case succeeds. But it is of the essence of what is called "circumstantial" evidence—*i. e.*, evidence dependent on the collection of numerous self-supporting facts—that if one of these facts should turn out to be forged, the taint affects the whole system. The probability of detection of falsification is therefore in proportion to the number of issues presented.

§ 19. Prejudice conditioned by circumstances.—But if perjury is probable only in the proportion of one to a hundred, is it so with prejudice? The late Mr. John Sergeant, a great and grave jurist, once told a jury, in discussing this kind of evidence, of a trial for damages accruing from collision between two sloops carrying lawyers to a circuit court to be held at Wilmington. The question arose as to which sloop was the aggressor; and on this question every lawyer swore with his sloop. The difficulty was not that any one of the lawyers consciously perverted the truth, but that they all were prejudiced, so that the truth was unconsciously perverted by them. More or less does this bias exist in every witness, whether from unconscious prejudice, or from the impossibility of any man using language that exactly expresses the truth. Of unconscious prejudice another illustration may be found in the fact that the purest and most high-minded of experts, in matters involving the identity of handwriting, are known to have much difficulty in divesting their minds of the predisposition to accept, as to such identity, the view which is unconsciously received by them from the party who first puts the papers in their hands.[1] And in the same line may be noticed the tendency

[1] See post, § 376.

observable in those engaged in ferreting out crime, to view the extrinsic facts which come to their observation in such a way as best to support some preconceived hypothesis as to the guilty agency.[2]

Of the inadequacy of memory and language exactly to represent a particular scene as it really took place, we have constant illustrations in the cross-examinations and re-examinations of witnesses during every long-contested trial. There is one probability in a hundred that a witness may be perjured; there is one in fifty or twenty or ten that he may be so prejudiced as unconsciously to misstate; there is a far higher probability that his statement may not be exactly true.[3] All these probabilities the jury have to weigh; and the conclusions they reach must be inferences from circumstances. Even in the case of the abstract witness, without antecedents or circumjacents, whom this hypothesis presents to us, the jury would infer, if such a witness were possible, a want of credibility from the very circumstance that the witness comes forward in this anomalous isolation. But no such witness exists or can exist. Every witness has some circumstances about him from which inferences as to his veracity and capacity may be made. Every case depending nominally upon what is called direct testimony depends really upon that which is circumstantial. Hence, if we are to hold that in circumstantial evidence there can be no conviction if the facts "are capable of explanation upon any other reasonable hypothesis than that of guilt," we must hold this to be the case with all evidence. If we do not hold this as to evidence in general, we must not hold it as to that kind of evidence popularly called circumstantial.

§ 20. Reasoning in such cases to be logical.—The conclusion to which the reasoning we have been following leads

[2] Glaser, Lehre vom Beweis (1884) 141 et seq.

[3] See post, § 373.

us is this: All evidence is more or less circumstantial; all statements of witnesses, all conclusions of juries, are the results of inferences. There is, therefore, no ground for the distinction between "circumstantial" and "direct" evidence. All evidence admitted by the court is to be considered by the jury in making up their verdict; and their duty is to acquit if, on such evidence, there is a reasonable doubt of the defendant's guilt; if otherwise, to convict.[1] It may be objected that the views just expressed land us in scepticism, being destructive of certainty of conclusion. But scepticism, while it frequently results from the assumption that no conclusion is to be believed that is not demonstrated, is reduced within proper bounds by the recognition of the position above stated, that it is only by inference from facts that conclusions as to human actions can be reached. The process has two sides: 1. The prejudice against what is called "circumstantial" evidence is dispelled. That this prejudice is deeply seated is illustrated by the fact that in some states, by statute or by constitutional provision, capital sentence cannot be awarded when the evidence is only "circumstantial," though if the fact be, as has just been argued, that no conviction ought to stand that does not rest upon a cumulation of probabilities, it is necessary, in order to carry out the limitations in this respect just noticed, to assign to the word "circumstantial" a meaning very different from that assigned to it in this chapter.[2] But aside from positive limi-

[1] The following cases may be consulted as to the points made in the text: *State* v. *Daley*, 41 Vt. 564; *Com.* v. *Annis*, 15 Gray, 197; *Com.* v. *Drum*, 58 Pa. 9; *Schusler* v. *State*, 29 Ind. 394; *Kingen* v. *State*, 45 Ind. 518; *State* v. *Johnson*, 19 Iowa, 230; *State* v. *Collins*, 20 Iowa, 85; *Orr* v. *State*, 34 Ga. 342; *Martin* v. *State*, 38 Ga. 293; *Hall* v. *State*, 40 Ala. 698; *Mose* v. *State*, 36 Ala. 211; *Chisolm* v. *State*, 45 Ala. 66; *Coffman* v. *Com.* 10 Bush, 495, 1 Am. Crim. Rep. 293; *Phipps* v. *State*, 3 Coldw. 344; *Conner* v. *State*, 34 Tex. 659; *Bowler* v. *State*, 41 Miss. 570; *People* v. *Strong*, 30 Cal. 151; *People* v. *Dick*, 32 Cal. 213; *People* v. *Cronin*, 34 Cal. 191; *People* v. *Morrow*, 60 Cal. 142.

[2] The difficulty, in these states, may be obviated by regarding the

tations, there is a superstition with regard to "circumstantial" evidence, which often prevents conscientious jurors from rendering convictions in cases in which justice demands such convictions. To avert such perversions of justice it is important that it should be understood that all trustworthy evidence derives its credit from facts. 2. The equally superstitious assignment of peculiar sanctity to the testimony of eyewitnesses, by which unjust convictions have been secured, will also be dispelled. A jury will not, if rightly advised in this relation, feel bound to find its verdict on grounds other than those on which its members would form conclusions on matters of everyday life. And the position is reached that the reasoning in courts of justice is the reasoning of common sense, by which men of common sense and justice are guided in forming their opinions as to the conduct of others. Certain exclusionary limits, indeed, are adopted, by which hearsay and irrelevant matters are shut out. But these exclusions will be found, when examined, to be based on common sense; and when the best evidence which the nature of the case permits is brought in, and irrelevant matters are excluded, then the reasoning which the jury is to apply is not fettered by artificial and arbitrary rules, but is that which is usual in all matters in which solemn judgments are reached out of court.

§ 21. Juridical value of hypothesis.—The evidence on trial consisting, therefore, of a series of facts more or less closely connected, argument consists in the application to these facts of particular hypotheses; and in criminal issues, if there be no probable hypothesis of guilt consistent, beyond a reasonable doubt, with the facts of the case, the defendant must be acquitted.[1] But this is not the only use of hypothesis. It is

term "circumstantial evidence" as convertible with "evidence which admits of a probable solution not consistent with guilt." But in such cases there should be no conviction at all.

[1] See *Beavers* v. *State*, 58 Ind. 530.

only by appealing to hypothesis that questions of relevancy, as will presently be more fully seen, can be determined. "My hypothesis," so argues the prosecution, "is that the act charged is part of a system of guilty acts." To support such an hypothesis, proof of such a system is relevant.[2] Or the defense argues, "No man of good character would commit a crime such as here charged," and to sustain this hypothesis evidence of good character is relevant.[3] Hypothesis, thus, is the basis on which admissibility of evidence must rest, as it is the basis on which must rest either acquittal or conviction.

[2] Post, § 34.

[3] Post, § 57.

CHAPTER II.

RELEVANCY OF EVIDENCE.

§ 22. Evidence.
23. Relevancy.
24. How determined.
24a. Where fraud is principal issue.
24b. Enforcement of the rule in criminal cases.
24c. Testimony cannot be excluded because facts admitted.
25. Equally applies to investigation of all truth.
26. Illustrated by questions as to documents.
26a. Various stages of.
27. Illustrated by questions of identity.
28. Prior, contemporaneous, and subsequent conditions.
29. Collateral facts generally irrelevant.
29a. Questions asked about collateral facts.
30. Proof of collateral offenses not admissible.
31. Exceptions to the rule as to proof of collateral offenses.
32. Conditions necessary to sustain the exceptions.
33. Exceptions to the rule; *res gestæ*.
34. Collateral offenses relevant to show identity.
35. Collateral offenses relevant in proving *scienter*.
36. Collateral offenses relevant where intent essential.
37. When there is other evidence or presumption of intent.
38. Relevancy to show motive.
39. Collateral offenses relevant to show system.
40. To prove malice; libel and murder cases.
41. Evidence of other crime to rebut special defense.
42. Evidence of other crimes in prosecution for sexual offenses.
43. Distinctive rule in cases of marital homicide.
44. Other offenses irrelevant in criminal negligence; exception.
45. Proof of prior attempts in like manner admissible.
46. Relevancy as applicable to confessions.
47. Other crime committed in resisting arrest, or attempting to escape after commission of crime charged.
48. Effect of indictment for, or conviction or acquittal of, evidential crime; limitation of actions.
49. Election of offense relied on.

§ 50. Right to question defendant concerning other crimes, on cross-examination.
51. When evidence of other crime is not prejudicial.
52. Statement or insinuation by prosecution of other crime.
53. Instructions to jury where evidence of other crimes is admitted.
55. Good faith.
56. Prudence and diligence.
57. Character in criminal issues.
58. "Character" interchangeable with "reputation."
58a. Not a substantive defense in itself.
59. Exceptions in certain offenses; relevancy to charge.
60. Purposes of admission.
61. Particular facts not relevant in rebuttal of reputation.
62. No presumption against defendant to be drawn from absence of character evidence.
63. Cannot rebut by showing character subsequent to commission of offense.
63a. Bad character of deceased irrelevant; exception.
64. Bad character of third parties not relevant.
65. Tendency, ability, and opportunity; when irrelevant.
66. Relevancy of character in all prosecutions; exception.
67. Weight attached to character evidence.
68. Character of party injured generally irrelevant.
69. Character of party injured relevant in assault or homicide, when self-defense first proved.
70. English rule; character of party injured where self-defense is shown.
71. New York rule; relevancy of character of party injured where self-defense shown.
72. Rule in New Jersey.
73. Rule in Pennsylvania.
74. Rule in North Carolina.
75. Rule in South Carolina, Georgia, Alabama, Kentucky, Tennessee, and Mississippi.
76. Rule in Indiana.
77. Rule in Michigan.
78. Rule in Minnesota.
79. Rule in Iowa.
80. Rule in Missouri and Texas.
81. Rule in California and other western states.
82. Inconclusive cases *contra* the rule.
83. Rule adopted in Massachusetts.
84. Summary of law.
85. "Relevant," "material," and "competent," convertible terms; use of words in reserving exceptions.

§ 86. Materiality of evidence in perjury.
87. Materiality; perjury; instructions of court.
88. Perjury not predicated on immaterial questions.
89. Materiality on questions of new trial.

§ 22. Evidence.—"Evidence includes the reproduction, before the determining tribunal, of the admissions of parties, and of facts relevant to the issue." [1] It is the legal means of ascertaining the truth or falsity of any alleged fact relevant to the issues.[2]

§ 23. Relevancy.—The fundamental quality required of all evidence, as applied to the facts in issue, is its relevancy. Relevancy is that characteristic which has a bearing on the case in hand, conducing to the proof of a pertinent hypothesis. A pertinent hypothesis is that hypothesis which logically affects the issue.[1] A person is found dead, for instance, with marks of violence on the body: the hypothesis is the theory on which we proceed to account for the fact, the solution of which may disclose the secret of death. Were the wounds homicidal or suicidal? If homicidal, what was the motive? On the trial for the homicide, all facts are admissible as relevant that sustain any hypothesis which might prove guilt. On the defense, any facts are admissible as relevant which might establish the hypothesis of innocence.[2]

[1] Wharton, Ev. § 3.

[2] Stephen's Digest of Ev. p. 3; Starkie, Ev. 10th ed. p. 12; Best, Ev. § 33; Bl. Com. bk. 3, p. 367; Greenl. Ev. § 1; McKelvey, Ev. p. 6; *Auditor General* v. *Menominee County*, 89 Mich. 552, 618, 51 N. W. 483; *State* v. *Ward*, 61 Vt. 153, 17 Atl. 483, 487, 8 Am. Crim. Rep. 207; *O'Brien* v. *State*, 69 Neb. 691, 96 N. W. 649, 650; *People* v. *Bowers*, — Cal. —, 18 Pac. 660, 665; *Mallery* v. *Young*, 94 Ga. 804, 807, 22 S. E. 142.

[1] Supra, § 21; *Levy* v. *Campbell*, — Tex. —, 20 S. W. 196; Stephen's Digest of Ev. p. xiii. pp. 4, 246; *State* v. *Lyon*, 10 Iowa, 340.

[2] *State* v. *Reno*, 67 Iowa, 587, 589, 25 N. W. 818; *State* v. *Rhoades*, 6 Nev. 352, 359; *Johnson* v. *Com.* 115 Pa. 369, 394, 9 Atl. 78; *Stone* v. *State*, 118 Ga. 705, 716, 98 Am. St. Rep. 145, 45 S. E. 630; *State* v.

§ 24. How determined.—The law furnishes no test of relevancy.[1] Unless settled by statute or controlling precedent, relevancy is to be determined by logic, being the application of the principles of reason, judgment, and systematic arrangement to the matter in hand.[2] All facts which tend either to sustain or to impeach a logically pertinent hypothesis are admissible.[3]

Moore, 77 Kan. 736, 740, 95 Pac. 409; *State* v. *Sebastian*, 81 Conn. 1, 3, 69 Atl. 1054; *State* v. *Gebbia*, 121 La. 1083, 1106, 47 So. 32.

[1] Thayer, Ev. p. 265; 11 Cyc. Ev. p. 174.

[2] Webster's New International Dictionary, p. 1270.

[3] Wharton, Ev. § 21.

United States.—

Butler v. *Watkins*, 13 Wall. 457, 20 L. ed. 629; *Sorenson* v. *United States*, 94 C. C. A. 181, 168 Fed. 785.

Alabama.—

Piano v. *State*, 161 Ala. 88, 49 So. 803, 805; *Phillipps* v. *State*, 161 Ala. 60, 49 So. 794, 796.

California.—

People v. *Mar Gin Suie*, 11 Cal. App. 42, 103 Pac. 951; *People* v. *Hall*, 57 Cal. 569, 570.

Colorado.—

Van Wyk v. *People*, 45 Colo. 1, 7, 99 Pac. 1009.

Florida.—

Thompson v. *State*, 58 Fla. 106, 50 So. 507, 508, 19 A. & E. Ann. Cas. 116.

Georgia.—

Alexander v. *State*, 7 Ga. App. 88, 66 S. E. 274, 275; *Webb* v. *State*, 133 Ga. 585, 66 S. E. 784, 785.

Idaho.—

State v. *Gallagher*, 14 Idaho, 656, 658, 94 Pac. 581.

Illinois.—

Hough v. *Cook*, 69 Ill. 581, 584.

Indiana.—

Danenhoffer v. *State*, 79 Ind. 75, 76.

Iowa.—

Hancock v. *Wilson*, 39 Iowa, 48, 49; *State* v. *Waltz*, 52 Iowa, 227, 228, 2 N. W. 1102; *State* v. *Kline*, 54 Iowa, 183, 184, 6 N. W. 184.

Louisiana.—

State v. *Clifton*, 30 La. Ann. 951, 952; *State* v. *Dufour*, 31 La. Ann 804, 805; *State* v. *Crowley*, 33 La. Ann. 782, 785; *State* v. *Beatty*, 30 La. Ann. 1266, 1267.

Maine.—

State v. *Hill*, 72 Me. 238, 243; *State* v. *Witham*, 72 Me. 531, 537.

Maryland.—

Brooke v. *Winters*, 39 Md. 505, 508; *Costley* v. *State*, 48 Md. 175, 177; *Robinson* v. *State*, 53 Md. 151, 153, 36 Am. Rep. 399.

Massachusetts.—

Com. v. *Dowdican*, 114 Mass. 257, 258; *Com.* v. *Sturtivant*, 117 Mass. 122, 138, 19 Am. Rep. 401; *Com.* v. *Costley*, 118 Mass. 1, 18; *Com.* v. *Allen*, 128 Mass. 46, 48, 35 Am. Rep. 356; *Com.* v. *Dunan*, 128 Mass. 422, 423.

Michigan.—

Welch v. *Ware*, 32 Mich. 77, 84; *People* v. *Hoffman*, 154 Mich. 145, 149, 117 N. W. 568.

But no facts are relevant which do not afford a reasonable presumption or inference as to the principal fact in issue, or which

Mississippi.—
Scott v. *State,* 56 Miss. 287, 290; *Brown* v. *State,* 57 Miss. 424, 428; *Spivey* v. *State,* 58 Miss. 858, 864.
Missouri.—
State v. *Emery,* 76 Mo. 348, 349.
Nebraska.—
Wells v. *State,* 11 Neb. 409, 413, 9 N. W. 552.
Nevada.—
State v. *Cowell,* 12 Nev. 337, 344.
New Hampshire.—
Hovey v. *Grant,* 52 N. H. 569, 580.
New York.—
Eighmy v. *People,* 79 N. Y. 546, 559; *Ryan* v. *People,* 79 N. Y. 593, 601; *Pontius* v. *People,* 82 N. Y. 339, 349.
North Carolina.—
State v. *Mikle,* 81 N. C. 552; *State* v. *Howard,* 82 N. C. 625, 628; *State* v. *Morris,* 84 N. C. 756, 760.
Oklahoma.—
Cox v. *State,* — Okla. — 104 Pac. 1074, 1077.
Pennsylvania.—
Pratt v. *Richards Jewelry Co.* 69 Pa. 53, 58; *Brandt* v. *Com.* 94 Pa. 290; *Johnson* v. *Com.* 115 Pa. 369, 9 Atl. 78.
Tennessee.—
Sartin v. *State,* 7 Lea, 679, 681.
Texas.—
Bouldin v. *State,* 8 Tex. App. 332; *Dubose* v. *State,* 10 Tex. App. 230; *Wright* v. *State,* 56 Tex. Crim. Rep. 353, 120 S. W. 458, 460; *Brown* v. *State,* 56 Tex. Crim. Rep. 389, 120 S. W. 444, 445.
Virginia.—
Dean v. *Com.* 32 Gratt. 912, 927.
Vermont.—
State v. *Hannett,* 54 Vt. 83, 87, 4 Am. Crim. Rep. 38; *State* v. *Manley,* 82 Vt. 556, 74 Atl. 231, 232.
Wisconsin.—
Yanke v. *State,* 51 Wis. 464, 466, 8 N. W. 276.
Inferences, post, § 734.

Instances of Relevancy of Minor Facts.

Homicide.—It was held relevant to show that, in searching for a body, witness found where a body had been buried, and, digging down, found traces of blood, and of clothing worn by deceased. *Green* v. *State,* 96 Ala. 29, 32, 11 So. 478.

It was held relevant to show that defendant had purchased the same kind of a bottle containing bitters, on the evening of the homicide, as that found in the buggy in which deceased was riding when last seen alive. *State* v. *Rainsbarger,* 74 Iowa, 196, 203, 37 N. W. 153.

It was held relevant to admit in evidence revolver of deceased, found on defendant's premises eighteen days after the homicide. *State* v. *Craemer,* 12 Wash. 217, 40 Pac. 944.

That a tie was found similar to one worn by defendant covered with blood. *Turner* v. *State,* 48 Tex. Crim. Rep. 585, 589, 89 S. W. 975. Boots, shoes, and evidence of

do not make more or less probable such a hypothesis.[4] Irrelevant facts draw the minds of the jurors from the point in

tracks and footprints were admitted in the following cases: *Doss* v. *State,* 50 Tex. Crim. Rep. 49, 50, 95 S. W. 1040; *Hargrove* v. *State,* 147 Ala. 97, 119 Am. St. Rep. 60, 41 So. 972, 10 A. & E. Ann. Cas. 1126; *Davis* v. *State,* 152 Ala. 82, 44 So. 545, 546; *Moore* v. *State,* 51 Tex. Crim. Rep. 468, 103 S. W. 188; *State* v. *Norman,* 135 Iowa, 483, 113 N. W. 340; *Heidelbaugh* v. *State,* 79 Neb. 499, 113 N. W. 145; *State* v. *Gallman,* 79 S. C. 229, 60 S. E. 682; *Johnson* v. *State,* 55 Fla. 46, 46 So. 154; *Hodge* v. *State,* 97 Ala. 37, 38 Am. St. Rep. 145, 12 So. 164; *Cordes* v. *State,* 54 Tex. Crim. Rep. 204, 112 S. W. 943; *Franklin* v. *State,* 69 Ga. 36, 44, 47 Am. Rep. 748 (also knife in this case).

Condition and character of certain pistols relevant testimony. *Andrews* v. *State,* 159 Ala. 14, 27, 48 So. 858.

Sunday laws.—Where it was necessary to show that store was open, evidence that a person bought a bottle was relevant. *Dillard* v. *State,* — Ala. —, 39 So. 584; *Lambie* v. *State,* 151 Ala. 86, 44 So. 51.

Theft.—On hypothesis that a watch and chain were torn from prosecuting witness at a particular spot, evidence showing that at that very spot a watch ring was found, such as was used to fasten watches, and having the appearance of being wrenched, was relevant. *Com.* v. *Watson,* 109 Mass. 354; *Com.* v. *Tolliver,* 119 Mass. 312; *People* v. *Collins,* 48 Cal. 277, 278; post, § 816.

Certain notes were held relevant to prove date in prosecution for theft of same. *Ellington* v. *State,* — Tex. Crim. Rep. —, 99 S. W. 997.

Names by which defendants were known, as bearing on identity, were held relevant. *Com.* v. *Johnson,* 199 Mass. 55, 61, 85 N. E. 188. Also as to tools found on premises. Ibid.

Pigs of metal similar to those stolen were allowed to be shown, to show similarity with those found. *Ahearn* v. *United States,* 85 C. C. A. 428, 158 Fed. 606.

Purpose and motives.—Where prosecution proved defendant went to a place to commit crime, defendant was allowed to show that he went to the place on legitimate business. *State* v. *English,* 67 Mo. 136.

Where there was evidence of motives likely to have prompted defendant, it was relevant for him to show stronger motives operating the other way, and counter motives. *State* v. *Johnson,* 30 La. Ann. 921; *Reg.* v. *Grant,* 4 Fost. & F. 322; *Mack* v. *State,* 48 Wis. 271, 4 N. W. 449.

As against murder, where defendant set up suicide as the cause of death, it was relevant for him to show melancholy on part of deceased. *Blackburn* v. *State,* 23 Ohio St. 146, 153.

In rape it is relevant to show previous friendly relations. *Hall* v. *People,* 47 Mich. 636, 638, 11 N. W. 414.

[4] *Com.* v. *Fitchburg R. Co.* 126 Mass. 472.

issue, and tend to excite prejudice, and mislead.[5] Relevancy is not determined by resemblance to, but by the connection

[5] In the following cases the irrelevant admissions were held prejudicial: *Smitherman* v. *State,* 40 Ala. 355, 356; *Billings* v. *State,* 52 Ark. 303, 311, 12 S. W. 574; *People* v. *Ching Hing Chang,* 74 Cal. 389, 391, 16 Pac. 201; *People* v. *Dye,* 75 Cal. 108, 112, 16 Pac. 537; *Vale* v. *People,* 161 Ill. 309, 311, 43 N. E. 1091; *People* v. *Betts,* 94 Mich. 642, 643, 54 N. W. 487.

And in the following as exciting prejudice against the accused; *Sims* v. *State,* 146 Ala. 109, 118, 41 So. 413; *Perry* v. *State,* 110 Ga. 234, 239, 36 S. E. 781; *Tijerina* v. *State,* 45 Tex. Crim. Rep. 182, 74 S. W. 913.

Evidence is admissible if it tends to prove the issue, or to constitute a link in the chain of proof; and this seems to be the limit, and excludes all evidence of collateral facts, or those which are incapable of affording any reasonable presumption or inference as to the principal fact or matter in dispute, and for the good reason for the rule stated by Mr. Greenleaf, that such evidence tends to draw away the minds of the jurors from the point in issue, and to excite prejudice and mislead them. *State* v. *Beaudet,* 53 Conn. 536, 550, 55 Am. Rep. 155, 4 Atl. 237, 7 Am. Crim. Rep. 84.

Instances of Minor Facts Held Irrelevant.

Homicide.—Where defendant killed the captain of a vessel, and later killed the mate, on trial for killing the mate the reputation of the captain was irrelevant. *Anderson* v. *United States,* 170 U. S. 481, 42 L. ed. 1116, 18 Sup. Ct. Rep. 689.

A conversation of defendant with deceased, the morning before the homicide, no connection with the issues involved being shown, is irrelevant. *Wilson* v. *State,* 128 Ala. 17, 25, 29 So. 569.

Where defendant shot deceased during the altercation, evidence of defendant's citizenship, birth place, marriage, etc., was irrelevant. *Mann* v. *State,* 134 Ala. 1, 20, 32 So. 704.

What office the witness held, who arrested defendant, is irrelevant on prosecution for assault with intent to murder. *Deal* v. *State,* 136 Ala. 52, 56, 34 So. 23.

As to whether witness saw any guns or pistols after the difficulty was irrelevant. *Braham* v. *State,* 143 Ala. 28, 31, 38 So. 919.

That witness on the stand exchanged certain signals with her mother, who was in the court room, has no relevancy. *Funk* v. *United States,* 16 App. D. C. 478.

Where two are jointly indicted, but separately tried, and one acquitted, the record of acquittal is not relevant on the trial of the other. *Musser* v. *State,* 157 Ind. 432, 441, 61 N. E. 1.

It is irrelevant that defendant was a shoemaker, even though it might account for the kind of knife used. *People* v. *Niles,* 44 Mich. 606, 609, 7 N. W. 192.

with, other facts.[6] Relevancy involves two distinct inquiries, to be determined by logic, if not otherwise prescribed by jurisprudence: First, Will the hypothesis, if proved, affect the issue? Second, Does the fact offered as evidence tend either to sustain or to impeach the hypothesis?[7] These inquiries, when determined by the application of those principles of reasoning, which the law assumes are known to its judges and to its ministers,[8] almost universally settle the question of relevancy or irrelevancy. There is no distinction, as to relevancy, between circumstantial and direct evidence. The test in both instances is, Does it tend to prove or disprove the issue?[9]

Evidence which sheds no light on defendant's acts, which does not tend to support the hypothesis of the prosecution, or which does not constitute an admission of guilty knowledge, or confession of guilt, nor a declaration against interest, is irrelevant. *Harper* v. *State,* 83 Miss. 402, 413, 422, 35 So. 572.

The fact that defendant is a fine shot is not relevant on prosecution for felonious assault. *State* v. *Elvins,* 101 Mo. 243, 246, 13 S. W. 937.

Evidence that a mob gathered to storm the jail and lynch defendant is irrelevant when offered by defendant on trial for murder. *State* v. *Huff,* 161 Mo. 459, 495, 61 S. W. 900.

An accomplice in larceny offered testimony that defendant broke a window in a store, then crossed a creek on the bridge, came back, and entered the store. The state sought to corroborate it by showing that a trailing blood hound went to the window, crossed the creek on the bridge, came back, and bayed others who had not been near the creek at all. Held irrelevant. *State* v. *Moore,* 129 N. C. 494, 55 L.R.A. 96, 99, 39 S. E. 626.

In prosecution for homicide, the number of jurors signing verdict of coroner's jury is irrelevant. *State* v. *Gilliam,* 66 S. C. 419, 420, 45 S. E. 6.

The testimony offered by defendant as to the amount of money he made cutting and selling hay was not relevant, nor the reasons he had for skinning certain cattle which he claimed to have found dead, to disprove the state's hypothesis that he had stolen and killed the cattle for the purpose of getting their hides. *Clay* v. *State,* 41 Tex. Crim. Rep. 653, 56 S. W. 629.

The number and the ages of the children left by deceased is not relevant on prosecution for murder. *Faulkner* v. *State,* 43 Tex. Crim. Rep. 311, 325, 65 S. W. 1093.

[6] *Stuart* v. *Kohlberg,* — Tex. Civ. App. —, 53 S. W. 596.

[7] *Com.* v. *Fitchburg R. Co.* 126 Mass. 472, 474.

[8] Thayer, Ev. 265.

[9] Supra, § 10; *State* v. *Reno,* 67

§ 24a. Where fraud is principal issue.—Where the principal issue is fraud, a large latitude is always given in receiving the facts, both inculpating and exculpating. As fraud is always a question of fact and never of presumption, it is only by induction from all the circumstances surrounding the case that a just conclusion can be reached.[1]

§ 24b. Enforcement of the rule in criminal cases.—While it is stated generally that the rules of law with regard to the admission of evidence are to be applied in civil and criminal cases alike,[1] yet in criminal cases the necessity always exists for a rigid enforcement of the rule that evidence that does not tend to prove or disprove the charge must be excluded.[2] And to enforce this rule, so consonant with reason and humanity, some of the states provide by statute that only the best evidence shall be considered by a grand jury, and prescribe what shall constitute legal evidence.[3]

Iowa, 587, 589, 25 N. W. 818; *McCann* v. *State,* 13 Smedes & M. 471, 489; *State* v. *McAllister,* 24 Me. 139, 143; *Simms* v. *State,* 10 Tex. App. 131; *Russell* v. *State,* — Ala. —, 38 So. 291; *Martin* v. *State,* 125 Ala. 64, 70, 28 So. 92; *Schley* v. *State,* 48 Fla. 53, 57, 37 So. 518.

England.—Rex v. *Ellis,* 6 Barn. & C. 147, 9 Dowl. & R. 174, 5 L. J. Mag. Cas. 1; *Rex* v. *Rooney,* 7 Car. & P. 517; *Reg.* v. *Briggs,* 2 Moody & R. 199; *Reg.* v. *Fursey,* 6 Car. & P. 81; *Anglesey* v. *Hatherton,* 10 Mees. & W. 235, 12 L. J. Exch. N. S. 57.

[1] Wharton, Ev. § 35; *Therasson* v. *People,* 82 N. Y. 238, 242; post, § 36; *Butler* v. *Watkins,* 13 Wall. 456, 462, 20 L. ed. 629, 630.

[1] *State* v. *Dart,* 29 Conn. 153, 156, 76 Am. Dec. 596.

[2] *Dyson* v. *State,* 26 Miss. 362, 385; *Hudson* v. *State,* 43 Tenn. 355, 361.

[3] Ga. Code, § 5164. See also Gilbert, Ev. 15; Starkie, Ev. 472.

The importance of the rule is apparent when we consider that irrelevant evidence so frequently vitiates a verdict; the courts uniformly holding that where irrelevant evidence is admitted that is prejudicial, the verdict of the jury must have been based upon such irrelevant evidence, as well as upon evidence properly admitted as relevant, and while there might be sufficient of such relevant evidence to sustain a verdict, nevertheless it must be set aside. Judges are not slow to rebuke prosecuting officers who, in their zeal to secure convictions, vio-

late this rule, or are intemperate in argument to the jury.

Alabama.—

White v. *State,* 136 Ala. 58, 62, 67, 34 So. 177, 15 Am. Crim. Rep. 696.

Arkansas.—

Gossett v. *State,* 65 Ark. 389, 391, 46 S. W. 537.

Colorado.—

Smith v. *People,* 8 Colo. 457, 458, 8 Pac. 920, 5 Am. Crim. Rep. 615; *Heller* v. *People,* 22 Colo. 11, 17, 43 Pac. 124.

Georgia.—

Mitchum v. *State,* 11 Ga. 615, 634; *Washington* v. *State,* 87 Ga. 12, 16, 18, 13 S. E. 131; *Thompson* v. *State,* 92 Ga. 448, 17 S. E. 265.

Illinois.—

McDonald v. *People,* 126 Ill. 150, 154, 9 Am. St. Rep. 547, 18 N. E. 817, 7 Am. Crim. Rep. 137; *Farrell* v. *People,* 133 Ill. 244, 247, 24 N. E. 423; *Hauser* v. *People,* 210 Ill. 253, 71 N. E. 416.

Indiana.—

Ferguson v. *State,* 49 Ind. 33, 1 Am. Crim. Rep. 582; *Brow* v. *State,* 103 Ind. 133, 136, 2 N. E. 296.

Iowa.—

State v. *Helm,* 92 Iowa, 540, 544, 61 N. W. 246.

Michigan.—

Lightfoot v. *People,* 16 Mich. 507, 510.

Mississippi.—

Martin v. *State,* 63 Miss. 505, 507, 56 Am. Rep. 812; *Middleton* v. *State,* 80 Miss. 393, 395, 31 So. 809, 14 Am. Crim. Rep. 1.

Missouri.—

State v. *King,* 174 Mo. 647, 660, 74 S. W. 627, 15 Am. Crim. Rep. 616; *State* v. *Ulrich,* 110 Mo. 350, 365, 19 S. W. 656; *State* v. *Good,* 46 Mo. App. 515, 517.

New York.—

Coleman v. *People,* 55 N. Y. 81, 89.

Pennsylvania.—

Com. v. *Dubnis,* 197 Pa. 542, 550, 47 Atl. 748.

Texas.—

Crow v. *State,* 33 Tex. Crim. Rep. 264, 270, 26 S. W. 209; *Brazell* v. *State,* 33 Tex. Crim. Rep. 333, 334, 26 S. W. 723.

Washington.—

State v. *Carter,* 8 Wash. 272, 276, 36 Pac. 29; *Sasse* v. *State,* 68 Wis. 530, 532, 32 N. W. 849; *Paulson* v. *State,* 118 Wis. 89, 102, 94 N. W. 771, 15 Am. Crim. Rep. 497.

England.—

Reg. v. *Gibson,* 16 Cox, C C. 181, 56 L. J. Mag. Cas. N. S. 42, L. R. 18 Q. B. Div. 537, 56 L. T. N. S. 367, 35 Week. Rep. 411, 51 J. P. 742, 7 Am. Crim. Rep. 171.

United States.—

Holl v. *United States,* 150 U. S. 76, 80, 37 L. ed. 1003, 1006, 14 Sup. Ct. Rep. 22; *Williams* v. *United States,* 168 U. S. 382, 397, 42 L. ed. 509, 514, 18 Sup. Ct. Rep. 92.

And the following expressions have been held to constitute reversible error:

"This moonshine business must be broken up. Clayton's murder was caused by the moonshine busi-

§ 24c. Testimony cannot be excluded because facts admitted.—It is error to exclude relevant evidence tending

to prove or disprove the issues, although the facts are admitted. Notwithstanding the admission, the prosecution has a right to prove the charge by competent evidence of the facts admitted, and the defendant the same right to establish his defense by the production of competent evidence in support of it.[1] Facts, when admitted, frequently lose their probative force, and are

ness, and it should be broken up." *State* v. *Tuten,* 131 N. C. 701, 42 S. E. 443, 14 Am. Crim. Rep. 28.

"Gentlemen of the jury, if you don't hang this negro, we will have such scenes as we are going to have at Lancing." *Powell* v. *State,* —Tex. Crim. Rep. —, 70 S. W. 218, 14 Am. Crim. Rep. 5.

"This is a most horrible crime, so far as my long experience at the bar has brought to my attention. I am surprised that this case was ever brought here; and it ought not to have been brought here; that while I do not believe in mob law as a rule, yet in a case like this the law ceased to be a virtue. I will be doing my duty as a citizen and a father if I can induce this jury to hang defendant high as Haman, and then go to my home and tell my wife what I have done, and hear her remark, 'Well done, thou good and faithful servant; you have performed your duty.'" *Smith* v. *State,* 44 Tex. Crim. Rep. 137, 142, 100 Am. St. Rep. 849, 68 S. W. 995.

"Why didn't the gentleman bring forward witnesses to impeach the old man?" *State* v. *Deves,* 9 Kan. App. 886, 61 Pac. 511, 14 Am. Crim. Rep. 18.

"There was no denial of that accusation then, and there is none now." *Jackson* v. *State,* 45 Fla. 38, 34 So. 243, 3 A. & E. Ann. Cas. 164, 14 Am. Crim. Rep. 20.

"Gentlemen of the jury, I want you to stand by me and help break up this vile den; if you could go over this town and see the good mothers whose pillows have been wet with tears over their boys who have been intoxicated by the acts of this woman." *Ivey* v. *State,* 113 Ga. 1062, 54 L.R.A. 959, 39 S. E. 423, 14 Am. Crim. Rep. 22.

"If there is a man on that jury who does not believe this man ought to be hung, then I say he is a weakling, not possessed of the proper manhood, and is unfit to sit on a jury." *State* v. *Blackman,* 108 La. 121, 92 Am. St. Rep. 377, 32 So. 334, 14 Am. Crim. Rep. 37; *People* v. *Smith,* 121 Cal. 355, 53 Pac. 802, 11 Am. Crim. Rep. 108, notes pp. 114–124; *Middleton* v. *State,* 80 Miss. 393, 31 So. 809, 14 Am. Crim. Rep. 1, note p. 3; *People* v. *Fielding,* 46 L.R.A. 641, notes, 158 N. Y. 542, 70 Am. St. Rep. 495, 53 N. E. 497, 11 Am. Crim. Rep. 88; Atwell, Fed. Crim. Law, § 22.

[1] *People* v. *Fredericks,* 106 Cal. 554, 560, 39 Pac. 944; *Trogdon* v. *State,* 133 Ind. 1, 4, 32 N. E. 725; *State* v. *Winter,* 72 Iowa, 627, 631, 34 N. W. 475; *State* v. *Jones,* 89 Iowa, 182, 188, 56 N. W. 427; *Com.* v. *Miller,* 3 Cush. 243; *Com.* v. *Mc-*

frequently admitted for this reason alone. Through loose admissions as to such facts, both judge and jury are apt to be confused as to what is and what is not admitted, and are consequently often misled.

§ 25. Equally applies to investigation of all truth.— Relevancy applies equally to all lines of the investigation of truth.[1] Certain exclusionary limits are indeed to be firmly imposed. Where the best evidence is obtainable, secondary evidence must always be refused. For instance, if record evidence can be had of a fact, oral evidence of the same fact must be refused, because not the best evidence. A person is on trial for an offense; evidence of independent crimes must not be admitted against him, except as hereafter shown,[2] where evidence of such independent crimes becomes relevant to show scheme, system, scienter, identity of person and crime, and intent, where intent is material. Another marked exception is where several crimes are so intermingled that they form one completed criminal transaction, and it is impossible to give a coherent explanation or account of one without involving the others. But in the latter instance where one crime may become relevant and material to prove the other for which the accused is on trial, the two transactions must be so connected and bound together as parts of a composite purpose and design that proof of one necessarily involves the other.[3] But aside

Carthy, 119 Mass. 354; *State* v. *Young,* 52 Or. 227, 18 L.R.A.(N.S.) 688, 132 Am. St. Rep. 689, 96 Pac. 1067, 1068.

[1] Wharton, Ev. § 22.

[2] Post, §§ 33 et seq.

[3] Post, § 39; *Goersen* v. *Com.* 99 Pa. 388, 399; *Killins* v. *State,* 28 Fla. 313, 334, 9 So. 711; *People* v. *Craig,* 111 Cal. 460, 468, 44 Pac. 186; *Benson* v. *State,* 119 Ind. 488, 492, 21 N. E. 1109; *Mason* v. *State,* 31 Tex. Crim. Rep. 306, 20 S. W. 564; *Crass* v. *State,* 31 Tex. Crim. Rep. 312, 20 S. W. 579; *Nixon* v. *State,* 31 Tex. Crim. Rep. 205, 20 S. W. 364; *Rex* v. *Whiting,* Holt, 396; 2 Russell, Crimes, 9th ed. 353; 3 Russell Crimes, 9th ed. 837.

"Not infrequently, records coming before this court impress the writer with the belief that some

from these limitations and the exceptions mentioned, which are exacted by the policy of the law, the tests we apply in juris-

trial judges are of opinion that, though such evidence of distinct, separate crimes may not serve either of the specified purposes, still it will be harmless if restricted by the charge to the jury. If in fact it is connected with the transaction under investigation, and tends to some one of the purposes mentioned above, it should be received; but if it is not so connected, or, if connected, does not tend to serve one of the purposes mentioned, then it is not competent evidence and it will be error to receive it, though restricted or withdrawn from the jury; for it is known to the profession, and to this court from the results shown in hundreds of cases brought here, that if there is a strong suspicion against the accused, though the evidence be not sufficient to authorize conviction, and there is evidences of other offenses before the jury, conviction will follow, notwithstanding such evidence, when admissible, is carefully and properly limited by the charge, or when inadmissible, be entirely withdrawn from the jury." *Welhousen* v. *State,* 30 Tex. Crim. Rep. 625, 626, 18 S. W. 300.

The importance of a strict recognition of this rule in practice cannot be ignored when it is considered that the reception of such incompetent and prejudicial testimony is seldom considered error without prejudice, but is considered such serious error on the part of the trial court as usually to reverse a conviction, although it may have been withdrawn from the consideration of the jury by the charge. While the lance may be withdrawn, still the wound remains.

"From the time when advancing civilization began to recognize that the purpose and end of a criminal trial is as much to discharge the innocent accused as to punish the guilty, it has been held that evidence against him should be confined to the very offense charged, and that neither general bad character, nor commission of other specific, disconnected acts, whether criminal or merely meretricious, could be proved against him. This was predicated on the fundamental principle of justice that the bad man, no more than the good, ought to be convicted of a crime not committed by him." *Paulson* v. *State,* 118 Wis. 89, 94 N. E. 771, 15 Am. Crim. Rep. 497, 504.

"In general it may be said that whenever the defendant's guilt of an extraneous crime tends logically to prove against him some particular element of the crime for which he is being tried, such guilt may be shown. . There must appear, between the extraneous crime offered in evidence and the crime of which the defendant is accused, some other real connection, beyond the allegation that they have both sprung from the same vicious disposition." *State* v. *Raymond,* 53 N. J. L. 264, 21 Atl. 328; *State* v. *Snover,* 65 N. J. L. 289, 47 Atl.

prudence are only those that we apply in historical and social criticism as well. Lord Bacon's alleged venality, or the theory that he was the author of Shakespeare's dramatic works, is to be proved or disproved, by historical critics, through the same kind of induction that we would apply to a trial in court. Whatever facts are admissible as yielding a logical inference in the one case are admissible as yielding a legal inference in the other. A stone claimed to be the remains of an ossified giant is produced; whatever facts would be relevant on the question of such pretension, viewing it as a matter of scientific criticism, would be relevant if the supposed fabricator of the stone was on trial as a cheat, for false pretenses, or confidence game. In this sense, it may be said all facts tending to show motive are admissible.

§ 26. Illustrated by questions as to documents.—A series of similar progressive tests may be applied in order to exhibit the meaning of any controverted writing.[1] A memorandum, for instance, in a foreign language, is put in evidence for the purpose of proving a debt. The plaintiff sets up, first, that the instrument is written in German; second, that certain clauses in it have, by custom of the trade, a meaning different from that in ordinary use. Here are two hypotheses successively presented in order to get at the meaning of the memorandum; whatever goes to prove either of these hypoth-

583, 15 Am. Crim. Rep. 27; *Mayer* v. *State,* 64 N. J. L. 323, 45 Atl. 624; *Cooper* v. *State,* 23 Tex. 331; Greenl. Ev. § 53; *Makin* v. *Atty. Gen.* 17 Cox, C. C. 704, 63 L. J. P. C. N. S. 41, [1894] A. C. 57, 6 Reports, 373, 69 L. T. N. S. 778, 58 J. P. 148; *Boyd* v. *United States,* 142 U. S. 450, 35 L. ed. 1076, 12 Sup. Ct. Rep. 292; *Moore* v. *United States,* 150 U. S. 57, 37 L. ed. 996, 14 Sup. Ct. Rep. 26; *Bishop* v. *State,* 55 Md. 138, 144; *Bell* v. *State,* 57 Md. 108, 114; *Carnell* v. *State,* 85 Md. 1, 6, 36 Atl. 117; *People* v. *Seaman,* 107 Mich. 348, 357, 61 Am. St. Rep. 326, 65 N. W. 203; *Green* v. *State,* 96 Ala. 29, 32, 11 So. 478.

[1] Froude's History of England. vol. 7, arguments as to the genuineness of the Casket letters.

eses is relevant. The number of hypotheses increases with the complication of the case. From January 21st, 1769, to January 21st, 1772, there appeared in the Public Advertiser, then the most popular newspaper in Great Britain, over the pseudonym of "Junius," a series of sixty-nine remarkable political letters, attacking all public characters of the day connected with the government, not sparing even royalty itself. The authorship has been attributed to many different persons, but is now generally credited to Sir Philip Francis. Suppose such title to this authorship was under investigation. We have a series of concentric hypotheses, each of which is pertinent, the innermost of which closely surrounds the point of identity. It would be pertinent to argue that the author of Junius, during the Chatham and Grafton ministries, was familiar with public life, that he possessed a facile pen, that he was cognizant of the traditions of the War Office and had access to its archives; that his animosity to Lord Mansfield and his attachment to Lord Chatham were strong; that he had cogent motives for concealing his identity, both at that particular period and for years afterwards; that he ceased to write about the year 1773, and that his writing exhibited certain marked peculiarities. Each of these hypotheses, being pertinent, it is relevant to prove that Sir Philip Francis was, during the period the letters appeared, familiar with English public life; that his style was polished, vigorous, and resembled that of Junius; that he had been for some time a clerk in the War Office; that his political relations repelled him from Lord Mansfield and connected him with Lord Chatham; that discovery of his identity would have been political ruin; that about the time the Junius letters concluded, Sir Philip Francis left the country; that his handwriting was strikingly similar to that of the Junius letters.

§ 26a. Various stages of.—Courts are not agreed upon rules that can be applied as an unfailing test of the relevancy of evidence. Any attempt to frame such rules, and to apply

them to cases existing or that may hereafter arise, must fail because of the infinite variety of human action, and because no two transactions are alike in all details. Mr. Stephens, in his Law of Evidence,[1] has attempted to codify the matter, but has done little more than to state a series of involved propositions open to criticism.[2] It is therefore not possible to make any more definite statement of the proposition than to say that evidence is relevant because pertinent to the issue; it may become relevant in the light of other relevant evidence already received, and a temporary relevancy may be assumed, where an attempt is being made to show the relevancy of the proffered evidence, which cannot fully appear until such proffered evidence is disclosed. Further than this, resort must be had to the principles of logic, modified and then applied to the particular circumstances of the case on trial, always having in view that the tests so made must be rigidly applied in criminal cases, where the issues involve the life, liberty, and happiness of the accused.

§ 27. **Illustrated by questions of identity.**—In questions of identity we have abundant illustrations of the principles just announced.[1] No matter how slight may be the inference to be drawn from any single fact, it is admissible as a fragment of the material from which the induction is to be made. One hundred thousand persons may be in a city at the time a particular crime is committed in that city. Proving that A was in the city at that time tends to make a case against him as a perpetrator, which is, by itself, only as one against one hundred thousand; yet it is nevertheless relevant to prove that he was at the time in the city. Multitudes of persons having to work with kerosene have kerosene stains on their clothing; yet when, on the trial of a person charged with burning a house,

[1] Stephen's Digest of Ev. Am. ed. chap. 2.

[2] Wharton, Ev. §§ 25, 26.

[1] Supra, § 13, post, §§ 34, 806.

the hypothesis of the prosecution is that an accomplice of the defendant fired the building by means of a can of kerosene oil furnished for the purpose by the defendant, it is relevant for the prosecution to prove that the shirt of the alleged accomplice had kerosene stains on it.[2] The fact that a horse is found in a stable at daybreak, smoking with sweat, and with marks of having just been violently driven, may in itself be trivial; yet it is not only relevant, but of decisive moment, when the issue is whether the horse was used that night or not, by someone having access to the stable.[3]

In the identification of goods, also, whatever marks or labels on them may tend to individuate them are admissible.[4]

§ 28. Prior, contemporaneous, and subsequent conditions.—Conditions, the presence or absence of which may be thus proved, may be divided into prior, contemporaneous, and subsequent conditions. For instance, a homicide is committed, and is charged upon the particular individual on trial. Among the prior conditions relating to the homicide are preparations, declarations, and other indications of enmity between the defendant and the deceased. Among the contemporaneous conditions are the meeting and collision of the parties and the commission of the overt act. Among the subsequent conditions are resistance to the officers when arrested, attempts at suicide or flight, possession of property, and confessions in various forms.

§ 29. Collateral facts generally irrelevant.—No fact, as already shown, which, on principles of sound logic, does not

[2] *State* v. *Kingsbury,* 58 Me. 239, 243; post, § 776; *State* v. *Kelsoe,* 11 Mo. App. 91; 2 Russell, Crimes, 9th ed. p. 353; *State* v. *Waterman,* 87 Iowa, 255, 256, 54 N. W. 359; 3 Greenl. Ev. § 109; *People* v. *Eppinger,* 105 Cal. 36, 41, 38 Pac. 538; *State* v. *Wentworth,* 37 N. H. 196, 217; *Davis* v. *State,* 15 Tex. App. 594.

[3] *People* v. *How,* 2 Wheeler, C. C. 412.

[4] *Com.* v. *Collier,* 134 Mass. 203.

sustain or impeach a pertinent hypothesis, is relevant; therefore no such fact, unless otherwise provided by some positive prescription of law, should be admitted as evidence on a trial.[1] The reasons for this rule are obvious. One of the fundamental provisions of the Federal and state Constitutions is that the accused "shall be informed of the nature and cause of the accusation." [2] To admit evidence of such collateral facts would be to oppress the accused by trying him on charges, of the nature and cause of which he has not been informed and which he has made no preparation to meet, and by prejudicing the jury against him through the publication of offenses of which, even if guilty, he may have long since repented, or which may have long since been condoned. Trials would thus be injuriously prolonged, the real issue obscured, and verdicts rendered on collateral issues. To sustain the introduction of such facts, as will be presently shown, there must be some connection established that will bring them into a common system with those under trial.[3]

[1] *State* v. *Baxter,* 82 N. C. 602, 603; *State* v. *Beverly,* 88 N. C. 632, 633.

[2] U. S. Const. 6th Amend.

[3] *Alabama.*—

Brock v. *State,* 26 Ala. 105, 106; *Hall* v. *State,* 51 Ala. 9, 14; *Williams* v. *State,* 45 Ala. 57, 63; *Rogers* v. *State,* 62 Ala. 170, 173; *Waters* v. *State,* 117 Ala. 108, 109, 22 So. 490; *Smith* v. *State,* 137 Ala. 22, 27, 34 So. 396, 13 Am. Crim. Rep. 410.

Arkansas.—

Jones v. *State,* 88 Ark. 579, 581, 115 S. W. 166.

California.—

People v. *Vidal,* 121 Cal. 221, 222, 53 Pac. 558; *People* v. *Argentos,* 156 Cal. 720, 106 Pac. 65.

Florida.—

Wallace v. *State,* 41 Fla. 547, 560, 26 So. 713.

Georgia.—

Cawthon v. *State,* 119 Ga. 395, 410, 46 S. E. 897; *Nesbit* v. *State,* 125 Ga. 51, 54 S. E. 195.

Kansas.—

State v. *Kirby,* 62 Kan. 436, 443, 63 Pac. 752, 15 Am. Crim. Rep. 212; *State* v. *Beaty,* 62 Kan. 266, 268, 62 Pac. 658, 14 Am. Crim. Rep. 513.

Illinois.—

Bishop v. *People,* 194 Ill. 365, 369, 62 N. E. 785, 14 Am. Crim. Rep. 548.

Kentucky.—

Miller v. *Com.* 78 Ky. 15, 23, 39 Am. Rep. 194; *Meadows* v. *Com.* 31 Ky. L. Rep. 1159, 104 S. W. 954.

§ 29a. Questions asked about collateral facts.—While the law regards as relevant all facts touching the credibility of the accused, or that can aid a jury to determine the weight of testimony; and while the question of relevancy must rest largely in the discretion of the trial judge, to be exercised by him with regard to the particular facts of each case, there is

Massachusetts.—

Com. v. *Call,* 21 Pick. 515, 522, 32 Am. Dec. 284; *Com.* v. *Campbell,* 7 Allen, 541, 83 Am. Dec. 705.

Michigan.—

People v. *O'Hara,* 124 Mich. 515, 521, 83 N W. 279, 12 Am. Crim. Rep. 576; *People* v. *Minney,* 155 Mich. 534, 537, 119 N. W. 918; *People* v. *Klise,* 156 Mich. 373, 374, 120 N. W. 989; *People* v. *Giddings,* 159 Mich. 523, 124 N. W. 546, 18 A. & E. Ann. Cas. 844.

Minnesota.—

State v. *Fournier,* 108 Minn. 402, 403, 122 N. W. 329.

Missouri.—

State v. *Reavis,* 71 Mo. 419, 420; *State* v. *Missouri P. R. Co.* 219 Mo. 156, 162, 117 S. W. 1173; *State* v. *Palmberg,* 199 Mo. 253, 116 Am. St. Rep. 476, 97 S. W. 566.

Nebraska.—

State v. *Sparks,* 79 Neb. 504, 510, 113 N. W. 154, 114 N. W. 598.

New Hampshire.—

State v. *Lapage,* 57 N. H. 245, 289, 24 Am. Rep. 69, 2 Am. Crim. Rep. 506.

Ohio.—

Farrer v. *State,* 2 Ohio St. 54, 75.

Oklahoma.—

Drury v. *Territory,* 9 Okla. 398, 418, 60 Pac. 101, 13 Am. Crim. Rep. 300; *Vickers* v. *United States,* 1 Okla. Crim. Rep. 452, 98 Pac. 467.

Oregon.—

State v. *Houghton,* 43 Or. 125, 129, 71 Pac. 982, 15 Am. Crim. Rep. 412.

New York.—

People v. *Governale,* 193 N. Y. 581, 586, 86 N. E. 554; *People* v. *Santagata,* 130 App. Div. 225, 114 N. Y. Supp. 321, 324; *People* v. *Bills,* 129 App. Div. 798, 114 N. Y. Supp. 587, 588.

Pennsylvania.—

Watson v. *Com.* 95 Pa. 418, 425; *Com.* v. *House,* 223 Pa. 487, 492, 72 Atl. 804.

Wisconsin.—

Topolewski v. *State,* 130 Wis. 244, 249, 7 L.R.A.(N.S.) 756, 118 Am. St. Rep. 1019, 109 N. W. 1037, 10 A. & E. Ann. Cas. 627; *State* v. *Miller,* 47 Wis. 530, 534, 3 N. W. 31.

Texas.—

Cesure v. *State,* 1 Tex. App. 19, 22; *Pinckord* v. *State,* 13 Tex. App. 468, 478; *Williamson* v. *State,* 13 Tex. App. 514, 518; *Brown* v. *State,* 56 Tex. Crim. Rep. 389, 120 S. W. 444; *Saldiver* v. *State,* 55 Tex. Crim. Rep. 177, 115 S. W. 584, 16 A. & E. Ann. Cas. 669; *Campbell* v. *State,* 55 Tex. Crim. Rep. 277, 116 S. W. 581; *Patrick* v. *State,* 45 Tex. Crim. Rep. 587, 590, 78 S. W. 947.

a marked distinction drawn between such facts and those sought to be brought out that merely tend to degrade the accused, or, by innuendo, to place irrelevant testimony before the jury. Such questions, "Is it not true that you have served a term in the penitentiary?" or "Have you not been arrested for felony?"—where not propounded in good faith, or asked concerning facts that in themselves are irrelevant, constitute reversible error, entitling the accused to a new trial. And this is true, even though such questions are objected to at the time on the ground of irrelevancy, and the answer excluded by the court. The reason is, the irrelevant facts have been placed before the jury by innuendo, the sinister influence remains, nor is it destroyed by the exclusion. It rationally follows, therefore, that the jury has been prejudiced against the accused, as fully as though the irrelevant facts themselves had been admitted, and nothing that the court can say entirely obliterates the effect.[1]

United States.—

Hall v. *United States,* 150 U. S. 80, 37 L. ed. 1003, 14 Sup. Ct. Rep. 22.

England.—

Griffits v. *Payne,* 11 Ad. & El. 131, 3 Perry & D. 107, 9 L. J. Q. B. N. S. 34, 11 Eng. Rul. Cas. 236; *Thompson* v. *Mosely,* 5 Car. & P. 502; *Reg.* v. *Mobbs,* 6 Cox, C. C. 223; *Reg.* v. *Dossett,* 2 Car. & K. 306, 2 Cox, C. C. 243; *State* v. *Whittier,* 21 Me. 341, 38 Am. Dec. 272.

[1] *Leo* v. *State,* 63 Neb. 723, 89 N. W. 303, 12 Am. Crim. Rep. 589; *State* v. *Fournier,* 108 Minn. 402, 403, 122 N. W. 329; *People* v. *Wells,* 100 Cal. 459, 34 Pac. 1078.

In *People* v. *Wells,* the court uses this language: "It would be an impeachment of the legal learning of the counsel for the People to intimate that he did not know the question to be improper and wholly unjustifiable. Its only purpose was to get before the jury a statement, in the guise of a question, that would prejudice them against the appellant. If counsel had no reason to believe the truth of the matter insinuated by the question, then the artifice was most flagrant; but if he had any reason to believe in its truth, still, he knew that it was a matter which the jury had no right to consider. . . . When the clear purpose is to prejudice the jury against the defendant in a vital matter by the mere asking of

§ 30. Proof of collateral offenses not admissible.—As has been stated,[1] there are peculiar reasons why the test should be applied to proof of collateral offenses. A defendant ought not to be convicted of the offense charged against him simply because he has been guilty of another offense. Hence, when such evidence is offered simply for the purpose of proving his commission of the offense on trial, evidence of his participation, either in act or design, in commission or preparation, in other independent crimes, cannot be received.[2] This rule obtains strictly, however, only where proof is offered of such independent offense to show that by reason of such independent offense the accused is more likely to have committed the one for which he is on trial.[3] The rule is that evidence of such collateral offense must never be received as substantive evidence of the offense on trial; and it extends to the proof of the accusation of another crime, as well as to evidence of its actual commission.[4]

§ 31. Exceptions to the rule as to proof of collateral offenses.—Certain exceptions exist, however, to the rule

the questions, then a judgment against the defendant will be reversed although objections to the questions were sustained, unless it appears that the questions could not have influenced the verdict."

[1] Supra, § 29.

[2] Supra, § 29, note 3, note in 62 L.R.A. 194.

[3] *Bullock* v. *State,* 65 N. J. L. 557, 86 Am. St. Rep. 668, 47 Atl. 62; *Barton* v. *State,* 18 Ohio, 221; *Jordan* v. *Osgood,* 109 Mass. 457, 12 Am. Rep. 731; *Reg.* v. *Oddy,* 5 Cox, C. C. 210, Temple & M. 593, 2 Den. C. C. 264, 20 L. J. Mag. Cas. N. S. 198, 15 Jur. 517.

The rule is not relaxed in larceny, but the clear distinction is maintained, though confusion often arises from the fact of the possession, by the alleged thief, of other stolen property. Where it is sought to corroborate the inference of guilt arising from the possession, the testimony would be admissible if the other stolen property was found in the possession of the alleged thief contemporaneously with the property he is accused of stealing. *Webb* v. *State,* 8 Tex. App. 115.

[4] *People* v. *Argentos,* 156 Cal. 720, 106 Pac. 65.

just stated. These exceptions fall under the following general divisions:

(1) Relevancy as part of *res gestæ*.
(2) Relevancy to prove identity of person or of crime.
(3) Relevancy to prove scienter, or guilty knowledge.
(4) Relevancy to prove intent.
(5) Relevancy to show motive.
(6) Relevancy to prove system.
(7) Relevancy to prove malice.
(8) Relevancy to rebut special defenses.
(9) Relevancy in various particular crimes.

It is recognized that in many instances the line of demarcation is not clear, but the discretion vested in the trial judge, intelligently and considerately exercised, will enable the prosecution fully to present the charge, on the one hand, and, on the other hand, to protect the accused and secure to him the rights guaranteed to him by the Constitution and the laws.

As several of these exceptions are discussed at some length in the famous case of People v. Molineux, 168 N. Y. 264, 62 L.R.A. 193, 61 N. E. 286, the opinion in this case has been deemed of sufficient importance to justify printing it in full as a footnote to this section.[1]

[1] Werner, J., delivered the opinion of the court:

In various forms and in several separate counts the indictment herein charges the defendant with the crime of murder in the first degree. The substance of the charge is that defendant killed one Katharine J. Adams while engaged in the commission of a felony upon and against the body of one Harry S. Cornish. The agency charged to have been employed for this purpose is cyanide of mercury, a rare and deadly poison, which is said to have been sent through the mails by the defendant to said Cornish with the intent that it should be taken by the latter. Direct evidence was adduced upon the trial to establish the fact that Cornish received by mail a package which

contained cyanide of mercury, and that he innocently administered to said Katharine J. Adams a portion of its contents, thereby causing her death. The legal questions which it is our duty to consider upon this appeal cannot be intelligently discussed without a clear understanding of the complicated facts and circumstances upon which the prosecution seeks to sustain the judgment of conviction against the defendant. In the effort to simplify the recital of these facts and circumstances we shall classify them into the several separate co-ordinate groups to which they belong, without reference to their chronological relation to each other, and without discussing the competency of the evidence by which they are claimed to have been established.

The facts which bear immediately upon the death of Katharine J. Adams and its cause are as follows: On the morning of December 24, 1898, Cornish received through the mail a package in which was found a pale blue box containing a silver bottle holder and a blue bottle bearing a "bromo seltzer" label, and filled with a powder purporting to be "bromo seltzer." The bottle fitted into the bottle holder. Accompanying these articles was a small envelope of the kind in general use for inclosing cards which are sent with gifts. There was no card in the envelope. Cornish, believing that some person had sent him a Christmas gift, and finding no card, recovered the outside wrapper of the package, which had been thrown into the waste basket, and found written upon it the address, "Mr. Harry Cornish, Knickerbocker Athletic Club, Madison Avenue and Forty-Fifth St., New York City." He cut, or tore, this address from the wrapper and placed it in his desk, together with the envelope, the bottle, and silver bottle holder. On the following day, December 25, 1898, Cornish, who was a member of the household of Katharine J. Adams, mentioned the receipt of these articles to the latter and her daughter, Mrs. Rodgers, and on the 27th of December, 1898, he took them home with him and exhibited them to the same persons. As a result of the conversation which ensued, Cornish presented the silver bottle holder to Mrs. Rodgers, who had other toilet articles resembling it in design. Cornish placed the "bromo seltzer" bottle on the dresser in his room, and retired for the night. On the next morning, December 28, 1898, Cornish arose shortly before 9 o'clock, and went to the door for his morning paper. In passing the kitchen door he observed Mrs. Adams with her head bandaged, and a few minutes later Mrs. Rodgers informed Cornish that her mother had a headache, and asked him for some of the bromo seltzer he had brought home. Cornish gave the bottle to Mrs. Rodgers, who attempted to open it without success, and she thereupon returned it to Cornish, requesting him to do so. He opened the bottle, and, after reading the directions upon the label, he poured a teaspoonful of the contents into a glass held by Mrs.

Adams, and stirred it while she poured water upon it from another glass. After the dose had been prepared Mrs. Adams drank from it. As she put down the glass she commented upon the peculiar taste of the mixture, whereupon Cornish remarked, "Why that stuff is all right," and swallowed a portion of what remained in the glass. Meanwhile Mrs. Adams had started for the kitchen, and in less than a minute Mrs. Rodgers called from the bathroom for help for Mrs. Adams. As Cornish arose from his chair to respond to the summons, his "knees went out from under him," but by an effort he succeeded in reaching Mrs. Adams just as she dropped to the floor in a state of collapse. Cornish being unable to lift Mrs. Adams, the daughter called a Mr. Hovey, who was in the house, and together they carried Mrs. Adams to a couch in the dining room. Cornish despatched a hall boy for a physician, returned for his coat and hat, picked up the bottle from which the dose had been taken and ran to a neighboring druggist, who gave him aromatic spirits of ammonia, with directions for administering it. Cornish returned to the house, and Dr. Hitchcock closely followed him. The doctor hurried to Mrs. Adams, who was breathing hard, her face overspread with a dark blue pallor and exhibiting evidence of great pain. Restorative measures were employed without avail, and upon the arrival of Dr. Potter, who had also been sent for, Mrs. Adams was dead. During the period which elapsed between the taking of the dose and the death of Mrs. Adams, Cornish had been retching and trying to vomit. After the death of Mrs. Adams, Dr. Hitchcock went in to see Cornish, who told him that Mrs. Adams had taken a dose of bromo seltzer, and handed the bottle to the doctor. Mrs. Rodgers informed Dr. Hitchcock that Cornish had taken some of the same stuff that Mrs. Adams had taken. The doctor put his finger into the bottle, and, extracting some of the powder, tasted it. He detected the odor of almonds, which is the characteristic odor of the cyanogen group of poisons, of which prussic acid is the base. He began to feel ill, and took whisky to counteract the effect of the powder. Dr. Hitchcock then took possession of the bromo seltzer bottle, the silver bottle holder, and the address. He and Cornish left the house together, and went to an undertaker. There they separated, the doctor returning to his home, and Cornish going down town to see Assistant District Attorney McIntyre, to notify him of Mrs. Adams' death. After seeing McIntyre, Cornish called upon a personal friend named Yocum, a chemist by profession, who noticed that Cornish looked ill, and prevailed upon him to take a drink of whisky, which he was not able to retain. Then Cornish proceeded to the office of his cousin, Louis H. Cornish, who was also a cousin of Mrs. Rodgers, the daughter of Mrs. Adams, and informed him of the latter's death. From thence Cornish went to the Knickerbocker

Athletic Club, where he lay down upon the bed in Yocum's room. During the whole of his trip down town and return Cornish had been ill, the journey being marked by frequent interruptions necessitated by the condition of his stomach and bowels. Soon after arriving at the clubhouse he sent for Dr. Phillips, who could not be found immediately, and Dr. Coffin, who happened to be in the clubhouse, was requested to see Cornish. He found Cornish in bed, belching gas from his stomach, and his bowels and stomach considerably distended. The patient's pulse was weak and intermittent. There was no odor which the doctor recognized. He diagnosed the case as one of gastric enteritis. He sent for stomach and rectal tubes, and, while waiting for them, Dr. Phillips arrived. The two doctors, Phillips and Coffin, treated Cornish. The latter was pale and ashen. He had the appearance of having passed through a long illness. The first police officer to arrive at the Adams house was Patrolman Palmer. This was in the afternoon of December 28, 1898. From there he went to Dr. Hitchcock and got the bromo seltzer bottle, the bottle holder, and the address taken from the wrapper. These he turned over to Dr. Weston, the coroner's physician. The latter visited the Adams house and viewed the body of Mrs. Adams. On the following day, December 29, 1898, Captain McClusky, chief of the detective bureau of New York, took charge of the police investigation. On the same day Dr. Weston performed an autopsy on the body of Mrs. Adams, as a result of which he later concluded that the death of Mrs. Adams was due to poisoning which resulted from hydrocyanic acid, or one of its salts, which is produced by the combination of cyanide of mercury with the ingredients of bromo seltzer. On the following day, December 31, 1898, Prof. Withaus, an expert chemist, made an analysis of the contents of the bromo seltzer bottle, and later reported that it contained a mixture of bromo seltzer and cyanide of mercury. The same chemist also analyzed the sediment of the glass from which the dose administered to Mrs. Adams, and tested by Cornish, had been taken. This was found to contain cyanide of mercury. The organs of Mrs. Adams were also subjected to an analytical examination by Prof. Withaus, which demonstrated that Mrs. Adams had died from mercuric cyanide poisoning. A pathological examination of these organs by Dr. Ferguson disclosed the presence of corrosive poison, which he described as cyanogen, or prussic acid, which is a poison resulting from cyanide of mercury. The death of Mrs. Adams and its immediate cause were, therefore, clearly established.

The logical and orderly narration of this grewsome tragedy naturally leads, next, to a consideration of the facts and circumstances which are relied upon by the prosecution to connect the defendant with the death of Mrs. Adams. We will first address ourselves to those which have no rela-

tion to handwriting or to the commission of any other crime than the killing of Mrs. Adams. In 1898 the defendant was thirty-one years of age. He had not only a liberal general education, but sufficient knowledge in chemistry to be the superintendent in the business of Morris Hermann & Co., who were manufacturers of dry colors in Newark, New Jersey. He had been employed in this capacity since 1893, and before that had been in charge of color-making for the firm of C. T. Raynolds & Co., of which his father was a member. He had studied chemistry for two years at Cooper Union. He had a good chemical library and a well-equipped labratory, which contained Prussian blue, chrome yellow, English vermilion, dry mercury, arsenic, and other chemicals, from which various poisons, including cyanide of mercury, could be produced. From these facts the prosecution argues that defendant had the knowledge, skill, and means to produce the poison which killed Mrs. Adams. Cornish was the athletic director in the Knickerbocker Athletic Club in 1898, and had held this position since January, 1896. At that time defendant was a member of the club and of its house committee. In January, 1896, difficulties arose between the defendant and Cornish over the conduct of one French, an athletic member of the club. This was followed in April, 1897, by trouble over an amateur circus which was given under the auspices of the club. Molineux had charge of the arrangements, and complained because Cornish had ignored and disobeyed his instructions. Cornish had been superintendent of the club and manager of the club restaurant. Defendant complained that the restaurant and baths were not being properly conducted. Cornish's authority was thereafter reduced to the training of the club teams and the management of athletics. Then came the trouble over the "Weefers" letter written by Cornish in August, 1897, and in which the latter reflected upon Mr. Weeks, a director of another athletic club. The defendant, having come into possession of this letter, requested that the matter be brought to the attention of the house committee, and suggested that Cornish be reprimanded or discharged. This request was not complied with, and then, through defendant's efforts, a dinner was given to Mr. Weeks by Mr. Ballantine, a leading spirit and principal stockholder in the club, at which various club officials and the defendant were present, and apologies were tendered to Mr. Weeks. Early in 1897, Hughes, chairman of the house committee, told the defendant that Cornish had said that defendant had made his money as a rumseller or by keeping a place of questionable repute. Defendant insisted that this matter, together with other grievances, be investigated by the club. Some investigation was made, but, as Cornish denied having made the statements attributed to him, no further action was taken. The defendant continued to agitate the alleged shortcomings and misdeeds of Cornish until he finally told Adams, the

secretary of the club, that if Cornish did not leave the club he would leave. Cornish was retained in the club, and on September 20, 1897, the defendant resigned. After his resignation, and on the same evening, the defendant and Cornish met on the stairs of the clubhouse. Cornish called the defendant a vile name, and taunted him with his failure to procure Cornish's discharge. Defendant's resignation was followed by an explanatory letter from him to Secretary Adams, dated September 24, 1897. This was followed by a letter from defendant to a Dr. Austen, inclosing a copy of the "Weefers" letter and dwelling upon the conduct of Cornish. After this, in October, 1898, the defendant met one Heiles at the New York Athletic Club, told him of the "Weefers" letter, and complained of the action of the board of governors of the Knickerbocker Athletic Club. On this occasion the defendant referred to Cornish as a low, vile, bad man, and spoke of the latter's assertion that defendant had kept a disreputable house. On November 9, 1898, the defendant wrote to his friend Sheffier, inclosing a copy of the "Weefers" letter, and referring to the fact that "Cornish is in" and he is out. These are the facts and circumstances narrated in mere outline that are relied upon by the prosecution as evidence of the motive which the defendant is said to have had against the life of Cornish, and of the intent with which the poisoned bromo seltzer was sent to the latter. As further bearing upon defendant's connection with this murder, it was shown that the silver bottle holder which was contained in the package received by Cornish had been purchased on the 21st day of December, 1898, at Hartdegan & Co.'s store in Newark, New Jersey, which was only a short distance from the factory of Hermann & Co., where the defendant was employed. The defendant was seen in the vicinity of the Hartdegan store on that day, but the clerk who made the sale of the bottle holder said the defendant is not the man who bought it. The box which contained the bottle and bottle holder was a "Tiffany" box, and the envelope was such as are used at Tiffany's to inclose cards which are sent with gifts. The defendant had an account at Tiffany's, and made a purchase there in December, 1898. There are no particulars regarding this purchase, except that it was in the stationery department. The so-called poison package was mailed at the general postoffice on the afternoon of December 23, 1898, at an hour when it was customary for the defendant to be in the postoffice district on his return from Newark to New York.

At this point it will be observed that, if the case had been tried upon the theory that the only crime which the defendant had committed was the killing of Mrs. Adams in the attempt to poison Cornish, the next and final step in the case of the prosecution would have been to prove the defendant's connection with the handwriting of the address upon the poison pack-

age. But, as a part of the theory or theories upon which the prosecution sought to connect the defendant with the killing of Mrs. Adams, evidence was offered and received to show that the defendant was responsible for the previous killing of one Henry C. Barnet, who came to his death at the Knickerbocker Athletic Clubhouse on the 10th day of November, 1898. The facts and circumstances upon this branch of the case, as established at the trial which relate directly to the death of Barnet, are substantially as follows: Barnet had been a member of the Knickerbocker Athletic Club for a number of years, and in 1898 was living at the clubhouse. Barnet was taken ill on the 28th day of October, 1898. He was first attended by Dr. Phillips, the same physician who subsequently attended Cornish. Dr. Phillips only attended Barnet on the first day of his illness, and Dr. Douglass then took charge of the patient, and attended him until his death on November 10, 1898. In the death certificate issued by Dr. Douglass "cardiac asthenia, caused by diphtheria," was assigned as the cause of Barnet's death. Dr. Douglass was given a box which was found in Barnet's room and purported to contain "Kutnow" powder, and the latter told the former that he had received it by mail, had taken a dose of it, and he thought that was the cause of his trouble. Barnet also told Dr. Phillips that he had taken a dose of "Kutnow" powders, and ascribed his trouble to that. Dr. Douglass took possession of this box on November 4, 1898, and gave it to Guy P. Ellison, a chemist, who made a qualitative analysis, and concluded that the "Kutnow" powder contained cyanide of mercury. The box was returned to Dr. Douglass with the chemist's report as to its contents, and thereupon the nurse in charge of Barnet was directed to search for the wrapper. No wrapper was ever found. On the 3d day of January, 1899, Dr. Douglass delivered to Capt. McClusky the box taken from Barnet's room. On the 4th day of January, 1899, Capt. McClusky delivered it to Prof. Withaus. The latter made an analysis of its contents, and found it to contain "Kutnow" powder and cyanide of mercury. On the 28th day of February, 1899, the body of Barnet was exhumed at Greenwood Cemetery in the presence of Dr. Douglass, Prof. Withaus, Dr. Weston, and others. Prof. Withaus made an analysis of the liver, kidneys, and other organs in the body, and found cyanide of mercury. Dr. Loomis, a pathologist, made a post mortem examination, and expressed the opinion that Barnet died from poisoning by mercury. Dr. Smith, who consulted with Dr. Douglass on the day of Barnet's death, was of the same opinion. Dr. Ferguson testified that the cause of this death was cyanide of mercury, and Dr. Potter concurred in that opinion. The discrepancy between the cause of death assigned in the death certificate of Dr. Douglass and the conclusions which followed the analyses of the deceased Barnet's organs and the contents of the "Kut-

now" powder box is sought to be accounted for by the explanation that mercuric poisoning at certain stages develops the symptoms of diphtheria, and by various other matters which are not essential to this statement. The death of Barnet was therefore clearly established, and the alleged cause thereof was proved by evidence which, if competent, would warrant the conclusion that it was due to mercuric cyanide poison.

As to the motive which the defendant is said to have harbored for the killing of Barnet, the prosecution gave evidence which, it was claimed, tended to show that the defendant was jealous of Barnet's attentions to the woman with whom the defendant was in love. In that behalf the facts, as presented by the prosecution and in part sustained by the evidence, are substantially as follows: In the summer of 1897 the defendant met Miss Cheeseborough at Portland, Maine. His attentions to her, which were immediate and marked, continued during their visit in Portland, and were renewed after the return of Miss Cheeseborough to New York city. The defendant and Barnet were both members of the Knickerbocker Athletic Club, and apparently good friends. In the fall of 1897 the defendant presented Barnet to Miss Cheeseborough at the Metropolitan Opera House. At this time the latter lived in apartments in the "Marie Antoinette" in New York city, but in a few weeks she took a room in the house of Mrs. Bell, at No. 251 West 75th street, New York city, where she remained until January, 1898. At this point in the chronology of the relations between the defendant and Miss Cheeseborough certain evidence was introduced by the prosecution which was afterwards ordered stricken from the record by the court, but for the purpose of preserving the continuity of the narrative of this branch of the case, and because certain questions have been raised concerning this evidence, it will be inserted here as though it had remained in the record. One Rachel Green, a colored woman who was employed at No. 251 West 75th street, from November 2, 1897, to May, 1898, testified that when she went to this house in November, 1897, Miss Cheeseborough and a man whom she thought she was able to identify as the defendant occupied the same room under the names of Mr. and Mrs. Cheeseborough, and that the only time she ever heard the name of Molineux mentioned there was on an occasion when a parcel came from a drug store addressed to that name. This witness further testified that in January, 1898, the "Cheeseboroughs" left the house of Mrs. Bell together. William Williams, who washed windows and took care of the furnace at the house of Mrs. Bell, in 75th street, from the autumn of 1897 to May, 1898, pointed from the witness stand to the defendant as a man whom he had seen at Mrs. Bell's on several occasions. He gave further and more explicit testimony upon the subject, but that was stricken out as hearsay. Minnie Betts, another colored woman,

testified that she lived with Mrs. Bellinger at 257 West End avenue, and that in January, 1898, Miss Cheeseborough came to live there, and remained until June, when she went away for the summer and returned in the fall. This witness testified that the first time she ever heard the name of Molineux was about a week before the defendant and Miss Cheeseborough were married in November, 1898. This witness also described a man, not the defendant, who frequently called on Miss Cheeseborough at Mrs. Bellinger's house. During her examination this witness was shown a visiting card and a photograph which were used in connection with the name of Barnet in such a way as to leave no doubt in the minds of the jury that the caller whom she had been trying to describe was in fact Barnet. The defendant himself testified, at the coroner's inquest upon the death of Mrs. Adams, that Barnet called upon Miss Cheeseborough, took her to dinners, theaters, and other places of amusement, and sent her flowers. On one occasion she went to an entertainment given by the Knickerbocker Athletic Club as the guest of Barnet, and while there was one of a number who visited Barnet's room and drank wine. The defendant says that on the occasion referred to Barnet escorted Miss Cheeseborough at his request. The defendant admitted that he had proposed marriage to Miss Cheeseborough in the winter of 1897, and that his offer had been declined. Three or four days before Barnet's death Miss Cheeseborough wrote him a letter expressing her solicitude over his illness. This letter was couched in language from which it could easily be inferred that there existed between Miss Cheeseborough and Barnet an attachment stronger than mere platonic friendship. The defendant, in testifying before the coroner, stated that when he learned of Barnet's illness he communicated the fact to Miss Cheeseborough, and it was agreed between them that the latter should send Barnet some flowers. The defendant also asserted that he bought the flowers himself, and, although he assumed that a card or letter would be sent with them, he never knew of the letter above referred to. Barnet died November 10, 1898. About two weeks later the defendant wrote to a friend with whom he had expected to take tea on the following Sunday evening, asking to be excused because of his sudden and romantic engagement to be married on the succeeding Tuesday. On the 29th day of November, 1898, nineteen days after Barnet's death, the defendant and Miss Cheeseborough were married. From this evidence bearing upon the alleged relations of the defendant and Barnet to Miss Cheeseborough it is contended by the prosecution that the defendand was jealous of Barnet because of the apparent favor with which the latter's attentions had been received by Miss Cheeseborough, and that this was the mainspring of the motive which prompted the killing of Barnet.

The foregoing outline of the facts which conclusively establish the

death of Barnet and Mrs. Adams, respectively, and which tend to prove the cause, thereof, and of the circumstances which are relied upon to connect the defendant therewith, naturally leads us, next, to a consideration of the other related facts and circumstances which are said to bear upon the handwriting of the poison-package address and upon defendant's connection with the murder of both Barnet and Mrs. Adams.

We will first consider the Barnet letter box and its correspondence. One Nicholas Heckmann testified, in substance, that in May, 1898, he kept private letter boxes for rent at No. 257 West 42d street, New York city. On Friday, May 27, 1898, shortly after 6 o'clock, the defendant came to his place and rented a letter box in the name of H. C. Barnet. Defendant was given a ticket for box 217. Defendant called about twenty times after that, and the witness delivered to him the mail addressed to H. C. Barnet, the general nature of which was patent medicine of various kinds. One package was described as being marked "Kutnow powder," and another "Von Mohl's calthos." The witness identified a box which came to box 217 some time in June, 1898, but was never called for, and was delivered to the district attorney, who procured it to be analyzed. Late in the summer of that year the real H. C. Barnet received through the mail, at his office in the Produce Exchange, a box marked "calthos" containing a number of pink capsules. The medicine bearing this name was advertised as a remedy for impotence. A similar package was found in Barnet's desk after his death. Some of the mail addressed to this box 217 was never called for. Part of it consisted of four letters, the envelopes of three of which bore the postoffice box number of Von Mohl & Co., of Detroit, and the fourth of which bore the postoffice box number of Dr. Fowler, of Moodus, Connecticut. These were marked 58, 61, 62, and 63 in the so-called "prime series." Nine letters and communications were written in the name of H. C. Barnet. These, together with five Barnet envelopes, comprise the so-called "Barnet" series, and are marked B, B^2 C, F, H, I, J, K, M, N, O, P, Q, and R, respectively. "B" is an order for Dr. Rudolphe's specific for impotence, received by Dr. Fowler June 1, 1898, and "B^2" is the envelope in which it was mailed. "C" is a letter to the Marston Remedy Co., dated May 31, 1898, writing for one month's treatment for the same trouble. "F" is a letter to Cameron & Co., received by them June 1, 1898, asking for "book," and "J" is the envelope in which it was mailed. "H" is a letter to Marston & Co., received by them June 6, 1898, asking for marriage guide, and "K" is the envelope in which it was mailed. "I" is the so-called "diagnosis blank" sent by Marston & Co. in answer to the request for marriage guide, and returned to Martson & Co. on the 4th or 5th of June, 1898, in the name of Barnet, but filled with answers which are said to accurately describe the defendant and not Bar-

net. "M" is a letter to Von Mohl & Co., received by them June 1, 1898, requesting "five days' treatment," and "N" is the envelope in which it was mailed. "O" is a letter to the "Sterling Remedy Co.," received by them June 6, 1898, asking for "book." "P" is a letter to G. B. Wright, Marshall, Michigan, written about June 1, 1898, asking for prescription, and "R" is the envelope in which it was mailed. It may be noted in passing that none of these Barnet letters contain any reference to any powder or substance which was used, or, so far as appears, could be used, in mixing with, or in the administration of, the poison by which Barnet and Mrs. Adams are alleged to have been killed.

We now come to the Cornish letter box and the correspondence written in the name of Cornish. One J. J. Koch testified that in December, 1898, he had for five years conducted a letter box agency at 1620 Broadway under the name of the Commercial Company. He was also the proprietor of the "Studio Publishing Company," under which name an advertising agency was conducted at the same place. Under date of December 31, 1897, the defendant, through his secretary, Mr. Allen, wrote upon the business stationery of Morris Hermann & Co. to the Studio Publishing Company for a sample copy of the paper. In July, 1898, Koch sent to defendant a printed circular upon which attention was called to the private letter box agency which was being conducted at No. 1620 Broadway, in connection with the advertising business. During the week of December 12, 1898, the defendant made inquiry of Koch about renting a private letter box for a friend. No box was rented on that day. On December 21, 1898, a box was rented to a man, not the defendant, under the name of H. Cornish. Four pieces of mail were received at this box addressed to "H. Cornish." One was a sample box of "Kutnow" powder. The second was a circular letter from Von Mohl & Co. The third was a sample box of "calthos," manufactured by Von Mohl & Co. Koch testified that by mistake all of these were placed in a different box than that assigned to H Cornish, and remained in the wrong box where they had been placed until January 14, 1899, when Koch delivered them to Captain McClusky. The fourth was a letter bearing the name of Frederick Stearns & Co., Detroit, Michigan, upon the envelope. This was seen by Koch and placed in the Cornish box. It was not there on January 14, 1899, when the others above referred to were delivered to Captain McClusky. It was called for by some unknown person in the absence of Koch. The discovery of this Cornish mail led to investigations, as the result of which exhibits D, E, and G, written in the name of "Cornish," came into the hands of the police authorities. Exhibit D is a letter signed "H. Cornish," addressed to Frederick Stearns & Co., Detroit, Michigan, and received by that firm December 24, 1898, stating, in substance, that one A. A. Harpster had ap-

plied to the writer for a position as collector, and requesting a line in reply to be sent to 1620 Broadway, New York city. At this point it may be stated that Harpster was a man who had formerly been in the employ of Stearns & Co., and had subsequently been employed at the Knickerbocker Athletic Club, where he was very friendly to Cornish, and had incurred the ill-will of the defendant because of his adherence to Cornish in the difficulties between the latter and the defendant. At the time the Cornish letter was written to Stearns & Co., Harpster was employed by Ballantine & Co., and had not applied to anyone for the position of collector. Upon this feature of the case it also appeared that in October, 1898, the defendant met one Heiles, who had been employed at the Knickerbocker Athletic Club at the time when Barnet, Cornish, Harpster, and the defendant were all connected with it. At that time the defendant requested Heiles to arrange to have a letter written to Stearns & Co. asking for information regarding Harpster. The defendant explained to Heiles that the purpose for which he wished to use this letter was to procure Harpster's discharge if the reply from Stearns & Co. should be suitable for that purpose. Heiles did arrange to have such a letter written about October, 1898, and a reply was received, which was given to Heiles, who showed it to the defendant. The defendant said he was too busy to look at it then, and told Heiles to keep it. Heiles kept the letter until after the arrest of the defendant, when he destroyed it. Exhibit E is a letter signed "H. Cornish," received by "Kutnow Bros." December 22, 1898, and requesting that a sample of salts be sent to 1620 Broadway, New York city. Exhibit G is a letter signed "H. Cornish," received by "Von Mohl & Co.," the manufacturers of "calthos," requesting said firm to send "five days' trial to 1620 Broadway, New York city. This letter was received from Von Mohl & Co. by Witte, assistant chief of police in Cincinnati, and by him turned over to Captain McClusky. Each of these three letters, exhibits D, E, and G, was written upon a peculiar paper of "egg-blue" tint, bearing a "tri-crescent emblem." The same kind of paper was used for the so-called "Burns" letter (exhibit 2), which was received June 1, 1898, by one Agnes Evans, acting for Dr. James Burns, who was requested to "send remedy" to Roland Molineux, Jersey street, Newark, New Jersey. The defendant admits having written the "Burns" letter. In this connection it is proper to refer to the evidence of Mary Melando, the forewoman at Hermann & Co.'s factory in Newark, New Jersey. She took care of the defendant's rooms. Upon the trial she was shown people's exhibits D, G, and E, and exhibit 2. She said she had seen paper like that in the drawer of the sideboard in the defendant's room at the Newark factory. She saw about a half dozen sheets as late as October, 1898. The witness took three sheets of this paper for her own use, and left about three sheets of it in the drawer of the

sideboard. It also appears in the case that paper like this was on sale at four of the large department stores in New York city and at two stores in Newark, New Jersey, at one of which, that of Plumb & Co., the firm of Hermann & Co. had an account. The foregoing writings, called the "Barnet" letters and the "Cornish" letters, were used in the case for the avowed purpose of connecting the defendant with the murder of Mrs. Adams. As a part of the theory or theories upon which these writings were admitted in evidence certain genuine and proved or conceded writings of the defendant, of the "real" Barnet and of the "real" Cornish were received in evidence.

This brings us to a statement of that branch of the evidence by which the prosecution claims to have established the culminating proof that the defendant was the writer of the address (exhibit A) upon the poison package received by Cornish. The evidence upon the subject of handwriting proceeds along everal distinct lines, and the history of each will be stated separately. On the 29th day of December, 1898, the day after Mrs. Adams' death, one of the newspapers in New York city published what was called a facsimile of the poison-package address. It is known in the case as defendant's "exhibit 12." This was seen by John D. Adams, the secretary, and Andre Bustanoby, the superintendent of the Knickerbocker Athletic Club. After seeing this Mr. Adams found some letters in the handwriting of the defendant, which were on the files of the club. These were shown to Bustanoby. Both men were familiar with the defendant's handwriting, and were struck with the resemblance between exhibit A, the poison-package address, and exhibit 12, the newspaper copy. On December 30, 1898, Adams showed Cornish exhibit 12 and a number of the defendant's letters with the signatures turned down. Among the latter were exhibits 20, 21, 22, and 24, which are part of the series of defendant's conceded handwritings. As a result of this interview Cornish telephoned to Captain McClusky. Adams and Bustanoby testified that exhibit A was in the handwriting of the defendant. One Martin, who had been teller of the Essex County National Bank of Newark, New Jersey, where the defendant had an account, said he had known the latter's signature for four years, and, from his knowledge thereof, as well as his experience in comparing and scrutinizing handwritings, he concluded that the writing on exhibit A was that of the defendant. These three are the only witnesses who testified to a belief that the defendant was the writer of the address of the poison package, based upon a personal knowledge of defendant's handwriting.

We now come to the testimony of the experts in handwriting. This fills so large a space in the record, and the conclusions arrived at are based upon so many different, and even divergent, points and theories, that it would be practically impossible to refer to this branch of the case in detail. It is, moreover, unnecessary for our purposes to do

more than to refer to the methods upon which the conclusions of the handwriting experts are based, in order to decide whether error was committed upon this branch of the case. There were 14 experts, of whom 9 were men who had made the study of handwriting a profession, and the remaining 5 held various positions in banks which required an expert knowledge of signatures. They were all agreed that the defendant wrote the address upon the wrapper of the poison package. For the purpose of arriving at these conclusions they were permitted to use and rely upon all of the several writings which have been referred to in the foregoing statement. These writings may be classified as follows: (1) Exhibit A, known as the "poison-package address." (2) The so-called "Barnet" letters written in the name of H. C. Barnet. (3) The so-called "Cornish" letters written in the name of H. Cornish. All of these together consist of exhibits A to R inclusive, and are known as the lettered exhibits. (4) The conceded handwritings of the defendant, which are known as the numbered exhibits, and consist of exhibits 1 to 63 inclusive. These numbered exhibits include the so-called "request writings" of the defendant and letters conceded to have been written by him. The history of the "request writings," briefly stated, is that on the 17th day of February, 1899, the defendant, at the request of the police department, wrote in the office of the district attorney, in the presence of Assistant District Attorney Osborne, Mr. Weeks, defendant's counsel, Police Sergeant McCafferty, and the experts Kinsley and Carvalho. It had been planned to have these writings consist of copies of the poison-package address (exhibit A) and other papers in the case, which were to have been made from typewritten memoranda prepared by Kinsley and by him sent to Mr. Osborne. The latter having mislaid the same, Kinsley dictated from memory, and the defendant wrote. The result was not satisfactory to Mr. Kinsley, and at his request the defendant, with his counsel, Mr. Weeks, called at the office of Kinsley on the 20th day of February, 1899, and there wrote the "request writings," exhibits 3, 4, 6, 7, 8, 9, and 10. For the sake of brevity we have omitted from the foregoing statement many details of fact and evidence, besides those relating to the subject of handwriting, because they are not essential to the proper disposition of the principal legal questions in the case. For the same reason we will refrain from discussing many of the minor grounds of error assigned by the defendant, which are so numerous and diversified that a consideration of them, *seriatim*, would only serve to becloud the larger and more comprehensive questions which, according to our views, are decisive of the case.

First in order, if not in importance, is the question whether any evidence was admissible concerning the alleged killing of Barnet. This question may be considered without referring to the specific objections or exceptions of the de-

fense, because it was raised so often and in so many ways that it would involve profitless reiteration and prolixity to dwell upon each objection and exception.

As has been disclosed by the foregoing statement of facts, evidence was received upon the trial tending to connect the defendant with the felonious killing of Barnet, for the purpose of proving his guilt of the crime of poisoning Mrs. Adams, which was the offense charged in the indictment. The general rule of evidence applicable to criminal trials is that the state cannot prove against a defendant any crime not alleged in the indictment, either as a foundation for a separate punishment, or as aiding the proofs that he is guilty of the crime charged. 1 Bishop, New Crim. Proc. § 1120. This rule, so universally recognized and so firmly established in all English-speaking lands, is rooted in that jealous regard for the liberty of the individual which has distinguished our jurisprudence from all others, at least from the birth of Magna Charta. It is the product of that same humane and enlightened public spirit which, speaking through our common law, has decreed that every person charged with the commission of a crime shall be protected by the presumption of innocence until he has been proved guilty beyond a reasonable doubt. This rule, and the reasons upon which it rests, are so familiar to every student of our law that they need be referred to for no other purpose than to point out the exceptions thereto. The rule itself has been stated and discussed in this court in a number of cases, but we will cite only a few. In *People* v. *Sharp,* 107 N. Y. 427, 1 Am. St. Rep. 851, 14 N. E. 319, it was said; "The general rule is that when a man is put upon trial for one offense he is to be convicted, if at all, by evidence which shows that he is guilty of that offense alone, and that, under ordinary circumstances, proof of his guilt of one or a score of other offenses in his lifetime is wholly excluded." In *Coleman* v. *People,* 55 N. Y. 81, it is laid down as follows: "The general rule is against receiving evidence of another offense. A person cannot be convicted of one offense upon proof that he committed another, however persuasive in a moral point of view such evidence may be. It would be easier to believe a person guilty of one crime if it was known that he had committed another of a similar character, or, indeed, of any character; but the injustice of such a rule in courts of justice is apparent. It would lead to convictions, upon the particular charge made, by proof of other acts in no way connected with it, and to uniting evidence of several offenses to produce conviction for a single one." In *People* v. *Shea,* 147 N. Y. 78, 41 N. E. 505, the rule is thus stated: "The impropriety of giving evidence showing that the accused had been guilty of other crimes, merely for the purpose of thereby inferring his guilt of the crime for which he is on trial, may be said to have been assumed and consistently maintained by the English courts ever since the common law has itself

been in existence. Two antagonistic methods for the judicial investigation of crime and the conduct of criminal trials have existed for many years. One of these methods favors this kind of evidence in order that the tribunal which is engaged in the trial of the accused may have the benefit of the light to be derived from a record of his whole past life, his tendencies, his nature, his associates, his practices, and in fine all the facts which go to make up the life of a human being. This is the method which is pursued in France, and it is claimed that entire justice is more apt to be done where such a course is pursued than where it is omitted. The common law of England, however, has adopted another, and, so far as the party accused is concerned, a much more merciful, doctrine. By that law the criminal is to be presumed innocent until his guilt is made to appear beyond a reasonable doubt to a jury of 12 men. In order to prove his guilt it is not permitted to show his former character or to prove his guilt of other crimes, merely for the purpose of raising a presumption that he who would commit them would be more apt to commit the crime in question." The highest court in Massachusetts has said: "The objections to the admission of evidence as to other transactions, whether amounting to indictable crimes or not, are very apparent. Such evidence compels the defendant to meet charges of which the indictment gives him no information, confuses him in his defense, raises a variety of issues, and thus diverts the attention of the jury from the one immediately before it, and, by showing the defendant to have been a knave on other occasions, creates a prejudice which may cause injustice to be done him." *Com.* v. *Jackson,* 132 Mass. 16, 44 Am. Rep. 299, note. The court of last resort in Pennsylvania thus states the rule: "It is a general rule that a distinct crime unconnected with that laid in the indictment cannot be given in evidence against a prisoner. It is not proper to raise a presumption of guilt on the ground that, having committed one crime, the depravity it exhibits makes it likely he would commit another. Logically, the commission of an independent offense is not proof in itself of the commission of another crime. Yet it cannot be said to be without influence on the mind, for certainly if one be shown to be guilty of another crime equally heinous, it will prompt a more ready belief that he might have committed the one with which he is charged. It therefore predisposes the mind of the juror to believe the prisoner guilty." *Shaffner* v. *Com.* 72 Pa. 60, 13 Am. Rep. 649. The exceptions to the rule cannot be stated with categorical precision. Generally speaking, evidence of other crimes is competent to prove the specific crime charged when it tends to establish (1) motive; (2) intent; (3) the absence of mistake or accident; (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the others; (5) the identity of the person

charged with the commission of the crime on trial. Wharton, Crim. Ev. 9th ed. § 48; Underhill, Ev. § 58; Abbott, Trial Brief, Crim. Trials, § 598.

Let us now endeavor to apply to the case at bar each of these exceptions to the general rule:

First. As to motive: It is obvious that in every criminal trial, when proof of motive is an essential ingredient of the evidence against a defendant, the motive to be established is the one which induced the commission of the crime charged. This is too simple for discussion. To hold otherwise would be to sanction the violation of the general rule under the guise of an exception to it. What was the motive assigned for the defendant's alleged attempt to kill Cornish? Hatred, engendered by quarrels between them, in which Barnet took no part, and of which, so far as the record shows, he had no knowledge. What was the motive which is said to have moved the defendant to kill Barnet? Jealousy caused by the latter's intervention in the love affair of the former. The mere statement of these two motives suffices to show that they have no relation to each other, and that the evidence which tends to prove the killing of Barnet throws no light upon the motive which actuated the attempt upon the life of Cornish. So apparent, indeed, is this diversity of motive in the two cases, that the learned counsel for the people upon the argument herein abandoned the claim that there was anything in common between them, and ingeniously sought to create a single motive out of the alleged forgeries by the defendant of the names of Barnet and Cornish. Of course, no inferences can be drawn from these alleged forgeries without assuming that the Barnet and Cornish letters were all properly received in evidence, and proved to have been written by the defendant. We will therefore assume that all of these letters were properly in evidence, that they were written by the defendant, and that he was therefore guilty of the crime of forgery in the use of each of these names. Is there anything in any of the Barnet letters which sheds a ray of light upon the question of motive for the attempt to kill Cornish? Not a word. We are at a loss to understand what probative force there is in the Barnet letters which does not also inhere in the Cornish letters. If the Barnet letters were forged, so were the Cornish letters. If the latter bore no intrinsic evidence of motive against the life of Cornish, this was equally true of the former. It will thus be seen that under no hypothesis, upon no assumption, can the Barnet letters be held to contain any evidence as to the motive for the attempt to kill Cornish that is not also to be found in the Cornish letters. What has been said about the Barnet letters is true of all the evidence relating to the alleged killing of Barnet. Even if it be admitted that it proves the commission of an independent crime, with an adequate motive behind it, it contributes nothing to the subject of motive in the case at bar. Although it seems

unnecessary to cite authorities in support of the statement that, whenever motive is to be established, it must be the motive which underlies the crime charged, we will briefly refer to a few cases which illustrate the rule. In *Pierson* v. *People,* 79 N. Y. 424, 35 Am. Rep. 524, the defendant was charged with the murder of one W. The alleged motive was defendant's desire to possess the wife of the deceased. On the trial evidence was received to show that, eleven days after the death of W., the defendant and the wife of the deceased appeared before a clergyman in Michigan to be married. Defendant there took an oath that there was no legal objection to the marriage. Although this evidence tended to prove the commission by the defendant of another crime than that for which he was on trial, this court said: "This evidence tended to prove that the motive which operated upon the prisoner was the desire to possess W.'s wife; that his passion for her was so absorbing that he was determined to overcome all obstacles standing in his way." *In Stout* v. *People*, 4 Park. Crim. Rep. 132, the crime charged was murder. On the trial evidence was received of an incestuous connection between the defendant and his sister, the wife of the deceased. This was held to be competent, even if it did prove the commission of another crime, for it tended to disclose the motive which prompted the defendant to get rid of the deceased. In *Hawes* v. *State,* 88 Ala. 37, 7 So. 302, the defendant was on trial for the murder of one of his children. Two other indictments were then pending against him for the murder of his wife and another child. Evidence was received to support the theory that the motive for the killing of all was to open the way for a second marriage, which was consummated a few days after the last death. This was held proper, because the motive was the same in each case. In *People* v. *Harris,* 136 N. Y. 443, 33 N. E. 65, the defendant was accused of the murder of his wife. The marriage had been secretly performed. Evidence of abortions performed upon his wife by the defendant were held to be admissible to show defendant's efforts to keep the marriage a secret, and as tending to show a motive for the poisoning of the wife when secrecy was no longer possible or the alliance had become burdensome. So, on the trial of a husband for the murder of his wife, evidence of criminal proceedings against the defendant for failure to support his family, made ten months before the murder, was properly held admissible upon the question of motive. *People* v. *Otto,* 4 N. Y. Crim. Rep. 149. In another case the defendant was charged with the murder of his brother's wife. The brother, his wife, and two children were poisoned with arsenic. The brother and his wife died, but the attempt upon the lives of the children failed. Thereupon the defendant procured himself to be appointed the guardian of his brother's children, and then commenced to create and utter various false and forged claims against his brother's estate. The

theory of the prosecution was that the defendant coveted his brother's estate, and, in order to gain possession of it, conceived the plan to murder those who stood in his way; that, failing in the attempt to kill the children, he attempted to accomplish his object by forgery. It was held that evidence was properly received of all the crimes involved in this theory, as it was relevant upon the existence of motive for the commission of the crime charged. *People* v. *Wood,* 3 Park. Crim. Rep. 681. Cases of this character might be multiplied indefinitely, but enough have been cited to show that, when evidence of extraneous crimes has been held competent upon the existence of motive, it has been either the specific motive which underlay the particular crime charged, or a motive common to all of the crimes sought to be proved.

Second. As to intent: In the popular mind intent and motive are not infrequently regarded as one and the same thing. In law there is a clear distinction between them. Motive is the moving power which impels to action for a definite result. Intent is the purpose to use a particular means to effect such result. When a crime is clearly proved to have been committed by a person charged therewith, the question of motive may be of little or no importance. But criminal intent is always essential to the commission of crime. There are cases in which the intent may be inferred from the nature of the act. There are others where wilful intent or guilty knowledge must be proved before a conviction can be had. Familiar illustrations of the latter rule are to be found in cases of passing counterfeit money, forgery, receiving stolen property, and obtaining money under false pretenses. An innocent man may in a single instance pass a counterfeit coin or bill. Therefore intent is of the essence of the crime, and previous offenses of a similar character by the same person may be proved to show intent. *Com.* v. *Jackson,* 132 Mass. 16, 44 Am. Rep. 299, note; *Com.* v. *Bigelow,* 8 Met. 235; *Com.* v. *Stone,* 4 Met. 43; *Helm's Case,* 1 N. Y. City Hall Rec. 46; *Smith's Case,* 1 N. Y. City Hall Rec. 49; *Coffey's Case,* 4 N. Y. City Hall Rec. 52; *Dougherty's Case,* 4 N. Y. City Hall Rec. 166. So, in a case where the defendant is charged with having received stolen property, guilty knowledge is the gravamen of the offense, and *scienter* may be proved by other previous similar acts. *Com.* v. *Johnson,* 133 Pa. 293, 19 Atl. 402; *Coleman* v. *People,* 58 N. Y. 555; *Copperman* v. *People,* 56 N. Y. 591; *People* v. *McClure,* 148 N. Y. 95, 42 N. E. 523. In cases of alleged forgery of checks, etc., evidence is admissible to show that, at or near the same time that the instrument described in the indictment was forged or uttered, the defendant had passed or had in his possession similar forged instruments, as it tends to prove intent. *Com.* v. *Russell,* 156 Mass. 196, 30 N. E. 763; *People* v. *Everhardt,* 104 N. Y. 591, 11 N. E. 62; *Reg.* v. *Colclough,* 15 Cox, C. C. 92, Ir. L. R. 10 C. L. 241. On the trial of an indictment for obtain-

ing goods by false representations, similar representations made by the defendant to creditors from whom goods had been previously purchased by him were held admissible to prove intent. *Mayer* v. *People,* 80 N. Y. 364. It will be seen that the crimes referred to under this head constitute distinct classes in which the intent is not to be inferred from the commission of the act, and in which proof of intent is often unobtainable except by evidence of successive repetitions of the act. The intent ascribed to the defendant in the alleged killing of Mrs. Adams was to kill Cornish. This is precisely the same as though he had succeeded in committing the particular crime he had planned. If A undertakes to kill B, and in the attempt kills C, the crime committed is no less a murder than it would have been if B had been killed. The agency employed to encompass the death of Cornish was cyanide of mercury,—a poison so rare and deadly that it is not kept on sale in places where strychnine, arsenic, and other poisons are sold. It was disguised in an effervescent salt called "bromo seltzer," which is a much used remedy for headache and other trifling human ills. The bottle containing this mixture was carefully prepared to create the impression that it contained nothing but the harmless bromo seltzer. It was accompanied by a silver bottle holder into which the bottle fitted. Both of these articles were inclosed in a box of the kind used in the sending of gifts. An empty card envelope was added to create the impression that it was a gift, and that the sender had forgotten to inclose his card. It was sent by mail on the eve of Christmas, when, according to the universal custom of this country, gifts are exchanged in this manner, and when even the most cautious and prudent person might have taken counsel of his generosity, rather than his suspicions. Could such a foul and cunningly devised act have been innocently done? Could proof of any number of repetitions of this act add anything to the conclusive inference of criminal intent which proof of the act itself affords? Can it be possible that, in the face of such irrefragable indicia of murderous intent, it is still necessary or proper to prove the commission of other similar crimes to establish intent? These questions carry their own answers. If intent may not be inferred from such an act as this, then there is no such thing as inference of intent from the character of the act. Let us suppose this to be a case in which evidence of felonious intent could properly be derived from proof of the commission by the defendant of other similar crimes. The supposition necessarily implies the establishment of the extraneous crime by legal and competent evidence before it can be referred to in support of the theory that it proves the guilty intent with which the crime charged was committed. We shall have occasion to show further on that this cardinal essential is lacking in the evidence which relates to the death of Barnet, and that there is no competent evidence in the case which connects the defendant with the

sending of the poison to Barnet. But assuming, for present purposes, that there is competent evidence which tends to show that the defendant was the sender of the poison in both instances, how does the sending of poison to Barnet prove the intent with which the poison was sent to Cornish? It is to be remembered that we are now dealing solely with the subject of intent, and not with the rebuttal of possible mistake or accident. In this connection it is also to be borne in mind that the practice of receiving evidence of other offenses to prove intent in cases of passing counterfeit money, etc., is a departure from the usual rules of criminal evidence, justified and necessitated by the peculiar nature of these crimes. A man may innocently pass counterfeit money. For this reason evidence of other similar acts by the same person, although not conclusive, may be received to establish intent. It is true that a person may innocently poison another, but that possibility will he discussed under the appropriate head of accident and mistake. Eliminating these latter factors from the inquiry, there can be no such thing as innocent poisoning. We have, then, two cases of poisoning as separate and distinct as two cases of shooting. Could it be successfully urged that the shooting of one person by another could be proved to show the intent with which the latter shot a third person at a different time and for a distinct cause? Certainly not, unless it were also established that the two shootings were so connected in time, place, and circumstance as to make them part of one common plan or design. The latter subject will also be further discussed under its appropriate head. Throughout the length and breadth of the testimony relating to the death of Barnet there is not a suggestion or a fact which throws any light upon the intent with which the poison was sent to Cornish, or which serves to support or strengthen the inferences as to intent which may be drawn from the evidence tending to show that the defendant sent the poison to Cornish.

Third. As to the possibility of mistake or accident, or doubt as to the cause of death: There are cases in which the possible or probable defense of accident or mistake may be rebutted upon the direct case of the prosecution, or in which the doubtful cause of the particular death may be established by other previous similar deaths. As most of these are poisoning cases, they are of special interest and importance here. The fact that the earlier English Reports are more prolific in such illustrations than all of our modern Reports is probably explained by the great progress in medical science, which has not only materially reduced the number of deaths from poisoning by mistake or accident, but has practically annihilated the possibility of death from poisons so subtle and obscure as to baffle investigation. In *Reg.* v. *Garner*, 3 Fost. & F. 681, the prisoner, Garner, had been previously married, and his former wife had died on March, 1861. Prior to that date his second wife had

been a servant in the house. The prisoner's mother resided with him after the second marriage. The mother's death occurred in December, 1861, and it was clearly proved that she died from arsenical poisoning. Garner, who dealt in milk, also sold arsenic for agricultural purposes. There was evidence of the administration by the prisoner to the deceased of articles of diet in which arsenic might be concealed, and of the symptoms of poisoning which followed. But there was also evidence that three horses, one of them belonging to Garner, had been poisoned by arsenic, and that some of his customers against whom he harbored no ill will had shown symptoms of arsenical poisoning. To prove the wilful administration of the poison to Garner's mother, and to rebut the theory of accident, it was held proper to receive evidence as to the circumstances of his former wife's death. In *Reg.* v. *Cotton,* 12 Cox, C. C. 400, the defendant was charged with poisoning her stepchild, the son of her deceased husband, who was insured for her benefit. Shortly before his death the child had been attended by a parish doctor, who had prescribed morphia, prussic acid, and bismuth in medicinal doses. It was shown that the doctor kept prussic acid, bismuth, and arsenic in separate bottles on the same shelf. The bismuth was in the form of subcarbonate of bismuth, which the doctor said was sometimes adulterated with arsenic, but only in minute quantities. It also appeared that shortly before the death of the child a mixture of soft soap and from four to six drachms of arsenic had been used for cleansing furniture and certain parts of the house. There was testimony tending to show that when this mixture was dried by exposure to the air it would release particles of the arsenic, amounting to 300 grains, which would float about the room, and could be inhaled and absorbed into the system by means of the lungs, but not through the stomach. Under these circumstances, evidence was offered by the prosecution, and received by the court, to show that two other children of the defendant and one Mattrass, a lodger, had died within a few months of each other with symptoms of arsenical poisoning; that their bodies had been exhumed, and arsenic had been found in the organs of each of them. The evidence was received on the authority of *Reg.* v. *Geering,* 18 L. J. Mag. Cas. N. S. 215, where the defendant was tried for the murder of her husband, the cause of whose death was not free from doubt. Three sons had died at about the same time, all exhibiting the same symptoms. The court held that evidence of the other three deaths was competent to show that all were due to arsenical poisoning, and the domestic history of the family was admissible to enable the jury to determine whether the poisoning was accidental or not. In *Reg.* v. *Heesom,* 14 Cox, C. C. 40, the defendant was charged with the murder of her child by poison on October 3, 1877, and also with the murder of her mother by the same

means on November 5, 1877. She was indicted for both offenses. On the trial for the murder of her child evidence was received to show that she had poisoned her mother and another of her children. It appeared that the accused held insurance upon the lives of the three alleged victims. The court, after some hesitation, admitted evidence as to the two previous deaths citing *Reg.* v. *Geering,* as authority, and saying: "If there had been no case on the point I would have paused to consider . . . whether the evidence could be received; but after the decision quoted, and with which I am quite satisfied, I have no doubt that it is competent to show that the death of the child . . was not due to the accidental taking of arsenic." In *Makin* v. *Atty. Gen.* 17 Cox, C. C. 704, 63 L. J. P. C. N. S. 41, [1894] A. C. 57, 6 Reports, 373, 69 L. T. N. S. 778, 58 J. P. 148, the defendant, who kept a "baby farm," was indicted for the murder of an infant, Horace Murray. The Murray child was found buried in a garden attached to defendant's house. The bodies of other children were found buried in the same garden and the gardens attached to other houses previously occupied by the defendant. Here, again, the authority of *Reg.* v. *Geering,* 18 L. J. Mag. Cas. N. S. 215, was invoked, and evidence of other similar deaths was received. In *Reg.* v. *Roden,* 12 Cox, C. C. 630, the defendant was indicted for the murder of her child, an infant nine days old, whose death was caused by suffocation while he was in bed with his mother. The defense was accident. To rebut this defense, testimony was received to show that five other children of the defendant had all died in infancy. The prisoner was acquitted, however, upon the testimony of a physician, who said the child might have been accidentally suffocated by the mother overlaying it or by the covering on the bed. In *Reg.* v. *Flannagan,* 15 Cox, C. C. 403, the defendants, who were sisters, were indicted for murdering the husband of the defendant Higgins by arsenical poisoning. The defendants had also been indicted for the murder of Margaret Jennings, John Flannagan, and Mary Higgins, apparently members of the same family. Evidence of the previous deaths was received "with a view to showing, not that the prisoner had feloniously poisoned the deceased, but that the deceased had in fact died by poison administered by someone." In *Zoldoske* v. *State,* 82 Wis. 581, 52 N. W. 778, the defendant was indicted and prosecuted for the murder of one Ella Maly, who died of strychnine poisoning. The evidence tended to show that the defendant was enamored of Dr. Mitchell, in whose family she lived as a servant, and was jealous of his attentions to Maly. Evidence was received to show the circumstances of Mrs. Mitchell's death, which occurred prior to the death of Maly, for the purpose of showing that the latter was not accidental. In the case of *Goersen* v. *Com.* 99 Pa. 388, the defendant was accused of causing the death of his wife by arsenical poisoning. On the trial evidence of the death of

the wife's mother was admitted to show that arsenic had been administered to both of them in pursuance of a design on defendant's part to obtain their property. This evidence was held to be competent to show the defendant's purpose and intent, the system by which that purpose was to be accomplished, and also to rebut the theory of accident, suicide, or the negligent or ignorant administration of arsenic either by the defendant or his wife. In *People* v. *Seaman*, 107 Mich. 348, 61 Am. St. Rep. 326, 65 N. W. 203, on prosecution for manslaughter in committing an abortion, where the proof of the killing was circumstantial, and the theory of the defense was that the premature birth was due to accidental causes, it was held proper to receive evidence that the respondent had performed other abortions in the same house. There are other cases of similar character in which this kind of evidence was not received. These will not be referred to, as our only purpose in citing the foregoing authorities under this head is to show the radical difference between the cases which must be relied upon by the prosecution and the case at bar. While the early English cases have gone to great lengths in the admission of testimony tending to establish other crimes than the one charged, it is clear that the only two theories upon which the rulings therein have been attempted to be or could be defended are: First, that the killing may have been accidental; or, second, that the cause of death was in doubt. In the one instance proof of other deaths in the same family under similar circumstances and identical symptoms may have been the only evidence obtainable to prove a felonious killing. In the other instance the uncertainty as to the cause of death could possibly have been removed by evidence of previous deaths in the same family circle, under conditions which would make the cumulative evidence of all the deaths cogent proof of the cause of the particular death charged in the indictment. No such case is presented here. The poison used is clearly and positively identified. The analyses of the contents of the bromo seltzer bottle, the glass from which a portion thereof was taken by the victim, and of her internal organs, point unerringly to the swift and terrible agent of death employed by the murderer. The poison is rare, subtle, deadly. It is mixed with a harmless powder of common use, contained in a bottle labeled and prepared with the design to deceive the recipient. It is accompanied by other articles calculated to induce the belief that they are component parts of a gift from a friend. It is sent by mail on the eve of that great holiday when the spirit of generosity and good will pervades the land, when friendships are renewed and enmities are forgotten, when distrust and suspicion are allayed by the higher and kindlier impulses of human nature. Was this poison sent by mistake or accident? Are not utter depravity, venomous malignity, murderous design, fiendish cunning, indelibly stamped upon

every fact and circumstance connected with the act? It would be a travesty upon our jurisprudence to hold that, in a case of such appalling and transparent criminality, it could ever be deemed necessary or proper to resort to proof of extraneous crimes to anticipate the impossible defense of accident or mistake. The same irrefutable logic of fact and circumstance that establishes felonious intent as clearly negatives the possibility of accident or mistake.

Fourth. As to a common plan or scheme: It sometimes happens that two or more crimes are committed by the same person in pursuance of a single design, or under circumstances which render it impossible to prove one without proving all. To bring a case within this exception to the general rule which excludes proof of extraneous crimes, there must be evidence of system between the offense on trial and the one sought to be introduced. They must be connected as parts of a general and composite plan or scheme, or they must be so related to each other as to show a common motive or intent running through both. Underhill, in his work on Criminal Evidence (§ 88), thus states this exception to the general rule: "No separate and isolated crime can be given in evidence. In order that one crime may be relevant as evidence of another, the two must be connected as parts of a general and composite scheme or plan. Thus the movements of the accused prior to the instant of the crime are always relevant to show that he was making preparations to commit it. Hence, on a trial for homicide it is permissible to prove that the accused killed another person during the time he was preparing for or was in the act of committing the homicide for which he is on trial. And, generally, when several similar crimes occur near each other, either in time or locality,—as, for example, several burglaries or incendiary fires upon the same night,— it is relevant to show that the accused, being present at one of them, was present at the others if the crimes seem to be connected. Some connection between the crimes must be shown to have existed in fact and in the mind of the actor, uniting them for the accomplishment of a common purpose, before such evidence can be received. This connection must clearly appear from the evidence. Whether any connection exists is a judicial question. If the court does not clearly perceive it, the accused should be given the benefit of the doubt, and the evidence should be rejected. The minds of the jurors must not be poisoned and prejudiced . . . by receiving evidence of this irrelevant and dangerous description." The compendium just quoted, of the exception now under discussion, is so accurate and concise that no other text writers will be cited, although there are many of them. There is, indeed, no room for discussion in regard to the general principles upon which evidence is admitted to show that a defendant is guilty of other felonies or misdemeanors than the one upon which he is tried. As stated in *People* v. *Sharp*,

107 N. Y. 467, 1 Am. St. Rep. 851, 14 N. E. 344, "whether the evidence in any particular case comes within the well-known exceptions to the general rule is often the difficult question to solve, and not as to what the rule itself really is."

Before adverting to the facts and circumstances upon which the prosecution rests its claim that there is such a connection between the alleged killing of Barnet and the killing of Mrs. Adams as to justify proof of the former in support of the latter, we will pursue the course hitherto adopted, in citing some authorities upon which the prosecution rely, and which illustrate and limit the exceptions to the general rule. In *Goersen* v. *Com.* 99 Pa. 388, the deaths of the defendant's mother-in-law and wife, respectively, were connected by evidence tending to show defendant's design to obtain possession of their property. There was a single motive, intent, and purpose. In *Hester* v. *Com.* 85 Pa. 139, which is known as one of the *Molly Maguire Cases,* the defendants were on trial for a murder which had been preceded by a highway robbery in which they were implicated. Evidence was received to show that the defendants were members of a secret society which had for its object the commission of various crimes, such as beatings, arsons, robberies, and murders, and the protection of its members from arrest and punishment by secreting them, aiding them to escape, and otherwise. This was held to be competent to show that the crime charged was within the scope of the purposes for which the conspirators were banded together, and to explain and corroborate other testimony which bore directly upon the commission of the crime charged. In *People* v. *Zucker,* 20 App. Div. 363, 46 N. Y. Supp. 766, affirmed in 154 N. Y. 770, 49 N. E. 1102, the crime charged was arson in the first degree, for burning a building in New York city. It appeared that in August, 1891, the defendant had a house in New York city containing some furniture. The furniture was removed to a house in Newark, New Jersey. The defendant stated to an accomplice, who was a witness for the prosecution, that his object in removing the furniture was to have it insured in the name of Seltzer, because he (the defendant) had been blacklisted by the insurance companies and could not get it insured in his own name. On January 4, 1892, the house in New York was burned, and a few days before that the furniture in Newark had also been burned. It was held that evidence in respect to the Newark fire was competent, upon the ground that both arsons were perpetrated with a single object and motive, and in pursuance of the same plan. The court said: "Where one crime is committed to prepare the way for another, and the commission of the second crime is made to depend upon the perpetration of the first, the two become connected and related transactions, and proof of the commission of the first offense becomes relevant to show the motive for the perpetration of the second." In *Hope* v. *People,* 83 N. Y. 418, 38 Am. Rep. 460, the defendant was

indicted and tried for the crime of robbery in the first degree. The evidence disclosed that a number of masked men entered the apartment of the janitor of a bank and forcibly took from him the key to the bank. The bank was burglarized on the same occasion. The two crimes were held to be so connected that evidence of the burglary was deemed competent to connect the defendant with the robbery. In *People* v. *Murphy*, 135 N. Y. 451, 32 N. E. 138, the defendant was convicted of the crime of arson in the third degree. The specific charge was that defendant had burned a barn belonging to the man by whom he had been employed as coachman and gardener. The defendant had been discharged from this position. A poisonous preparation had been kept in the barn for use in destroying insects in the garden. The defendant knew of this. Evidence was received to show that on the night of the fire, and before it occurred, a span of horses, a pony, and a cow had been poisoned and died. This evidence was held competent as tending to prove that the injury to the animals was done by the incendiary, and as a part of the same criminal scheme which resulted in the destruction of the barn. In *Kramer* v. *Com.* 87 Pa. 301, the defendant was convicted of arson, in attempting to burn a hotel of which he had been an inmate. The evidence, which was circumstantial, pointed to the defendant as the guilty person. Evidence was offered and received to show that two days after the first attempt, which had proved abortive, the defendant was apprehended with combustible materials in his possession, under circumstances which strongly indicated a second attempt at burning the hotel. The evidence was held to be competent to show a renewed purpose to accomplish the crime previously attempted, and to identify the person who made both attempts. In approving of this ruling the court quoted with approval the statement in *Shaffner* v. *Com.* 72 Pa. 63, 13 Am. Rep. 651, that, "to make one criminal act evidence of another, a connection between them must have existed in the mind of the actor, linking them together for some purpose he intended to accomplish, or it must be necessary to identify the person of the actor by a connection which shows that he who committed the one must have done the other." There are other cases where two or more crimes are so connected that it is impossible to distinguish them, and proof of all, in the effort to establish one, is a part of the *res gestæ*. Illustrations of this class will be found in *Brown* v. *Com.* 76 Pa. 319, in which defendant killed a man and his wife at the same time and place, under circumstances showing that both were committed by the same person; and in *People* v. *Foley*, 64 Mich. 148, 31 N. W. 94, where the defendant murdered his two children in the same bed and at the same time.

Without further multiplying the cases which exemplify and support the exception to the general rule that extraneous crimes may be proved to establish the specific

crime charged, when all are shown to have been committed in pursuance of a common design, or when they are so connected that evidence of one tends to prove the other, we will now quote from a single authority which clearly and succinctly prescribes the limitations of this exception, and the reasons for careful judicial discrimination in its application. In *Shaffner* v. *Com.* 72 Pa. 63, 13 Am. Rep. 651, the highest court of Pennsylvania said: "To make one criminal act evidence of another, a connection between them must have existed in the mind of the actor, linking them together for some purpose he intended to accomplish, or it must be necessary to identify the person of the actor by a connection which shows that he who committed the one must have done the other. Without this obvious connection, it is not only unjust to the prisoner to compel him to acquit himself of two offenses instead of one, but it is detrimental to justice to burden a trial with multiplied issues that tend to confuse and mislead the jury. The most guilty criminal may be innocent of other offenses charged against him, of which, if fairly tried, he might acquit himself. From the nature and prejudicial character of such evidence, it is obvious it should not be received unless the mind plainly perceives that the commission of the one tends, by a visible connection, to prove the commission of the other by the prisoner. If the evidence be so dubious that the judge does not clearly perceive the connection, the benefit of the doubt should be given to the prisoner, instead of suffering the minds of the jurors to be prejudiced by an independent fact carrying with it no proper evidence of the particular guilt." This statement voices the keynote of the distinction between the civil law and our own more merciful common law. Under the former there is no presumption of innocence. A mere official charge of crime puts the accused upon his defense. His history is an open book, every page of which may be read in evidence by the prosecution. Every crime or indiscretion of his life may be laid bare to feed the presumption of guilt. How different is our own common law, which is the product of all the wisdom and humanity of all the ages! Under it the accused comes into a court of justice panoplied in the presumption of innocence, which shields him until his guilt is established beyond a reasonable doubt. His general character can be thrown into the balance by no one but himself. The incidents of his life, not connected with the crime charged, are his sacred possession. He faces his accuser in the light of a distinct charge, with the assurance that no other will be or can be proved against him.

Let us now endeavor to make a practical application of these principles to the case at bar, remembering that the subjects of motive, intent, accident, and mistake have already been discussed, and that the subject of identity remains for separate consideration. Mrs. Adams was killed on the 28th day of December, 1898. The cause of the

latter's death was clearly established by evidence connected with a definite motive and unmistakable intent. The only mistake or accident that was possible did in fact happen. The intended victim innocently administered the poison to another. We are therefore to consider whether the killing of Mrs. Adams and the alleged killing of Barnet were part of a common plan or scheme, or were so connected that evidence of the death of Barnet and its cause tended to prove the murder of Mrs. Adams. Barnet died on the 10th day of November, 1898. Subsequent events proved that he died of mercuric poisoning. There was no evidence tending to connect the defendant with the sending of the poison to Barnet, except the inference which may be drawn from the assumption that it was sent by mail, and this assumption is based upon the utterly incompetent statement of Barnet to his physicians. The motive for the alleged killing of Barnet is so distinct from the motive assigned for the crime charged in the indictment that a new and common motive is sought in the alleged forgeries of the defendant, and this, as we have seen, is the creation of counsel upon the argument of the appeal, never having been suggested upon the trial. The motive against Barnet, exploited upon the trial, was without the support of evidence, since a large part of the testimony upon that subject was stricken from the record. But, assuming for present purposes that the prosecution did in fact prove all that it sought to prove, it is impossible to perceive any legal connection between the two cases. Barnet was said to have been poisoned because he had interfered in the defendant's love affair. Cornish was to be poisoned because he had incurred the hatred of the defendant as the result of quarrels between them over club matters. Barnet died November 10th, and Mrs. Adams died seven weeks later. Let us suppose that the defendant, having a motive for the killing of Barnet, had shot and killed him in November, 1898, and that in darkness of night on the 28th day of December, 1898, some one had shot and killed Mrs. Adams while she was near to Cornish; that in a subsequent investigation it had transpired that defendant also had a different motive for killing Cornish, thus creating the suspicion that the bullet which killed Mrs. Adams had been intended for Cornish,—could it be shown that the defendant shot Barnet to prove that he shot Mrs. Adams? The two deaths were caused by the same means, at different times, inspired by separate motives, and charged against one person. Is there any connection between the two crimes? It is said that the connection is established by the Barnet and Cornish letter-box correspondence. Let us assume for the present that the Barnet letters were competent for all the purposes for which they were used. Referring to the Barnet correspondence and its incidents, it appears that the defendant rented a letter box in the name of Barnet. Through it the letters addressed to Barnet were received. There is no suggestion of

Cornish in the renting of the box, or in any of the communications which passed to and fro in the name of Barnet. When the defendant undertakes to describe a person who is not Barnet, as it is said he did in the "diagnosis blank," he describes himself. Seven months later, and six weeks after the death of Barnet, the defendant rents a letter box in the name of Cornish. This was the medium under cover of which the Cornish correspondence was sent and received. Neither in the renting of this box, nor in any of the letters addressed to, or written in the name of, Cornish, is there any reference to the Barnet case. Where is the connection between them? It is argued that it exists in the similarity of the methods employed in the two cases, and in the identity of the remedies written for in both names. It is true that "calthos" and "Kutnow" powder were found among the belongings of Barnet. The same things were found in the letter-box agency of Koch, addressed to Cornish, but placed in the wrong box, and therefore never delivered until given up to the police. What do these things prove? Simply this: That if the same person was operating through both boxes, he was employing similar means for different ends, or for some common purpose not disclosed by this record. The methods referred to are as identical as any two shootings, stabbings, or assaults, but no more so. In this connection it may be well to remember that Kutnow powder was not written for in the name of Cornish until the 21st day of December, 1898, the very day on which the bottle holder was purchased which exactly fitted the bottle of bromo seltzer containing the poison sent to Cornish. This would indicate that when the Cornish letter was written, asking for a sample of Kutnow salts, the vehicle had already been chosen for the poison that was to be sent Cornish. While this fact would not necessarily be inconsistent with the poisoner's efforts to obtain other materials to effect his designs if the bromo seltzer should fail, it remains true that whatever was done in December had reference to the death of Cornish, and not of Barnet; the latter having died in November. It is also urged that the poison which caused the death of Mrs. Adams was one which could only be secretly and successfully produced and administered by a person who had the requisite knowledge and skill, and therefore it was proper to show the use of the same poison in a previous case. Other evidence had been properly admitted to show that the defendant had the knowledge, skill, appliances, and opportunity to produce the poison used in the Adams Case. It is as plain as that two and two make four that the man who could produce it in one case could do so in another. But the naked fact that the same means were used in the two cases simply proves that two distinct crimes may have been committed by the same person by similar means. There is not a fact or circumstance in the Barnet Case that, taken by itself, legitimately tends to prove any essential fact

in the Adams Case until we come to the subject of the handwriting of the Barnet and Cornish letters, and that will be considered under the head of handwriting evidence.

Fifth. As to identity: Another exception to the general rule is that, when the evidence of an extraneous crime tends to identify the person who committed it as the same person who committed the crime charged in the indictment, it is admissible. There are not many reported cases in which this exception seems to have been affirmatively applied. A far larger number of cases, while distinctly recognizing its existence, have held it inapplicable to the patricular facts then before the court. The reason for this is obvious. In the nature of things, there cannot be many cases where evidence of separate and distinct crimes, with no unity or connection of motive, intent, or plan, will serve to legally identify the person who committed one as the same person who is guilty of the other. The very fact that it is much easier to believe in the guilt of an accused person when it is known or suspected that he has previously committed a similar crime proves the dangerous tendency of such evidence to convict, not upon the evidence of the crime charged, but upon the superadded evidence of the previous crime. Hence our courts have been proverbially careful to subject such evidence to the most rigid scrutiny, and have invariably excluded it in cases where its relevancy and competency were not clearly shown. As was said in *People* v. *Sharp,* 107 N. Y. 471, 1 Am. St. Rep. 851, 14 N. E. 345, such evidence "tends necessarily and directly to load the prisoner down with separate and distinct charges of past crime, which it cannot be supposed he is or will be in proper condition to meet or explain, and which necessarily tend to very gravely prejudice him in the minds of the jury upon the question of his guilt or innocence." Such evidence gives opportunity for the conviction of an accused person upon mere prejudice, instead of by evidence showing the actual commission of the crime for which a defendant is on trial. It compels a defendant to meet an accusation not charged in the indictment, which he might successfully refute if given the opportunity to do so unembarrassed by other issues.

Before applying the exception under discussion to the case at bar, let us examine a few authorities, which illustrate the theory upon which evidence of previous crimes is admissible to identify the person who is charged with the commission of the crime set forth in the indictment. In *People* v. *Rogers,* 71 Cal. 565, 12 Pac. 679, the defendant was convicted of a murder committed by him while burglariously entering the house of the deceased. Evidence was received tending to show that the defendant had committed a prior burglary at which he had stolen a knife and chisel, and still another burglary at which he had stolen a pistol. The evidence also tended to show that the burglary at the house of the deceased had been committed by means of the knife and chisel,

and that the deceased had been killed with the pistol which the defendant had previously stolen. It will be seen at once that there was such a palpable connection between the several crimes referred to that the identification of the means used in the commission of the crime charged, while incidentally proving the defendant guilty of other crimes, also directly identified him as the person who was guilty of the murder. In *Com.* v. *Choate,* 105 Mass. 451, the defendant, a ship joinder, was indicted for burning the buildings of one Ackerman. The charred remains of a box of peculiar construction and equipment were found on the ground beside one of these buildings. After the fire the defendant fled from the state. Soon thereafter his shop was searched, and certain tools and materials were found, which, upon inspection and comparison, tended to show that the box found at Ackerman's buildings had been made in the defendant's shop from the materials and with the tools that were there. Another box of similar design, material, and workmanship had been previously found at a church near by, under conditions indicating an attempt at incendiarism. Comparison was made between the box first found and a piece of wood in defendant's shop, and it was shown that they had been originally parts of the same piece of wood. An anonymous letter which had been sent to the municipal authorities, threatening general incendiarism, was shown to have been written by the defendant. The admission of the evidence relating to the box found at the church was upheld on the ground that "it tended to show that the defendant was possessed of the requisite skill, materials, tools, and opportunity to have made the box used at the Ackerman fire," and, in connection with said letter, "to show that the defendant made both boxes with the single motive" expressed in the letter. As proof of the crime there charged depended wholly upon circumstantial evidence, the mere finding of the box at Ackerman's buildings was not sufficient to establish either motive or intent. Evidence of other attempts at arson was therefore neccessary and competent to establish these essential elements of the crime charged. Such evidence was, of course, not rendered incompetent because it also tended to identify the defendant as the person who was guilty of that crime. In *Hope* v. *People,* 83 N. Y. 418, 38 Am. Rep. 460, a robbery committed by masked men was followed by burglary of a bank. The janitor of the bank had been robbed of the key thereto by these men. Evidence of the burglary was held proper to identify those known to have been implicated therein with the persons who had committed the robbery. In *Rex* v. *Clewes,* 4 Car. & P. 221, a nisi prius case, imperfectly reported, there was a question of identity. A. was indicted for the murder of H. The theory of the prosecution was that A., having malice against P., hired H. to murder him; that H. having committed the murder, but having been detected in the act, A. murdered H.

to prevent the discovery of his (A.'s) guilt. In each of the last two cases there was an immediate and direct connection between the crime charged and the extraneous crime proved. In the first case the burglary of the bank, by men who were known, with the key of which the janitor had been robbed, directly identified the burglars as the masked men who but a moment before committed the robbery which was charged in the indictment. In the second case, proof that the defendant hired H. to murder P., and that H. was detected in the act, was cogent evidence that the same man who had hired the assassin had a motive for getting rid of him when his confession seemed imminent.

What is there in the evidence of the alleged killing of Barnet that tends to identify the defendant as the person who poisoned Mrs. Adams? Assuming Barnet to have been killed by the defendant, the crime has its own separate motive, intent, and plan. This is equally true of the crime charged in the indictment. The mere fact that the two crimes are parallel as to the methods and means employed in their execution does not serve to identify the defendant as the poisoner of Mrs. Adams, unless his guilt of the latter crime may be inferred from its similarity to the former. Such an inference might be justified if it had been shown conclusively that the defendant had killed Barnet, and that no other person could have killed Mrs. Adams. But no such evidence was given. The evidence tended to show that the defendant had the knowledge, skill, and materal to produce the poison which was sent to Cornish. But he was not shown to be the only person possessed of this knowledge, skill, and material. Indeed, it is common knowledge that there are many such persons. Therefore the naked similarity of these crimes proves nothing. It is said that the renting by the defendant of two letter boxes, one in the name of Barnet and the other in the name of Cornish, and the correspondence which passed through them, proves that the man who rented both boxes and carried on the correspondence is the same man who committed both murders. Let us see how logical this deduction is. As we have shown, there is nothing in common between the subject-matter of the Barnet correspondence and the Cornish correspondence except the fact that in the main it all relates to advertised remedies for impotence. There is one letter in each series in which the writer sends for "calthos." One Cornish letter asks for a sample of Kutnow powder. A box of this powder is found in the Barnet letter box, and another is found in the Cornish letter box. Assuming Barnet to have been poisoned with cyanide of mercury contained in Kutnow powder administered to or taken by him, it is clear that the package found in the Barnet letter box did not contain the powder used for that purpose, and it is equally clear that no one is shown to have written for Kutnow powder in the name of Barnet. The Kutnow powder

found in the Cornish letter box could not have been placed there until after the poisoner had decided to use bromo seltzer in the Cornish case, for the bottle holder was purchased on the same day that the Cornish letter box was rented, and that was seven weeks after the death of Barnet. All that is shown by the character of this correspondence is that defendant used the names of Barnet and Cornish to carry it on, and that it related generally to a common subject not connected with either of the alleged murders. As the contents of none of the letters in the one series contained any reference to or throw any light upon the matters referred to in the other series, it is difficult to understand how the letters in the Barnet series tend to identify the murderer of Mrs. Adams. As briefly as possible, we have discussed each of the five foregoing exceptions to the general rule in the effort to exclude them, one by one, from application to the case at bar. If, as we think, we have successfully eliminated each of them, then they are all removed from the case and it necessarily follows that none of the evidence tending to prove the poisoning of Barnet was relevant or competent to prove the murder of Mrs. Adams.

Before leaving this point it may be added that, even if the evidence relating to the death of Barnet were generally competent for the purpose of proving the murder of Mrs. Adams, yet there was fatal error in the admission of the statements made by Dr. Douglass as to what Barnet had told him with reference to receiving the box of Kutnow powder by mail. This evidence was clearly incompetent. It may be conceded for the purposes of this discussion that, when evidence of an extraneous crime is admissible to prove the crime for which a defendant is on trial, it is not necessary to prove every fact and circumstance relating to the extraneous crime that would be essential to sustain a conviction thereof. But it cannot require serious argument to show that such evidence, to be admissible, must be relevant and competent to the issue on trial. There was therefore no competent testimony in the case that Barnet ever received Kutnow powder through the mail, and as there was nothing in the Barnet correspondence to show that the defendant had ever written for Kutnow powder in the name of Barnet or in any other name until the Cornish letter of December 22, 1898, was written, the record is barren of evidence which tends to connect the defendant with the killing of Barnet. At this point it is proper to observe, also, that even if it could have been proper to prove two distinct crimes, with separate motives, there was an utter absence of evidence of motive in the Barnet Case. The evidence of the witness Rachel Green to the effect that the defendant and his wife had lived together before their marriage was stricken out upon the court's own motion, on the ground that the district attorney had not connected it with the defendant, nor made it material to

the case at bar, as he had promised to do. This evidence was, however, not stricken out until it had been in the case a full month, and even then the district attorney was permitted to present the case to the jury precisely as though the evidence had been retained.

As to the evidence of handwriting: For the purpose of proving that the defendant wrote the address upon the package of poison received by Cornish, the prosecution offered, and the court admitted, as standards of comparison, three classes of writings. The first class consisted of 56 specimens of defendant's handwriting, gathered from various places and in sundry ways, and conceded by him at the trial to be his genuine handwriting. The second class consisted of the so-called "request writings," seven in number, admitted to have been written by the defendant under the circumstances disclosed in the statement of facts. The third class consisted of nine so-called Barnet letters, five Barnet envelopes, and three so-called Cornish letters. These Barnet and Cornish letters, although unlike in many respects, and introduced in part for different purposes, may be classed together in considering the questions arising out of the exceptions taken to the rulings of the court upon the subject of comparison of handwriting. The facts upon which the prosecution based the charge that the defendant had written the writings of the third class, and the facts necessary to be understood in considering the admissibility of the writings of the second class, briefly recapitulated, are as follows: On the 27th day of May, 1898, the defendant rented a letter box in the name of H. C. Barnet from one Heckman, who kept a private letter-box agency at No. 257 West Forty-Second street, New York city. The nine Barnet letters consist of exhibits B, C, F, H, I, M, O, P, and Q. The envelopes consist of exhibits B2, J, K, N, and R. These letters were addressed to various manufacturers of proprietary medicines for remedies. None of them referred in terms to any fact or circumstance connected with the death of Mrs. Adams. All of these letters are said by the experts to disclose certain peculiarities of handwriting which also appear in the Cornish letters, in the poison-package address, and in the conceded writings of the defendant. One of these, the "diagnosis blank," written in the name of Barnet, is said to describe the defendant, and not Barnet. The Cornish letters embrace exhibits D, E, and G. Exhibit D is one addressed to Stearns & Co., asking for information about Harpster; Exhibit E is a letter to Kutnow Bros., asking for a sample of salts; and exhibit G is the letter to Van Mohl & Co., asking for "five days' trial." As we have seen, these three letters were written upon the egg-blue, tricrescent paper, which was also used in writing the Burns letter (exhibit 2), which paper was of the same character and description as that seen by the witness Melando in the drawer of the sideboard in the defendant's room at the Hermann

factory in Newark. The second class consists of the so-called "request writings," embracing exhibits 3, 4, 6, 7, 8, 9, and 10, written by the defendant in the presence and at the suggestion of Kinsley, the handwriting expert who had been retained by Capt. McClusky as early as the 1st day of January, 1899. The admission by the trial court of these standards of comparison raises interesting and important questions which will be considered in their order.

The first point made by the defendant is that comparison of the address upon the poison package could not be made with any other writings whatever, under the statutes regulating the subject in this state. When the genuine writings of the defendant, known in the case as the "conceded writings," were offered by the prosecution as standards of comparison, the defendant objected to them upon the ground that comparison of handwriting is competent only in a case in which the disputed writing is the subject-matter of the issue to be tried, and never when it is only evidentiary; in other words, that comparison may be made when the disputed writing is the fact in issue ut not when it is merely a fact relevant to the issue. The disposition of this objection goes to the foundation of the people's case, and requires a statement of the rule at common law, and of its statutory modifications. There is some difference of opinion among the highest courts of the several states concerning the extent to which comparison of handwritings may be made at common law. The rule long established in England which was adopted in this state and existed until the enactment of the statute of 1880, was briefly this: Whenever it was relevant, according to the general rules of evidence, to prove that any person had or had not written a particular paper, such proof might be made either (1) by witnesses who had seen the paper written, or to whom it had been acknowledged; or (2) by witnesses familiar with the handwriting of the person charged to be the writer, and who were able to testify from their familiarity with his handwriting to a belief respecting the genuineness of the handwriting in question; or (3) by what has come to be known as comparison of hands, which could be made at common law by witnesses, or by the court or jury without the aid of witnesses, between the disputed writing and other writings already in evidence for other purposes. It has often been pointed out that the second class of evidence above mentioned is, equally with the third, a comparison of hands, for in the second class the witnesses compare the disputed writing with a standard or exemplar present in their own minds. It has never been doubted, however, that the second class of evidence was admissible whenever, within the accepted rules of evidence, it became relevant to determine whether a particular person wrote a disputed paper. The third class, consisting of direct comparison made by or in the presence of the tribunal charged with the deter-

mination of the fact, was limited in England and in this state to comparison between documents properly in evidence for other purposes. Comparison might be made between such documents and the disputed writing in order to determine whether the writer of the other documents was also the writer of the disputed paper, but that was the extent of the rule. No document could be introduced merely as a standard of comparison with the disputed writing. *Doe ex dem. Perry* v. *Newton,* 5 Ad. & El. 514, 1 Nev. & P. 1 W. W. & D. 403, 6 L. J. K. B. N. S. 1; *Doe ex dem. Mudd* v. *Suckermore,* 5 Ad. & El. 703, 2 Nev. & P. 16, W. W. & D. 405, 7 L. J. K. B. N. S. 33; *Van Wyck* v. *McIntosh,* 14 N. Y. 439; *Dubois* v. *Baker,* 30 N. Y. 355; *Randolph* v. *Loughlin,* 48 N. Y. 456; *Miles* v. *Loomis,* 75 N. Y. 288, 31 Am. Rep. 470. It will be seen, upon an examination of the decisions establishing the common-law rule in England and in this state, that the idea that a disputed writing must be the very fact in issue, in order that comparison may be made between it and other writings already properly in evidence for other purposes than comparison, finds no support in the rule itself, or in any of the reasons which led to the formulation of that rule. If it has any foundation, it must be in the statutes regulating the subject of comparison of handwriting.

The first statute in this state upon the subject is chapter 36 of the Laws of 1880, entitled "An Act to Amend the Law of Evidence and Practice and Civil and Criminal Trials," and is as follows:

"Sec. 1. Comparison of a disputed writing, with any writing proved to the satisfaction of the court to be genuine, shall be permitted to be made by witnesses in all trials and proceedings, and such writings and the evidence of witnesses respecting the same may be submitted to the court and jury as evidence of the genuineness, or otherwise, of the writing in dispute.

"Sec. 2. This act shall take effect immediately."

It is obvious that the purpose of this enactment was to enlarge, and not in any wise to narrow, the rule established at common law. The latter was generally felt to be too inelastic, as it frequently excluded from the consideration of the court testimony which common experience proved to be helpful. As early as 1854 the restrictions of the common-law rule had been thrown off in England by statute. 17 & 18 Vict. chap. 125, §§ 27, 103; 28 & 29 Vict. chap. 18, §§ 1, 8. The statute of 1880 is almost verbatim like the English statute of 1854. So far as our research has gone, we have been unable to find any suggestion that the statute was intended to limit comparisons which at common law could be made concerning any writing relevant to the issue to writings which were themselves facts in issue, except a *dictum* presently to be noticed. Such a construction cannot be given the statute, without assuming that the legislature, while intending to broaden the common-law rule, actually

made it much narrower. The statute of 1880 was first considered by this court in *Peck* v. *Callaghan*, 95 N. Y. 73. That was an appeal from a decree admitting a will to probate. The questions before this court were whether the surrogate had properly admitted genuine specimens of the testator's handwriting to be used by expert witnesses as standards with which to compare the signature to the will, and had properly rejected specimens of the writing of a person charged to have forged the will. This court held that the rulings were clearly right under the statute. Ruger, Ch. J., said: "This act was evidently intended to enlarge the rules of evidence and extend the facilities for testing the handwriting of a party, the genuineness of whose signature was disputed, beyond the opportunities afforded by the then existing rules." Page 75. The learned chief judge in the following paragraph added a sentence which appears to be the foundation of the defendant's argument against the admissibility of the comparisons made in the case at bar between the "conceded writings" and the address upon the poison package, namely: "The disputed writing referred to in the statute relates only to the instrument which is the subject of controversy in the action, and the specimens of handwriting admissible thereunder are those of the person purported to have executed the instrument in controversy." *Ibid.* This is a slender foundation for the defendant's argument. The observation made by the learned judge must be confined to the facts before the court. Further than that, it was unnecessary to the decision and not binding upon the court.

The decision in *Peck* v. *Callaghan* was made in 1884, and in 1888 the legislature, evidently in order to avoid the construction confining the standards of comparison to the genuine handwriting of the person purporting to have executed the disputed instrument, enacted chapter 555 of the Laws of 1888, which is as follows:

"Sec. 1. Section 2 of chap. 36 of the Laws of 1880, entitled 'An Act to Amend the Law of Evidence and Practice on Civil and Criminal Trials,' is hereby amended so as to read as follows: Sec. 2. Comparison of a disputed writing with any writing proved to the satisfaction of the court to be the genuine handwriting of any person, claimed on the trial to have made or executed the disputed instrument, or writing, shall be permitted and submitted to the court and jury in like manner. But nothing within contained shall affect or apply to any action or proceeding heretofore commenced or now pending.

"Sec. 2. This act shall take effect immediately."

The act of 1888 does not repeal or supersede the act of 1880, but enlarges the operation of the latter by admitting evidence of the kind which it was thought had been decided in *Peck* v. *Callaghan* to be inadmissible under the statute of 1880. In other words, it authorized evidence which would establish forgery of the disputed writ-

ing by a particular person. We see nothing in either of the statutes which have been quoted to justify the construction attempted to be placed upon them by the defendant, while the whole history of the subject at common law and under the statutes of Great Britain and this state requires the contrary view.

The precise question appears never to have been decided in any of the courts of this state, probably for the reason that the bar had deemed the statutes too plain to warrant so fanciful a construction as the defendant's counsel attempts to give them here. We think it too clear for extended argument that the "disputed writing" referred to by the statutes is any writing which one party upon a trial seeks to prove as the genuine handwriting of any person, and which is not admitted to be such, provided that the writing is not inadmissible under other rules of evidence. The statutes were clearly intended to remove the restriction which at common law limited the comparison of a disputed writing either with other writings put in evidence for other purposes than comparison, or with standards existing in the minds of witnesses familiar with the handwriting of the person sought to be charged with the disputed writing. The class of disputed writings which may be proved upon the trial of an issue has neither been enlarged nor restricted. The admissibility of such disputed writings depends upon other rules than either the common-law or the statutory rules respecting comparison of handwriting. If a disputed handwriting is itself either a fact in issue, or a fact relevant to the issue, it may be proved by the means pointed out by the statutes. If it is neither in issue nor relevant to the issue, it must be excluded, not because the statutes of 1880 and 1888 have anything to do with the question, but because, according to fundamental rules, it can have no bearing upon the controversy. Although similar statutes are in force in several of the states, no such construction as is contended for by the defendant here has ever been suggested, so far as we have been able to ascertain. In this connection it is significant that comparisons between disputed writings merely evidentiary in character and accepted standards have been sanctioned in a number of cases before this court, some of which have passed its scrutiny, although it had the power of correcting errors not pointed out by exceptions. *Sudlow* v. *Warshing,* 108 N. Y. 520, 15 N. E. 532; *McKay* v. *Lasher,* 121 N. Y. 477, 24 N. E. 711; *Dresler* v. *Hard,* 127 N. Y. 235, 12 L.R.A. 456, 27 N. E. 823; *People* v. *Sliney,* 137 N. Y. 570, 33 N. E. 150; *Mutual L. Ins. Co.,* v. *Suiter,* 131 N. Y. 557, 29 N. E. 822; *People* v. *Corey,* 148 N. Y. 476, 42 N. E. 1066; *People* v. *Kennedy,* 164 N. Y. 449, 58 N. E. 652.

It is, of course, beyond dispute that the people's exhibit A, the address upon the poison package, is an important link in the chain of evidence tending to connect some person with the killing of Mrs. Adams. It is a fact relevant to the issue, the

fact in issue being whether the defendant killed Mrs. Adams. The defendant's contention is that, if he were on trial for having forged exhibit A (were such a thing possible), then exhibit A would be the fact in issue, and might be compared with the "conceded writings," in order to establish the charge that the defendant wrote exhibit A. But since the fact in issue is the defendant's responsibility for the death of Mrs. Adams, and exhibit A is only a link in the chain tending to connect him with the death, no such comparison can be resorted to. We think we have demonstrated the fallacy of this argument, and have already given it more space than it merits.

Another objection made by the defendant at the trial to the standards of comparison admitted by the court was the so-called "request writings." The circumstances in which those writing were made by the defendant have already been detailed. We are of the opinion that it was not error to receive them in evidence. When they were produced, the inquest into the circumstances of Mrs. Adams' death was in progress. The defendant was suspected, as he knew, of being the murderer, and was under subpœna to testify at the inquest. Nevertheless, he was not in custody, nor had a formal charge been made against him. It is strongly urged upon us that, owing to the publicity of the case, and the known suspicion of the police and prosecuting authorities against the defendant, he could not safely have refused Kinsley's request to produce specimens of handwriting; that such refusal would have subjected him to criticism; that it would have augmented suspicion in the public mind and incited the attacks of certain newspapers, which appear to have tried the case to their own satisfaction without awaiting the more tedious processes of the law. But the court cannot admit the argument. The defendant had the legal right to refuse to write for Kinsley. He preferred to accede to the latter's request, and we can discover no ground upon which the writings thus produced can be excluded from the case. If, as we have held in another part of this opinion, the defendant's testimony at the coroner's inquest, which he attended under subpœna, and where he was obliged to choose between claiming his privilege against self-incrimination and testifying fully, is admissible, *a fortiori* these "requesting writings" are competent. Writings created *post litem motam* are inadmissible in favor of a party creating them. Chamberlayne's Best, Ev. 236; *Hickory* v. *United States,* 151 U. S. 303, 38 L. ed. 170, 14 Sup. Ct. Rep. 334. But we have found no case holding that such writings should be excluded when offered by the adverse party, except *Reg.* v. *Crouch,* 4 Cox, C. C. 163, which was decided before the English statute of 1854, and *Hynes* v. *McDermott,* 82 N. Y. 41, 37 Am. Rep. 538, in which the decision, although made after the passage of our own statute of 1880, was based upon the law as it stood when the controversy arose. It is to be observed, moreover, that in the latter case there

were peculiar facts which would have justified the exclusion of the writings there offered in evidence, even if the statute had been in existence when the action was commenced.

The third objection made by the defendant to the standards of comparison adopted at the trial is to the admission of the Barnet letters and Cornish letters. The Barnet letters were undoubtedly admitted in the first instance to support the charge that the defendant had killed Barnet, and the Cornish letters to sustain the charge that he murdered Mrs. Adams. Both were subsequently treated as evidence tending to connect the defendant will each of the crimes said to have been committed by him. All of these letters were also used as standards of comparison from which to determine who wrote the poison-package address. They may, therefore, be considered together for the purpose of review under this head. The statutes of 1880 and 1888 provide that the comparison of a disputed writing may be made with any writing proved to the satisfaction of the court to be genuine. The words "proved to the satisfaction of the court" are to be construed in the light of the obvious purpose for which these statutes were enacted. At common law a paper properly in evidence for general purposes can be compared with a disputing writing, but only when the genuineness of the handwriting of the former is admitted or proved beyond a reasonable doubt. Chamberlayne's Best, Ev. 239; *Doe ex dem. Perry* v. *Newton*, 5 Ad. & El. 514, 1 Nev. & P. 1, W. W. & D. 403, 6 L. J. K. B. N. S. 1; 1 Greenl. Ev. 14th ed. 578; *Miles* v. *Loomis*, 75 N. Y. 288, 31 Am. Rep. 470; *State* v. *Scott*, 45 Mo. 302; *Moore* v. *United States*, 91 U. S. 270, 23 L. ed. 346. Since these statutes were designed to amplify and broaden the common-law rule by permitting the use of genuine writings as standards of comparison, even when they are not competent or relevant for other purposes, it must be assumed that the language prescribing the manner in which the genuineness of such writings is to be established was carefully and deliberately chosen by the legislature. While it is obvious that the words "proved to the satisfaction of the court" do not invest the trial court with a mere personal discretion, which is to be exercised without reference to rules of evidence, it is equally plain that the failure of these statutes to prescribe the precise method or degree of proof necessary to establish the genuineness of a writing for purposes of comparison with a disputed writing renders it necessary to resort to the general rules of the common law for that purpose. Thus, the genuineness of a writing may be established (1) by the concession of the person sought to be charged with the disputed writing made at or for the purposes of the trial, or by his testimony; (2) or by witnesses who saw the standards written, or to whom, or in whose hearing, the person sought to be charged acknowledged the writing thereof; (3) or by witnesses whose familiarity with the handwriting of the person who is claimed to have

written the standard enables them to testify to a belief as to its genuineness; (4) or by evidence showing that the reputed writer of the standard has acquiesced in or recognized the same, or that it has been adopted and acted upon by him in his business transactions or other concerns. Since common-law evidence is competent to establish the genuineness of a writing sought to be used as a standard of comparison, it is apparent, in the absence of a statutory rule as to the degree of proof to be made, that the general rule of the common law as to the sufficiency of evidence must prevail. In civil cases the genuineness of such a paper must be established by a fair preponderance of the evidence, and, in criminal cases beyond a reasonable doubt. Writings proved to the satisfaction of the court by the methods and under the rules adverted to may be used as standards for purposes of comparison, with a disputed writing, subject, however, to the qualification that writings which are otherwise incompetent should never be received in evidence for purposes of comparison. It is therefore sufficient to say, with reference to the Barnet and Cornish letters, that the general rule on the subject of handwriting expert testimony which we have laid down herein will properly guide the trial court in the disposition of the questions which may arise as to them upon another trial.

It was further urged at the bar in behalf of the defendant that the statutes of 1880 and 1888 authorizing comparison of a disputed writing with any writing proved to the satisfaction of the court to be genuine are unconstitutional, because in conflict with article 1, § 2, of the Constitution of this state, which provides that "trial by jury in all cases in which it has been heretofore used shall remain inviolate forever." The argument, in brief, is that this provision of the Constitution requires the submission to the jury in every case properly triable by jury of every material fact relied upon to establish the allegations in controversy. It is unnecessary to go into an extended examination of the question. We are clearly of the opinion that these statutes are not unconstitutional, and that the proper construction of the statute requires the submission to the jury of the genuineness of the standards with which the disputed writing is compared. The word "court" in the statutes is used in its generic sense, and includes both judge and jury in a case where a jury is present. It is significant that the statute of 1880, which was obviously copied from the statute of Great Britain enacted in 1854, substitutes the word "court" for the word "judge." We are not aware that it has ever been decided, even in England, by any court of great authority, that the ultimate decision concerning the genuineness of the standards of comparison must not be made by the jury. Be that as it may, however, such a decision would not, in view of the difference between the powers of the legislature in Great Britain and in this state, and the significant difference in the phraseology of the statutes, serve as a

guide to the interpretation of our statutory enactments upon the subject. We have not been referred to, and have not found, any decision of this court to the effect that the judge presiding at the trial has the final decision concerning the genuineness of the writings offered as standards of comparison. We see nothing in the language of Peckham, J., in *McKay* v. *Lasher,* 121 N. Y. 477, 24 N. E. 711, which is opposed to the views above expressed. As between a construction which would withdraw from the jury the important question of the genuineness of the standards and a construction which submits their genuineness first to the judgment of the judge, and, upon his acceptance of them, ultimately to the decision of the jury, which must find, within the rules above laid down, that they are genuine, before it can use them, or regard any evidence based upon them, we prefer and are bound to accept the latter construction. The sufficiency of the proof given of the genuineness of the papers offered as standards is a preliminary point to be determined in the first instance by the court before permitting the papers to go to the jury. If the court, having regard to the rules adverted to, adjudge the papers genuine, it then becomes the duty of the jury in its turn, at the proper time, before making comparison of a disputed writing with the standards, to examine the testimony respecting the genuineness of the latter, and to decide for itself, under proper legal instructions from the court, whether their genuineness has been established. We are aware that a contrary conclusion respecting the duty of the court to submit the genuineness of the standards of comparison to the jury has been reached in Vermont (*Rowell* v. *Fuller,* 59 Vt. 688, 10 Atl. 853), and apparently in Massachusetts (*Costello* v. *Crowell,* 133 Mass. 352). We are convinced, however, that the sounder rule is the one we have stated. It may be added that comparisons with standards produced in court, whether at common law or under the statutes, may be made by witnesses, or by the court or jury without the aid of witnesses. *Cobbett* v. *Kilminster,* 4 Fost. & F. 490; *Hickory* v. *United States,* 151 U. S. 303, 38 L. ed. 170, 14 Sup. Ct. Rep. 334; *Merritt* v. *Campbell,* 79 N. Y. 625.

Another point urged upon our attention by counsel for the defense is that the learned trial court erred in admitting in evidence upon the trial the testimony of the defendant given at the coroner's inquest. This question must be decided for the guidance of the court below upon another trial. When this testimony was offered in evidence by the district attorney, the defendant's counsel interposed the objection that it had not been shown that the defendant was advised of his rights at that time, and had not been warned of his rights by the coroner. What were the defendant's rights at the inquest? If the defendant, when he attended the inquest, was under arrest or formal accusation for the murder of Mrs. Adams, he was entitled to be informed of the charge against him, and of his right to the aid of counsel in every stage of

the proceedings, and before any further proceedings were had. Code Crim. Proc. § 188. This section is, in terms, applicable only to examinations before a magistrate. It is, however merely a codification of the common-law rule, and this court has held that when a person is called upon to testify at a coroner's inquest, convened to inquire into a crime, for the commission of which such person is then under arrest, or upon which he has been formally accused, he occupies the same position and he has the same rights, as though he were before an examining magistrate. *People* v. *Mondon,* 103 N. Y. 211, 57 Am. Rep. 709, 8 N. E. 496. So, on the other hand, if the person who testifies at the inquest does so simply as a witness, he has none of the rights or immunities of a party. This is the foundation of the rule, which is now firmly established in this state, that when a person testifies at an inquest as an accused or arrested party his testimony cannot be used against him upon a subsequent trial of an indictment growing out of the inquest, unless his testimony has been voluntarily given, after he has been fully advised of all his rights, and has been given an opportunity to avail himself of them. *People* v. *Chapleau,* 121 N. Y. 267, 24 N. E. 469. The logical and necessary corollary of that part of the rule stated is that when a person testifies simply as a witness, and not as a party, his testimony can be used against him, even though he is afterwards indicted and tried for the commission of the crime disclosed by the inquest. *Hendrickson* v. *People,* 10 N. Y. 14, 61 Am. Dec. 721; *Teachout* v. *People,* 41 N. Y. 7. What was the situation at the coroner's inquest held upon the death of Mrs. Adams? It appears that the inquest was commenced on the 9th day of February, 1899. The defendant attended the inquest, was sworn, and testified pursuant to a subpœna issued to him by the coroner on the 10th day of February, 1899. The inquest was concluded on the 27th day of February, 1899, and the defendant was arrested at its close upon a warrant charging him with the murder of Mrs. Adams. When the defendant's counsel, upon the trial, interposed the preliminary objection to the admission of evidence of the testimony given by the defendant at the inquest, the learned trial court very properly allowed an examination into the proceedings at the inquest for the purpose of determining whether the defendant had testified as a party or as a witness. *People* v. *Fox,* 121 N. Y. 449, 24 N. E. 923. The ground of defendant's complaint in this behalf upon this appeal is that he was not given the opportunity to show that he was in fact an accused party at the inquest, and that his rights as such had not been recognized by the coroner. Many pages of the record are filled with the proceedings in this regard showing that from the outset of the inquiry into this subject the district attorney objected to the questions of defendant's counsel; that many of these objections were sustained and that the court by frequent interventions, prevented defendant from completing the questions

which he had started to frame. The sole purpose of this inquiry was to ascertain a few facts which were matters of record, and of which it was necessary for the court to become informed, to enable it to pass upon the admissibility of the testimony then offered in evidence. It is obvious that the facts to be ascertained were of paramount importance as compared with the method by which that was to be accomplished. Even if, as must be admitted, many of the questions of defendant's counsel were wide of the mark, a few well-directed suggestions or questions from the court would speedily and clearly have elicited the desired information, and thus have avoided the tedious and confusing proceedings which mark this portion of the record. Notwithstanding all this, however, it is plain that the defendant was not under arrest or accusation when he testified before the coroner. It appears that Cornish had testified on the opening day of the inquest. In the course of his testimony he referred to an interview with Capt. McClusky, during which he stated to the latter his suspicion that the defendant had sent him the poison package. Without the support of other facts which came to light later in the inquest, this suspicion, expressed by Cornish, could not have been a sufficient basis for charging the defendant with the commission of this crime. It further appears that the defendant attended the inquest, and testified thereat pursuant to a subpœna issued to him by the coroner, and that defendant was threatened with punishment for contempt if he refused to testify. The coroner had the right to issue a subpœna for defendant, and to punish him if he disobeyed it. Code Crim. Proc. § 776. The law presumes that a party who is called upon to testify as a mere witness knows his rights. He may decline to testify to anything that may tend to incriminate him. This the defendant could have done had he chosen to claim his privilege. Having failed to do so, he cannot now complain.

The record further discloses that the defendant sought to show that the district attorney, in his summing up to the coroner's jury, stated that he had from the beginning suspected the defendant of the commission of the crime, but had pretended to suspect Cornish, so as to lull the defendant into a sense of security, and thus get him to testify. This statement, if made, was after the defendant had testified. Whether it was true or not, or whether the district attorney's suspicions were well or ill founded, are matters of no consequence, for they could have had no influence on the status of the defendant when he testified. We therefore conclude that no material error was committed in respect to the general admission in evidence upon the trial of the defendant's testimony given before the coroner. We do not pass upon the separate objections to specific portions of this testimony, as these may not be presented upon another trial.

Among the questions urged upon our attention, there are several which may be grouped together for the purpose of such brief consider-

ation as we deem it necessary to give them. They are: (1) That the court erred in its charge to the jury and in its refusal to charge the requests submitted by counsel for the defendant; (2) that prejudicial error was committed in the opening and summing up of the district attorney; (3) that the trial court erred in admitting incompetent evidence, and excluding competent evidence, over the objection of the defendant; and (4) that the defendant did not receive that fair and impartial trial to which he is entitled under the law. The first and third of these points need not be discussed. Many of the exceptions taken to the charge, the refusals to charge, and the rulings admitting or excluding evidence have been disposed of in the conclusions that the Barnet evidence was inadmissible, and that the rules governing expert evidence upon the subject of handwriting were not properly applied, and many other exceptions will be obviated by the different course which another trial of this case will necessarily take. The claims of defendant's counsel that "error was committed in the opening and summing up of the district attorney," and that "the defendant did not receive that fair and impartial trial to which he is entitled under the law," have been so urgently presented that we should be inclined to discuss in detail the many grounds of error assigned under these heads were it not impossible to do so fairly and impartially without a full and critical review of the 12,000 folios of this record for that sole purpose. Such a review would extend this opinion beyond all reasonable and useful limits, and, in view of the result reached, we deem it unnecessary to discuss or decide the questions raised as to the conduct of the recorder and the district attorney upon the trial. And, finally, counsel for the defendant contends that the verdict of the jury is not supported by the evidence. In view of the fact that a reversal of the judgment herein is required by the decision reached upon the two questions discussed in the earlier pages of this opinion, it would be obviously unprofitable and improper, in the face of the new trial which must be had, to express our views upon the weight of the whole evidence, and we therefore pass defendant's fourth point without further mention.

In conclusion we desire to express our sense of obligation to counsel for both the prosecution and the defense upon this appeal for the fairness and ability with which the case was presented, and for the diligence in research and painstaking arrangement of details which have contributed so materially to lighten the labors of the court.

The judgment of the court below should be reversed, and a new trial ordered.

Bartlett and Vann, JJ., concur.

O'Brien J., concurring:

There can be no doubt that the People were permitted upon the trial of the defendant, now under review, to give proof of the commission by him of two distinct crimes,

namely, the poisoning of Barnet and the poisoning of Mrs. Adams. The only crime charged in the indictment was the murder of the latter. We all agree that a vital part of the testimony with respect to the death of Barnet and its cause was merely hearsay and incompetent. Whether any proof bearing upon the sickness and death of Barnet, or the defendant's connection with it, was admissible upon the trial of the case at bar, is a much broader and more important question. The defendant was indicted for feloniously causing or procuring the death of Mrs. Adams; and the fact, if it be a fact, that at some other time and place he also caused the death of Barnet, is not admissible to prove the offense charged. That is certainly the general rule, established by abundant authority, and founded upon the plainest principles of reason and justice. The only question upon which there is an opportunity for minds to differ is whether the events connected with Barnet's sickness and death are so related to the case at bar as to form an exception to the general rule, and thus bring the proof that was given at the trial within some one of these recognized exceptions. The issue in this case was whether the defendant was guilty of causing the death of Mrs. Adams, and not whether he was guilty of causing the death of Barnet. In a more specific sense, the issue was whether he sent upon its errand of death, through the mail, the package from which the deceased, through mistake, took the deadly poison that killed her; or, to be still more specific, the issue was whether the defendant wrote the direction upon the package with the felonious intent to transmit it by mail to Cornish. If the address upon the package was in fact written by the defendant, all the elements of the crime where to be deduced from the maxim, *Res ipsa loquitur*. The events constituting the history of Barnet's sickness and death did not prove, or tend to prove, the fact that the defendant wrote the address upon the poison package that eventually came to the hands of Mrs. Adams, and that was the material issue at the trial.

The death of Mrs. Adams resulted from poison administered by her own hand, but the real author of her death was the person who made use of the mail to transmit to someone the deadly substance that produced death. In any inquiry concerning the identity of the author of a great crime, where the evidence is purely circumstantial, the human mind instinctively adopts processes in arriving at results that are not sanctioned by the rules of evidence. The hardened and habitual criminal is more likely to be suspected than one who had never committed a crime before. If the party suspected committed a similar crime before by the same or similar means, or a series of such crimes, proof of these facts goes far to establish his guilt in the popular mind of the offense charged, and for which he is on trial; and yet nothing is better established than the rule that the vicious character of a person on trial for a specific offense cannot be shown, unless he

himself makes his character or the events of his life a subject of inquiry by becoming a witness in the case. No matter how notorious a criminal the party on trial may be, neither his general reputation nor other specific offenses can legally be proved against him as evidence of his guilt of the offense charged. That such proof is persuasive, and has great influence, when introduced, upon courts and juries, cannot be doubted; but the law does not permit it to be given upon the trial of an issue concerning the guilt or innocence of the party on trial for a specific offense. The reason is that such proof does not bear upon the issue in the case, and hence it is misleading, since it does not follow that a party who has committed one crime, or many, is guilty of some other crime for which he is on trial. It is said that the evidence culminating in Barnet's death tends to identify the defendant as the author of the death of Mrs. Adams; but that is only another way of asserting the general proposition that the commission by the defendant of one crime tends to prove that he committed another crime, and, no matter in what form or how often that proposition is asserted, or how persuasive and plausible it may appear, it is erroneous and misleading, since it violates a salutary principle of the law of evidence, which should be applied in all cases without regard to the question of actual guilt or innocence. If the guilty cannot be convicted without breaking down the barriers which the law has erected for the protection of every person accused of crime, it is better that they should escape, rather than that the life or liberty of an innocent person should be imperiled. I think the evidence relating to Barnet's sickness and death would not for a moment be considered competent but for the fact that it creates a strong impression upon the mind that the author of his death must also be the author of Mrs. Adams' death, since in both cases death was caused by similar means. We may attempt to deceive ourselves with words and phrases by arguing that it is admissible to prove intent, or identity, or the absence of mistake, or something else, in order to bring the case within some exception to the general rule; but what is in the mind all the time is the thought so difficult to suppress, that the vicious and criminal agency that caused the death of Barnet also caused the death of Mrs. Adams. The rule of law that excludes the evidence for such a purpose may be, and probably is, contrary to the tendency of the human mind; but, since the law was intended to curb the speculations of the mind, and to guard the accused from the result of error in its operation, I am for maintaining the law in all its integrity, and not for undermining it by qualifications that rest upon no reasonable or logical basis.

The cases cited to show that proof of Barnet's death was admissible to prove that the defendant wrote the address upon the package sent to Cornish have all been explained in the opinion of Judge Werner, and it is unnecessary to

comment upon them further than to say that, in my opinion, none of them apply to the case at bar. When these cases, and all the considerations urged in behalf of the People, have been given due weight, it is still safe to say that the question as to the competency of the proof is by no means clear, but at best is very doubtful; and therefore the accused, and not the prosecution, should be given the benefit of that doubt. It is so difficult for the human mind to discard false theories that assume the disguise of truth, and so easy to substitute suspicions and speculations for evidence of facts, that proof of the general bad character of the accused, or of participation in other crimes, which is practically the same thing, would no doubt be of great aid to the people in procuring a conviction for the specific offense charged in the indictment. Such proof, in a doubtful case, might turn the scale against the accused; but the law, for obvious reasons, does not permit it, and it is dangerous to subvert the rule upon the vague theory that it identifies the accused as the author of the offense charged, which means nothing more than that it proves, or tends to prove, that he is guilty. If the defendant procured or caused the death of Barnet, he is liable to be indicted and tried for that offense; but it is contrary to the plainest principles of justice to require him, when accused of poisoning Mrs. Adams, to clear himself from all suspicion of participation in another crime of the same character. If the Barnet evidence was properly admitted in the case, it must follow that in every case proof of other crimes is admissible, since in every case it can be said, as it is said in his, that proof of the other crime identifies the accused as the real author of the crime charged. If the defendant wrote the address upon the poison package that was sent to Cornish, then he is identified; but proof that at another time he sent another package to Barnet proves nothing in regard to the address. All it proves is that possibly he was capable of the wicked act charged in the indictment, and that is only another way of proving his general bad character, not even by reputation, but by a specific act, which all agree is not admissible.

While the chain of proof to connect the defendant with the poisoning of Barnet is fatally defective in that there is no competent testimony to show that he ever sent to him, by mail or otherwise, the bottle of Kutnow powders which it is said contained the poison, yet, if the missing link had been supplied, it would only make the proof all the more dangerous and incompetent. The defendant was required to answer the charge of causing the death of Mrs. Adams, and not the charge of causing the death of Barnet; but by the whole course of the trial and the rulings of the court he was really and substantially required to answer both charges, and, since this constitutes a clear error of law, the defendant is entitled to have the judgment of conviction reversed, and, as this may possibly result in a new trial, it is scarcely within the

province of this court to express any opinion upon the facts.

Comparison of a disputed writing with a writing shown to be genuine is allowed now by the statute. Laws 1880, chap. 36; Laws 1888, chap. 555. It is not very clear what the legislature meant in these statutes by the words "disputed writing," and, while I think the construction given to these acts by my brethren is quite iberal, notwithstanding the rule that statutes changing the common law are to be strictly construed, yet I am disposed to concur in their view, since it is based on the ground that any other construction would render the legislation practically useless.

Parker, Ch. J., dissenting:

I vote for a reversal of this judgment on the ground that the court erred in receiving the testimony of Dr. Douglass to the effect that Barnet stated to him in his last illness that he had received a box of Kutnow powder through the mail. The declarations of Barnet under the circumstances disclosed by the physicians were not competent to show that Barnet received Kutnow powder through the mails. As the fact thus sought to be established was one of vast importance, the exception taken to the admission of the testimony requires a reversal of the judgment.

I dissent from that part of the prevailing opinion which, in effect, holds that, had the fact been established by competent evidence that Barnet had taken a dose of Kutnow powder containing cyanide of mercury, which he had received through the mails, nevertheless the evidence tending to show that the defendant mailed that Kutnow powder to him is inadmissible on the trial of the defendant for the killing of Mrs. Adams. Of course, it is not admissible unless it tends to prove that Molineux is responsible for the death of Mrs. Adams. If it does tend to prove such responsibility, then it is admissible, although the facts proved establish that the defendant committed another crime. It is often carelessly said that the people cannot, upon trial under an indictment, prove facts showing that the defendant committed another crime,—a statement which is incorrect without the addition of the qualification,—unless the facts establishing the other crime also tend to establish the commission by defendant of the crime for which he is being tried. There is no controversy in this court—nor out of it, so far as I know—touching the general rule that evidence of the commission by him of other crimes is not admissible upon the trial of a defendant charged with crime. It is only on rare occasions that proof of the commission of another crime by a defendant is either necessary or helpful towards establishing the crime with which he is charged. Hence, the evidence is ordinarily irrelevant, while at the same time its admission would necessarily operate to so prejudice a jury against a defendant as that in a doubtful case it might control the verdict. Therefore the courts long ago decided that a defendant should not be prejudiced by the admission of evidence of other crimes committed by him which in no wise tends to es-

tablish that he committed the crime for whose commission he is on trial. But it has never been held by any court of responsible authority that the people cannot prove the facts constituting another crime, when those facts also tend to establish that the defendant committed the crime for which he is on trial. Such a holding would accomplish the absurd result of permitting a rule intended to prevent a defendant from being prejudiced in the eyes of the jury because of his life of crime to so operate in certain cases as to prevent the people from proving the facts necessary to convict him of the crime charged. The interests of justice, which require alike the conviction of the guilty and the innocent, make it the duty of courts to preserve this rule in its entirety, for by it a defendant will be protected from the prejudice resulting from the evidence of other unrelated crimes committed by him, while the people will not be prevented from proving the facts of another and related crime, which tend to establish the commission by the defendant of the crime charged. There are many cases both in England and in this country where the people were permitted to prove the commission of another crime by defendant because it tended to prove him guilty of the one for which he was standing trial. Among them may be found the following; *People* v. *Place,* 157 N. Y. 585, 52 N. E. 576; *People* v. *Van Tassel,* 156 N. Y. 561, 51 N. E. 274; *People* v. *McLaughlin,* 150 N. Y. 365, 386, 44 N. E. 1017; *People* v. *McClure,* 148 N. Y. 95, 42 N. E. 523; *People* v. *Harris,* 136 N. Y. 443, 33 N. E. 65; *People* v. *Murphy,* 135 N. Y. 451, 32 N. E. 138; *People* v. *Dimick,* 107 N. Y. 13, 32, 14 N. E. 178; *People* v. *Everhardt,* 104 N. Y. 591, 11 N. E. 62; *Pontius* v. *People,* 82 N. Y. 339; *Hope* v. *People,* 83 N. Y. 418, 38 Am. Rep. 460; *Mayer* v. *People,* 80 N. Y. 364; *Pierson* v. *People,* 79 N. Y. 424, 35 Am. Rep. 524; *Coleman* v. *People,* 58 N. Y. 555; *Coppermon* v. *People,* 56 N. Y. 591; *People* v. *Zucker,* 20 App. Div. 363, 46 N. Y. Supp. 766, affirmed in 154 N. Y. 770, 49 N. E. 1102; *Stout* v. *People,* 4 Park. Crim. Rep. 132; *Hawes* v. *State,* 88 Ala. 37, 7 So. 302; *People* v. *Otto,* 4 N. Y. Crim. Rep. 149; *People* v. *Wood,* 3 Park. Crim. Rep. 681; *Com.* v. *Jackson,* 132 Mass. 16, 44 Am. Rep. 299, note. *Com.* v. *Bigelow,* 8 Met. 235; *Com.* v. *Stone,* 4 Met. 43; *Helm's Case,* 1 N. Y. City Hall Rec. 46; *Smith's Case,* 1 N. Y. City Hall Rec. 49; *Coffey's Case,* 4 N. Y. City Hall Rec. 52; *Dougherty's Case,* 4 N. Y City Hall Rec. 166; *Com.* v. *Johnson,* 133 Pa. 293, 19 Atl. 402; *Com.* v. *Russell,* 156 Mass. 196, 30 N. E. 763; *Reg.* v. *Colclough,* 15 Cox, C. C. 92, 241; *Reg.* v. *Garner,* 3 Fost. & F. 681; *Reg.* v. *Cotton,* 12 Cox, C. C. 400; *Reg.* v. *Geering,* 18 L. J. Mag. Cas. N. S. 215; *Reg.* v. *Heesom,* 14 Cox, C. C. 40; *Makin* v. *Atty. Gen.* 17 Cox, C. C. 704, 63 L. J. P. C. N. S. 41, [1894] A. C. 57, 6 Reports, 373, 69 L. T. N. S. 778, 58 J. P. 148; *Reg.* v. *Roden,* 12 Cox, C. C. 630; *Reg.* v. *Flannagan,* 15 Cox, C. C. 403; *Goersen* v. *Com.* 99 Pa. 388; *People* v. *Seaman,* 107 Mich. 348, 61 Am. St. Rep. 326, 65 N. W. 203; *Hester* v. *Com.* 85 Pa.

139; *Kramer* v. *Com.* 87 Pa. 301; *Brown* v. *Com.* 76 Pa. 319; *People* v. *Foley,* 64 Mich. 148, 31 N. W. 94; *People* v. *Rogers,* 71 Cal. 565, 12 Pac. 679; *Com.* v. *Choate,* 105 Mass. 451; *Rex* v. *Clewes,* 4 Car. & P. 221; *Com.* v. *McCarthy,* 119 Mass. 354; *Com.* v. *Miller,* 3 Cush. 244. It is unnecessary to refer to these cases in detail, as it is sufficient for my present purpose to say that each one of them presents a case in which proof of the facts tending to show the commission of another crime by the defendant on trial was admitted for the purpose of aiding in establishing the fact that he committed the offense charged. Indeed, no one denies that this has often happened, nor questions that in the future it will and should happen again and again; but, instead, it is said in effect that this case is not within the rule as interpreted by those cases. In other words, that the facts of this case do not bring it within the exceptions (so called) created by those cases. The argument proceeds upon the assumption that the exceptions are not to be added to, but that as large a number had been created when this trial began as should be tolerated, instead of treating these decisions as establishing the principle that the facts of another crime may be proved by the people whenever their tendency is to prove the commission of the crime charged.

Wharton, Crim. Ev. 9th ed. § 48; Underhill, Ev. § 58; Abbott, Trial Brief, Crim. Causes, § 598,—are cited in support of the statement that: "Generally speaking, evidence of other crimes is competent to prove the specific crime charged when it tends to establish: (1) Motive; (2) intent; (3) absence of mistake or accident; (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the others; (5) the identity of the person charged with the commission of the crime on trial." This list of exceptions has been extended in terms in some of the opinions in the cases cited supra, but it is of sufficient length for the purposes of this discussion. The argument then proceeds with an attempt to show that evidence authorizing a finding that Molineux killed Barnet is not within any of the exceptions, and hence it is assumed that it is not competent. I think the real test in such cases is, Does the evidence of the other crime fairly aid in establishing the commission by defendant of the crime for which he is being tried? And that test, and none other, is fairly established by the authorities. It is conceded that cases have arisen where another crime was permitted to be proved for the purpose of establishing a motive for the crime for whose commission defendant is on trial,—just that and nothing more. Motive is an important element, it is true, in certain cases, but it is only one element; and yet, if it is necessary to establish that the defendant had a motive in committing the crime charged, proof of another crime may be permitted for that purpose. Intent is another essential element which must be made out before there can be a conviction for a

crime, and, if the commission of another crime by a defendant tends to establish a guilty intent on his part in the case on trial, the other crime may be proved. So, if a defendant claims that the killing was due to mistake or accident, the facts of another crime may be proved by the people if those facts tend to show that there was neither mistake nor accident of the part of defendant. Other cases may be found where evidence of another crime has been received simply because it tended to identify the person on trial. Judge Peckham, in *People* v. *Sharp,* 107 N. Y. 427, 468, 1 Am. St. Rep. 851, 14 N. E. 319, 344, refers to a "class of cases in which the facts show the commission of two crimes, and that the individual who committed the other crime also committed the one for which the defendant is on trial. Evidence is then permitted to show that the defendant was the person who committed the other crime, because in so doing, under the circumstances and from the connection of the defendant with the other crime, the evidence of his guilt of such other crime is direct evidence of his guilt of the crime for which he is on trial." In *People* v. *Murphy,* 135 N. Y. 451, 32 N. E. 138, the evidence of another offense was held admissible because it had been shown to be "a part of the same criminal scheme" as the main offense. An examination of the cases cited *supra* discloses still other situations in which the proof of another offense has been sanctioned, and those cases show that almost every element essential to a conviction for crime either has been established, or the evidence tending to prove it has been supported and strengthened by proofs of the commission of another crime by the same party. In not one of those cases is it suggested that there is any element of a crime that may not be proved in that way, and this court long ago distinctly laid down the rule, as it seems to be established by the authorities generally, as follows: "Evidence tending to prove any fact constituting an element of a crime charged in an indictment is competent, although it may tend to prove the prisoner guilty of some other crime." *Weed* v. *People,* 56 N. Y. 628. And this conclusion has been followed in this court recently in three cases by expression quite as comprehensive. In *People* v. *Van Tassel,* 156 N. Y. 561, 565, 51 N. E. 274, 275, where it is said: "Evidence of other transactions, otherwise material or relevant, is not inadmissible merely because it tends to prove another crime;" and in *People* v. *Place,* 157 N. Y. 584, 598, 52 N. E. 576, 581, where the court carefully stated the rule in its entirety in two sentences, as follows: "It is an elementary principle of law that the commission of one crime is not admissible in evidence upon the trial for another, where its sole purpose is to show that the defendant has been guilty of other crimes, and would, consequently, be more liable to commit the offense charged. But, if the evidence is material and relevant to the issue, it is not inadmissible because it tends to establish the defendant's guilt of a crime

other than the one charged." And *People* v. *McLaughlin*, 150 N. Y. 365, 386, 44 N. E. 1017, is to the same effect. Here we have a broad and comprehensive test—one that looks towards justice: Do the facts constituting the other crime actually tend to establish one or several elements of the crime charged? If so, they may be proved. Measured by this test, it was competent for the people to show that Barnet came to his death through cyanide of mercury contained in a dose of Kutnow powder taken from a box received by him through the mails, in view of the facts and circumstances proved, tending strongly to show that one mind conceived and one hand executed all of the details of both crimes. But I shall not discuss the evidence from that point of view, for it is my purpose to attempt to show that, even if we assume the contention to be sound that the people can prove facts constituting another crime only when they are within one of the exceptions enumerated, the Barnet evidence is clearly within the fifth enumerated exception, in that it tends to establish "the identity of the person charged with the commission of the crime on trial." There are features of the evidence that bear upon two of the other exceptions, but, for the sake of brevity, only the one named will be considered.

In the prevailing opinion, after a preliminary discussion of the facts relating to the death of Mrs. Adams, it is said: "The next and final step in the case of the prosecution would have been to prove the defendant's connection with the handwriting of the address upon the poison package." This done, it is conceded that a prima facie case would have been established on the part of the people. Evidence to that effect was given by three lay witnesses and also by a number of handwriting experts. But the people were not obliged to stop there. If there were other evidence tending to show that the defendant sent the poison package to Cornish, it was the duty of the prosecuting officer to present it to the court and the jury. Of course, no one saw the person who sent the package mail it, and, aside from the proof of the handwriting, resort had necessarily to be had to circumstantial evidence to prove who was the sender. The package sent to Cornish contained a broma seltzer bottle filled with broma seltzer in which had been put cyanide of mercury, and Mrs. Adams, on taking a dose from that bottle for sick headache, obtained such a quantity of cyanide of mercury as to lose her life. Cornish also took a small dose, but it did not prove fatal. Cyanide of mercury is a rare and unusual poison, not kept on sale by druggists generally, as strychnine and many other poisons are, and the books of the medical and chemical professions record only five cases, prior to these, of death by that poison. Dr. Phillips, a physician who was called to see Cornish, suspected that he had taken cyanide of mercury because of the similarity between the symptoms displayed by him and those exhibited by Barnet, whom he had treated a little over a month previous. The fact that an attempt had been made

upon the lives of two persons within so brief a period by this rare and unusual poison naturally suggested to those whose duty to the state it was to find the murderer, if possible, that it would quite likely appear that one person sent both packages. The autopsies showed that both Barnet and Mrs. Adams died from that poison, and in the Kutnow powder of which Barnet told his physician he had partaken was found cyanide of mercury. On May 27, 1898, a letter box was hired from one Heckman in the name of H. C. Barnet. Barnet did not rent it, and Heckman positively identified the defendant, Molineux, as the man who did rent it and gave his name as H. C. Barnet. To that letter box was sent, among other things, patent medicines, to which other reference will be presently made. Someone in the name of Barnet wrote to the Marston Remedy Company a letter, inclosing $5, with a request that he be sent one month's treatment for impotency, and the address of the letter box which Molineux had rented in the name of Barnet was given. In reply the Marston Remedy Company sent a blank diagnosis sheet, addressed to H. C. Barnet at that private letter box, as requested, with directions that the questions thereon be answered. The author of the answers to the questions in that diagnosis blank gave the following description of himself: (1) Single man; (2) thirty-one years of age; (3) chest measurement 37 inches; (4) waist measurement 32 inches; (5) there had been consumption in his family; (6) business sedentary; (7) contemplated matrimony; (8) eyes and complexion "yellowish;" (9) seeking treatment for impotency. This in no respect described the real H. C. Barnet, who was a large man, weighing 180 pounds; but, according to the people's evidence, it described Molineux with perfect accuracy. He was single; was thirty-one years of age in the very month the letter was written; his tailor had measured him less than two months before, and testified his chest measurement was 37 inches and his waist measurement 32 inches; the death certificate of his maternal grandmother showed that she died of consumption; his business was sedentary; he was contemplating matrimony; the jury had an opportunity to observe his eyes and complexion, which the people contend are "yellowish;" and he was seeking a remedy for impotency, for on June 1, 1908, Molineux wrote a letter to Dr. James Burnes, signing his own name, inclosing 25 cents, and directing that a remedy be sent to his Newark address. Both the letter and the envelope were put in evidence, and it was shown that the remedy was for impotency. There was also evidence that the diagnosis blank was in the handwriting of the defendant, and it needs no argument to support an assertion that the jury had the right to find from all this evidence that Molineux was the man who used this letter box, and used the name of Barnet for his own purposes. According to the claim of the people, then, Molineux positively identified himself as the renter of the letter box and the seeker after remedies

for impotency in the Barnet case, and Heckman identified him as positively. The identity of Molineux in the Barnet case being established, the people were at liberty to show that the facts and circumstances in the Barnet case and the Cornish case were of such a character that they must necessarily have resulted from the action of a single mind. To have shown that would necessarily have identified the defendant as the criminal actor in the attempt to poison Cornish. It turned out that before the attempt to poison Cornish was made someone hired a private letter box in his name, and, as in the Barnet case, it was not hired by Cornish, nor for him. Now, while Molineux personally hired the box in Barnet's name at Heckman's, he did not personally hire the box at Koch's, at 1620 Broadway, which was hired in Cornish's name. But it seems that Koch, in addition to renting private letter boxes to persons who had personal and confidential correspondence which they wished to keep out of the regular channels of their mail matter, sent out a publication called the "Studio," and on December 31, 1897, about a year before the death of Mrs. Adams, Molineux wrote a letter to "Editor 'Studio,'" in which he asked for a copy of the paper. About six months later Koch sent Molineux some circulars relating to his business, and one of them described his private letter boxes. Between December 12 and 17, 1898, Molineux called on Koch at his place of business, and talked about the letter boxes, but said he was not prepared to make an arrangement for one, as he only called for a friend. A few days later, and on December 21st, another man called, and rented a box in the name of H. Cornish; but Koch testified when Cornish stood up in court that he (Cornish) was not the man who rented the box. After the hiring of the box, some one wrote for Kutnow powders in the name of H. Cornish, and directed that they be sent to the letter box at 1620 Broadway, which the stranger had hired, and the letter was written on the same kind of blue paper, with a tricrescent emblem at the top, as Molineux used in his letter to Dr. James Burns on June 1st, asking for a remedy for impotency. The Kutnow powders were sent to 1620 Broadway, in pursuance of the request, but by mistake were placed in the wrong box. A letter was also written on the blue stationery with the tricrescent emblem, as in the other cases, to Von Mohl & Co., of Cincinnati, requesting a five days' trial of their remedy for impotency, the address given being 1620 Broadway. This letter was not written by Cornish. "Calthos" was the name of the remedy of Von Mohl & Co., and a box of it was sent to H. Cornish at 1620 Broadway. Some person other than Cornish, but in his name, sent a letter, also written on blue paper with the tricrescent emblem, as in the other instances referred to, to Frederick Stearns & Co., of Detroit, Michigan, concerning one A. A. Harpster, in which the address of H. Cornish was given as 1620 Broadway. I shall not refer further to the Harpster incident, which

is one of considerable importance, as disclosed by the record, other than to say in passing that Harpster was a great friend of Cornish, and had taken sides with him in Cornish's controversy with Molineux, thus arousing the enmity of Molineux, who took other steps looking to his injury besides writing the letter referred to asking for confidential information in relation to Harpster from his former employers, if he did write it. Cornish received through the mails a bottle of bromo seltzer containing syanide of mercury, a dose of which resulted in the death of Mrs. Adams, Molineux was a chemist, and a manufacturer of dry colors, and kept large quantities of Prussian blue and other dry colors, from which cyanide of mercury can be made. Three lay witnesses, who were familiar with the handwriting of Molineux, testified that the letters signed "H. Cornish," to which reference has been made, as well as the Barnet letters and the answers in the diagnosis blank, were in the handwriting of Molineux. And the testimony of a number of prominent experts in handwriting is to the same effect. But, aside from that testimony, there is to be gleaned from the letters themselves and the circumstances surrounding and attending their writing very strong evidence that one brain conceived and carried out both schemes. In each case the letter box was hired in the name of the intended victim; in each, remedies for impotency were written for in the name of the intended victim; both the Cornish and the Barnet letters were undated; both series of letters, as well as the address on the poison package, contained misspelled words; in each case a rare poison—cyanide of mercury—was employed; in both cases the mails were used to convey the poison to the intended victims; in both cases samples of Kutnow powder were written for, and were received at both boxes; calthos, a remedy for impotency, was also received at both boxes; Barnet and Cornish were members of the same club, and the poison sent to each was contained in a simple headache remedy in ordinary use. These facts and circumstances, standing wholly uncontradicted and unexplained, as they do, in this record, force the mind almost irresistibly to the conclusion that the same man desired the death of both Barnet and Cornish, and plotted and worked to accomplish it. Certainly a jury are at liberty to draw that inference, and, if they do, the conclusion will necessarily follow that Molineux was the criminal actor in the Cornish case, because he was positively identified as the actor in the Barnet case, both by the testimony of Heckman and by Molineux's description of himself in the diagnosis blank. The evidence in the Barnet case therefore tends to identify Molineux as the sender of the poison package in the Cornish case, thus supporting the evidence of the lay and expert witnesses who testified that the address on the poison package sent to Cornish was in the handwriting of Molineux. The Barnet evidence, therefore, is strictly with-

in one of the exceptions referred to in the prevailing opinion. It is said in *People* v. *Dimick,* 107 N. Y. 13, 32, 14 N. E. 178, that the people have the right, when it is material, to give proof of the facts constituting another crime, and have it submitted to the jury under proper instructions, although such proof may be inclusive; and, if this view of a unanimous court in that case should be followed, the Barnet evidence would be competent, although direct proof of the sending of the Kutnow powders through the mails should not be made out on the retrial.

This argument, however, has proceeded on the assumption that, in order to justify the retention of the evidence relating to the Barnet crime, it is necessary to establish every element relating thereto, which necessarily includes the receipt by Barnet of Kutnow powders through the mails. Hearsay evidence to that effect was admitted by the court, and its admission was error; but we cannot assume that on the new trial which is about to be ordered the people will not be able to establish that fact by competent evidence, and great care should be taken not to close the door against such evidence, if it exists, for that justice which the safety of society requires and the law demands has not as yet been meted out to the murderer of Mrs. Adams.

Haight, J., concurs.

Gray, J., dissenting:

I think the judgment of conviction should be reversed, and that the defendant should have a new trial, for error in the admission of testimony relating to declarations made by Barnet to his physician of his having received through the mail Kutnow powders, of his having taken a dose of them, and of his condition being due to that fact. In any view, such evidence was quite incompetent, and, of course, prejudicial to the defendant. With respect to the evidence relating to the death of Barnet, with some hesitation I have reached the conclusion that it was admissible, within the recognized exceptions to the rule which excludes proof by the prosecution of another crime. Unless the evidence was relevant to connect the defendant with the commission of the crime charged in the indictment, it was immaterial, and its effect could not have been other than prejudicial to his case. But it is well established that evidence of facts which show, or tend to show, the commission of another crime, is not, for that reason, inadmissible against the defendant, if they tend to prove his guilt under the indictment. If these other damaging or criminating facts throw any light upon motive or intent, if they establish the absence of mistake or accident, if they exhibit a scheme involving the commission of several crimes, or if they may become a means of identification of the person charged with the commission of the crime on trial, they become admissible for the purpose. The theory of the prosecution was that the defendant had caused Barnet's death by poison from motives of jealousy, and had attempted to poison Cornish from motives of hatred, provoked by per-

sonal conflicts and quarrels. It is plain that there could be no common motive, and the theory of the prosecution could only become serviceable if the evidence relating to the commission of a former crime would identify the defendant as the common perpetrator of both crimes. In my opinion, all of the exceptions to the general rule of evidence mentioned may be eliminated as of useless consideration, except that which makes all legal evidence admissible for the identification of the defendant. I cannot perceive its relevancy for the purpose of proving intent, or the absence of mistake, or accident. The defendant was shown to be familiar with the use of chemicals, and to have all the opportunities to concoct the particular poison which Cornish received through the mail, and from the taking of which Mrs. Adams subsequently died. If the evidence showed that he had sent this bottle containing its poisonous compound to Cornish, the felonious intention would be evident, and there would be no room for the idea of ignorance, mistake, or accident. It would be unnecessary to enter upon the proof of the other criminating facts in order to supply those elements of a case. Neither is it conceivable that the Barnet evidence would be admissible to prove a scheme which involved the commission of further crimes in connection with the killing of Barnet. There was no pretense of that. But there may be sufficient in the circumstances of Barnet's death to furnish support for the theory that the same person committed both crimes, and, with other circumstances testified to, to tend to an identification of the defendant. The rarity of the deadly drug used within a few weeks in both cases, its concealment in the same kind of powders as taken by Mrs. Adams and as found in Barnet's room after his death, and the use of the mail by the sender of the poison, in connection with the evidence showing, or tending to show, that defendant made use of the names of Barnet and of Cornish in the hiring and use of private letter boxes for various purposes, including the procuring of patent medicines, all of these facts would, if competently proved, have a tendency to show a unity or similarity of mental plan and operation, and bear upon the defendant's identification, however inconclusive in themselves. While, for the reasons I have briefly assigned, I think the evidence relating to Barnet's death was not inadmissible for the prosecution's case, the admission of the testimony of the physicians as to what Barnet told them about the reception and the taking of the powders was distinct error, and, in view of the nature of the case made, one which cannot be overlooked. It was objectionable as being hearsay evidence, and as not told for the purpose of treatment. Without that testimony there was no evidence that Barnet received any Kutnow powder containing the poisonous admixture through the mail, or that he took any of it, except as might be inferred from the autopsy performed upon his body some time after Mrs. Adams' death. If those material facts should be competently proved upon another trial, I am

§ 32. Conditions necessary to sustain the exceptions.—It is true that on the trial of all crimes known to the law, some one, or more, or perhaps all, of the exceptions to the fundamental rule, may properly present themselves in the development of the respective hypotheses of prosecution and defense. While the relevancy of such exceptions, under the limitations stated, is not now open to dispute, yet certain conditions must always exist as a predicate to their admission.

These exceptions, being a departure from the fundamental rule, are only admitted to render more certain the ascertainment of the exact truth as to the charge under trial.

In any loose relaxation of the rule the danger to the accused is that, under the exceptions, evidence may be adduced of offenses that he has not yet been called upon to defend, of which, if fairly tried, he might be able to acquit himself.

The collateral offense for which he has not been tried, first of all tends to prove his tendency towards crime, that is, to render more probable his guilt of the charge under trial, which is an absolute violation of the rule. It does not reflect in any degree upon the intelligence, integrity, or the honesty of pur-

of the opinion that the circumstances of Barnet's death would be within the province of the jury to pass upon as determining, in connection with all the other facts and circumstances, whether the same person poisoned Barnet and attempted to poison Cornish, and whether they pointed conclusively to the defendant as the criminal agent.

As to the handwriting evidence, I concur with Judge Werner's construction of the statutes; but, while conceding the admissibility of opinion evidence as to handwriting, I am, nevertheless, indisposed to concede to it such evidentiary character and strength as, like a fact, to constitute a link in the chain of circumstantial evidence upon which a capital conviction shall depend. Such evidence is entitled to be considered by the jury as corroborative of other evidence connecting the defendant with the commission of the crime.

In view of the responsibility imposed upon this court in capital cases, I think that the circumstances relied upon to support the defendant's conviction should be such as, when considered with the opinion evidence, to convince the mind of its absolute correctness.

pose of the juror, that matters of a prejudicial character find a permanent lodgment in his mind, which will, inadvertently and unconsciously, enter into and affect his verdict. The juror does not possess that trained and disciplined mind which enables him either closely or judicially to discriminate between that which he is permitted to consider and that which he is not. Because of this lack of training, he is unable to draw conclusions entirely uninfluenced by the irrelevant prejudicial matters within his knowldege. Indeed a knowledge of the extraneous facts, disclosed on examination, disqualifies the juror, if shown to be prejudicial, and such facts coming to his knowledge after his acceptance does not lessen the harm.

A man may fully recover from the effects of judicial tribulation, where it affects only his property or material interests. But recovery from the effects of a charge that involves his reputation and character, and that threatens his liberty or his life, is a recovery only in name. Absolute acquittal cannot completely restore him to the place he once held. The stain of prosecution cannot be eradicated. These momentous consequences demand a rigorous enforcement of the rule in criminal charges, that evidence of the collateral offense must never be admitted, unless the exception can be applied to more certainly demonstrate the truth. Hence: (a) Ground must first be laid implicating the accused in the charge under trial, and unless sufficient evidence of this has been, in the opinion of the trial judge, first adduced, all evidence of other offenses must be excluded; (b) the collateral offense cannot be put in evidence without proof that the accused was concerned in its commission;[1] (c) there must be identity of person or crime,

[1] *Reg.* v. *Harris,* 4 Fost. & F. 342. A letter to the defendant, inclosing counterfeit money, which letter has been taken from the post-office by the defendant, but not opened by him, or its genuineness acknowledged by him, is not evidence against him. *Com.* v. *Edgerly,* 10 Allen, 184; infra, § 682. So, forged paper found on the wife's person cannot be used against the husband without proving his knowl-

scienter, intent, system, or some integral parts of the exceptions established between the charge under trial and that sought to be introduced, that clearly connects the accused, showing that the person who committed the one must have committed the other.[2]

§ 33. Exceptions to the rule; res gestæ.—When a collateral offense, or, as it is sometimes called, an extraneous crime, forms part of the *res gestæ,* evidence of it is not excluded by the fact that it is extraneous.[1] As an isolated or disconnected fact, it is not relevant, nor where it is offered for the mere purpose of creating prejudice against or inviting sympathy for the accused;[2] but when offered under the excep-

edge. *People* v. *Thoms,* 3 Park. Crim. Rep. 256.

[2] In *Shulman* v. *People,* 14 Hun, 516, 20 Alb. L. J. 96, which was an indictment for procuring goods by false pretenses in January, 1876, evidence of similar representations to others in March, 1876, was offered to prove falsity, and was excluded for that purpose, but was admitted to show the knowledge of falsity in January. This was held error. See other cases infra, § 53; *Swan* v. *Com.* 104 Pa. 218, 4 Am. Crim. Rep. 188.

[1] *Rex* v. *Salisbury,* 5 Car. & P. 155; *Reg.* v. *Richardson,* 2 Fost. & F. 343, 8 Cox, C. C. 448; *Reg.* v. *Cobden,* 3 Fost. & F. 833; *Reg.* v. *Rearden,* 4 Fost. & F. 76; *Reg.* v. *Proud,* Leigh & C. C. C. 97, 31 L. J. Mag. Cas. N. S. 71, 8 Jur. N. S. 142, 5 L. T. N. S. 331, 10 Week. Rep. 62, 9 Cox, C. C. 22; *State* v. *Gorman,* 58 N. H. 77; *State* v. *Morton,* 27 Vt. 310, 65 Am. Dec. 201; *State* v. *Smalley,* 50 Vt. 736, 748; *Osborne* v. *People,* 2 Park. Crim. Rep. 583, 585; *Pierson* v. *People,* 18 Hun, 239, 252; *Hope* v. *People,* 83 N. Y. 418, 427, 38 Am. Rep. 460; *People* v. *Gibbs,* 93 N. Y. 470, 1 N. Y. Crim. Rep. 473; *People* v. *Noelke,* 94 N. Y. 137, 46 Am. Rep. 128, 1 N. Y. Crim. Rep. 495; *Brown* v. *Com.* 76 Pa. 319, 338; *Campbell* v. *Com.* 84 Pa. 187, 197; *Brown* v. *State,* 26 Ohio St. 176, 181; *Tarbox* v. *State,* 38 Ohio St. 581, 584; *State* v. *Murphy,* 84 N. C. 742, 743; *Pearce* v. *State,* 40 Ala. 720, 724; *Ross* v. *State,* 62 Ala. 224, 228; *Gray* v. *State,* 63 Ala. 66, 73; *State* v. *Adams,* 20 Kan. 311, 319; *State* v. *Cowell,* 12 Nev. 337, 342; *Street* v. *State,* 7 Tex. App. 9; *State* v. *Goff,* 117 N. C. 755, 762, 23 S. E. 355, 10 Am. Crim. Rep. 20.

[2] *Vale* v. *People,* 161 Ill. 309, 43 N. E. 1091; *Irvine* v. *State,* 26 Tex. App. 37, 49, 9 S. W. 55; *Sims* v. *State,* 146 Ala. 109, 41 So. 413; *Tijerina* v. *State,* 45 Tex. Crim. Rep. 182, 74 S. W. 913.

tions to the rule, it becomes a matter of substance with the charge on trial. And where such testimony is offered for several purposes, it is error to exclude it if it is competent for any one of such purposes.[3]

[3] *State* v. *Goff*, 117 N. C. 755, 762, 23 S. E. 355, 10 Am. Crim. Rep. 20.

The following cases are illustrations of the application of the rule in prosecutions for various crimes.

Murder.

Where two persons are killed at the same time and place, and apparently in the same transaction, or approximately so, evidence as to the circumstances of the killing of one is admissible on the trial under an indictment for the killing of the other. *People* v. *Smith*, 106 Cal. 74, 39 Pac. 40.

Where upon the trial of an indictment for murder it was claimed that the trial court erred in permitting the people to prove the killing of another person and an assault upon still another in the same fracas. The court held that as the evidence in reference to the two latter was inseparable from the evidence in relation to the killing of the person for whose murder the defendant was on trial, it was admissible as a part of one and the same transaction. *Hickam* v. *People*, 137 Ill. 75, 27 N. E. 88.

In *People* v. *Pallister*, 138 N. Y. 601, 33 N. E. 741, where defendant was indicted upon a charge of murder, it appearing that, the defendant attacked the deceased and his companions, inflicting a wound upon the former from which he afterwards died, and followed the others, who were running from him, stabbing another man three times, it was argued that it was error to admit the testimony as to the prisoner's stabbing the second man, inasmuch as it occurred after the offense of which the defendant stood indicted, and constituted no part of the *res gestæ*. But it was held that the exception was untenable; that the stabbing of the other man was something which occurred in the same affray as the killing with which defendant was charged, and was sufficiently connected therewith, as an incident, to make it admissible; that it was one of those surrounding circumstances which related to, and illustrated, the principal fact, and therein lay the principle of its admissibility.

On a trial for murder where it appeared that accused had assumed to be a spiritualistic medium, and had induced the victim to make and wear a certain belt, containing gold coins, for the purpose of developing power as a medium, and that deceased, when found, was without such belt and coins, and his clothing was in a condition indicating that the belt had been torn from his body, it was held that it was competent for the people to show that accused was dealing dishonestly with deceased, and attempting to get his money dishonestly and by

false pretenses; that all of defendant's dealings with his victim were admissible as part of the *res gestæ*. *People* v. *Ascher,* 126 Mich. 637, 86 N. W. 140.

Where the killing of one person was preceded by an attack upon another in his company, who fired his pistol at the assailants and fled, whereupon they pursued him for a short distance and then returned to the place of the attack, and, as was inferred from the circumstances, killed the person with whose murder they are charged, it is competent upon the trial for the state to show the attack upon the other person, as immediately connected with the killing charged, and as constituting part of the same transaction. *Doghead Glory* v. *State,* 13 Ark. 236.

Upon the trial of an indictment against two persons for the murder of a third, evidence of the killing of another person at the same time and place, by one of the accused, was held, in *State* v. *Vines,* 34 La. Ann. 1079, 4 Am. Crim. Rep. 296, to be admissible as part of the *res gestæ,* the general rule in homicide cases being that all that occurs at the time and place of the killing is admissible as *res gestæ*.

Where three persons were attacked at the same time, one being instantly killed, while another was killed and the third wounded in attempting to escape, the whole transaction lasting about two minutes, evidence of all that occurred was held to be admissible upon the trial of a woman charged as being present aiding and abetting another in the murder of the person first killed, including what happened after such killing as well as what took place before. *People* v. *Marble,* 38 Mich. 117.

Upon the trial of a man for the murder of one of his twin children evidence of the murder of the other child is admissible, it being impossible to give the circumstances concerning the death of the child named in the indictment without detailing those connected with the death of the other child. *People* v. *Foley,* 64 Mich. 148, 31 N. W. 94.

Evidence of the character of the wounds on the body of a murdered person is admissible in evidence on a prosecution for the murder of another; where the killing of the two men was part of one and the same transaction; all that took place and all that was said at the time of the killing being competent to go to the jury in determining the guilt or innocence of the accused and the degree of the crime with which he is charged. *People* v. *Wright,* 89 Mich. 70, 50 N. W. 792.

Defendant had been convicted of the murder of his wife. Upon his trial therefor the state was permitted to prove that, immediately after killing his wife, and within forty steps of her dead body, the defendant shot and killed another person. It was held that the evidence was clearly admissible as *res gestæ*. *Wilkerson* v. *State,* 31 Tex. Crim. Rep. 86, 19 S. W. 903.

Upon a trial for murder evidence was received, over the objection of defendant, tending to show that defendant and another had been in the business of horse stealing; that they had stolen quite a number of horses from different persons; and

that they, when they believed they were in danger of being arrested, resorted to their arms. Several fights were introduced in evidence under circumstances showing, evidently, that they were determined not to be arrested under any circumstances. Evidence was introduced tending to show that, after the homicide, they did not propose to be arrested, and that to prevent this they would resort to deadly weapons to prevent even a legal arrest. It appeared in evidence that the defendant and the other person mentioned were in possession of stolen horses, and the sheriff of the county, and the deceased, at the request of the sheriff, went to examine some horses to ascertain whether they were the stolen property; that, while they were looking at the horses, the defendant and the other person mentioned came up, and, as the latter was about to get on his horse, the sheriff walked past the defendant and halted the other man. Just as he did so he turned and saw deceased falling. It was held that, under the circumstances, all the evidence before mentioned was competent. *English* v. *State,* 34 Tex. Crim. Rep. 190, 30 S. W. 233.

Where a man and his wife were shot at the same time, the wife being instantly killed and the husband mortally wounded, evidence of the killing of the wife is properly admitted on a prosecution for the murder of the husband, as part of the *res gestæ*. *Crews* v. *State,* 34 Tex. Crim. Rep. 533, 31 S. W. 373.

A constable and a companion having been killed in an attempt to arrest a third person, evidence of the killing of the constable is admissible as part of the *res gestæ* on a prosecution for the murder of his companion, both killings being part of the same transaction and having occurred within a short time of each other; and it is also proper to admit evidence describing the wound on the body of the constable, from an examination made hours after the killing and after the body had been removed from the place where he was killed, since, if proof of the shot that killed him was proper, a description of the wound made by the shot was also proper. *People* v. *Coughlin,* 13 Utah, 58, 44 Pac. 94.

On the trial of an indictment for murder it was held proper for the counsel for the prosecution in opening to state to the jury that the circumstances of the whole transaction would show that the killing of the person named in the indictment and of two other young men occurred at one time and as one transaction; that all three of the boys met their death at the hands of the defendant, at about the same time; that it would be impossible to separate the proof of the killing for which defendant was on trial from the killing of the other two young men; and that the prosecution would show the killing of the three as part of one transaction; and testimony showing the whole transaction was admitted as a part of the *res gestæ*. *State* v. *Hayes,* 14 Utah, 118, 46 Pac. 752.

On a trial for murder, where the defendant, immediately after slaying his victim, proceeded to take,

chase, threaten, and endeavor to kill the mother of the deceased, who was present and witnessed the killing, such subsequent threats and acts of the defendant are admissible in evidence as part of the *res gestæ*, and to show the *animus* of the defendant. *Killins* v. *State*, 28 Fla. 313, 9 So. 711.

Upon a trial for murder of a woman by defendant where it appeared from the evidence that the infant child of the deceased was murdered at the same time, and evidently by the same hand that destroyed the mother's life, it was held that no error was committed in admitting evidence of the killing of the babe. *State* v. *Craemer*, 12 Wash. 217, 40 Pac. 944.

Upon the trial of an indictment for killing a deputy sheriff who at the time of the homicide was attempting to arrest the accused, a person who accompanied the officer may testify that the defendant, immediately after shooting the deputy sheriff, attempted to shoot him also, and knocked him down with his gun; these acts constituting a part of the *res gestæ*. *Seams* v. *State*, 84 Ala. 410, 4 So. 521.

Where two men were wounded by the defendant, such wounding occurring in the same encounter, and being done with the same weapon, and being almost simultaneous, on the trial of the defendant for assault with intent to murder one of them, evidence of a witness that he saw prosecutor's brother, just after the cutting, lying on a snowdrift alongside the road with a gash somewhere upon him, and the prosecutor standing between him and their buggy with a cut on his temple, is properly admitted. *Starr* v. *State*, 160 Ind. 661, 67 N. E. 527.

On the trial of a person for the murder of a woman, where it was shown that the prisoner had stated that he would kill two persons that night if he came across them, and it appeared that a witness for the prosecution, who lived in the house with the defendant, was on terms of intimacy with the woman who was killed.

On trial for the murder of one of three persons who the evidence tended to show were killed at the same time, by the same weapon; that the government had the right to lay before the jury the whole transaction of which the murder of the person for the killing of whom the defendant was on trial was a part; and that, for this purpose, the testimony of the physician as to the autopsy on one of the other persons killed was competent. *Com.* v. *Sturtivant*, 117 Mass. 122, 19 Am. Rep. 401.

On a trial for murder committed by defendants while attempting to escape an arrest for a previous burglary, evidence that, after the wounding of deceased, the defendants undertook to escape, and in doing so seized one or more teams to aid them in their flight, and of their final capture, is competent and admissible, as part of the *res gestæ*. *State* v. *Phillips*, 118 Iowa, 660, 92 N. W. 876.

Upon a trial for murder a state's witness said "that accused raised a stick, just prior to the difficulty with deceased, and attempted to strike (naming another person)."

The defendant's counsel objected to the statement on the ground that it tended to establish a different offense from that for which he was being prosecuted and tried, and to prejudice the minds of the jury against the accused. The court declined to sustain the objection, "because it was part of the *res gestæ,* and offered as such, and not to prove an independent, substantive offense, and could not be excluded, because it was so inseparably connected with the homicide that the facts of the one included the other." It was held that this ruling was correct. *State* v. *Fontenot,* 48 La. Ann. 305, 19 So. 111.

Assault with intent to murder.

Upon a prosecution for assault with intent to commit murder, where the facts show that defendant was in possession of a certain lot of hogs held for trespass, the property of the person assaulted, and that, upon the owner, in company with another person, driving up to the corral where the hogs were confined and alighting and engaging in conversation with defendant, words passed between them, whereupon the owner was struck by a club in the hands of defendant, who immediately thereafter attempted to assault the other person, who at once drove away, though pursued some distance by defendant, evidence of the second assault was held to be properly admitted as being part of the same affray and *res gestæ. People* v. *Teixeira,* 123 Cal. 297, 55 Pac. 988.

On the trial of an indictment for an assault with intent to murder charged to have been committed with a knife, evidence offered by the state, that, during the fight, the defendant seized a gun, is admissible as a part of the *res gestæ,* but not for the purpose of establishing an assault with the gun. *Weaver* v. *State,* 24 Tex. 387.

After the conviction of the defendant of the crime of assaulting another by wilfully shooting at him, where the trial court had propounded to the prosecuting witness the question whether the defendant had made an assault upon him with a knife just previous to the shooting, which was answered in the affirmative, and the trial judge had stated, in the bill of exceptions to his ruling admitting the testimony, that it was part of a continuous act; that the evidence showed that the assault made by the accused on the prosecutor with the knife immediately preceded the assault made by him on the prosecutor by wilfully shooting at him, —the supreme court, in affirming the conviction, said the narrative of the trial judge in the bill of exceptions brought the ruling within the exception to the general rule that evidence of another offense than that charged can be admitted as laid down in the jurisprudence of Louisiana. *State* v. *Porter,* 45 La. Ann. 661, 12 So. 832.

In a prosecution for assault with intent to murder, by the defendant upon his divorced wife, after evidence had been introduced, which was held to be competent, of prior assaults by defendant on the prosecutrix, the state was permitted to

prove that, one night, he shot at her and beat her; and, when she got away by running around the table, he took a slat from the bed and beat her mother, who was interceding for her, so that the latter was laid up for several days in bed, it was held that the assault upon the mother, occurring contemporaneously with the assaults upon the prosecutrix, was *res gestæ*. *Hamilton* v. *State*, — Tex. Crim. Rep. —, 56 S. W. 926.

In *Piela* v. *People*, 6 Colo. 343, where the indictment charged defendant with the crime of assaulting a person with intent to murder him, and the evidence showed that defendant delivered several blows with a knife, and at the same time also wounded another person. Statements by witnesses concerning the injury inflicted upon such other person, were held properly admitted on the ground that the striking of the blow which wounded the other person might be termed a part of the *res gestæ*, and that it would be difficult for witnesses to describe the transaction without speaking of this act.

Rape.

On the trial of a person charged with rape, it is proper for the state to prove, as part of the *res gestæ*, that, when the girl upon whom the crime was committed was being assaulted, she cried and called to her mother, and that the latter went to her, and was struck by the defendant. *Oakley* v. *State*, 135 Ala. 15, 33 So. 23.

Where a party is indicted for a rape, and a complete, detailed narrative of that offense by the witnesses involves a recital of another rape upon another female, it is not error to permit them to complete the detailed narrative of the offense for which the party is indicted, notwithstanding the recital of an offense for which he was not indicted. *Parkinson* v. *People*, — Ill. —, 24 N. E. 772.

So, on a trial for rape committed on a little girl when she was with another girl, evidence that defendant also committed rape on the other girl is admissible when it is impossible to give a detailed account of the offense charged without showing what the defendant did to the other girl. *Ibid.*

On a trial for rape where it appeared that the defendant, by force and the use of a pistol, compelled the prosecutrix and her male escort to go to the place where the offense was committed, and there tied the male escort, the latter while on the stand as a witness was asked by the prosecuting attorney if the defendant got anything from him, and he answered, "He got ten cents." This was assigned as error because tending to prove a distinct offense from that charged in the indictment. It was held that the answer was clearly admissible as part of the *res gestæ;* and in such a case it was not incompetent because it tended to show defendant guilty of robbery, as well as rape. *State* v. *Taylor*, — Mo. —, 22 S. W. 806, 118 Mo. 153, 24 S. W. 449, 11 Am. Crim. Rep. 51.

Upon the trial of an indictment for rape the injured party was al-

lowed, over objection of defendant, to tell the jury that her father-in-law was knocked down by defendant,—remained on the ground bleeding and helpless,—and that after the occurrence she got him into the house, and that he was then dead. It was held that the evidence was *res gestæ,* and germane to the accusation for which the accused was on trial. *Thompson* v. *State,* 11 Tex. App. 51.

Larceny.

It is competent for the state, on a trial for theft, to prove the theft of other property at the same time and place as that of the property in question, if such proof conduces to establish identity in developing the *res gestæ. Conley* v. *State,* 21 Tex. App. 495, 1 S. W. 454.

On the trial of an indictment for larceny evidence that, on the night previous to the taking of the horse for the stealing of which defendant was on trial, he stole a mule from another person, is admissible, where it appeared that the defendant and another person, who was indicted with him, afterwards disposed of both animals and another mule, which had been taken from the prosecutor at the time of taking the horse, to different persons in another state; as the stealing of the prosecutor's horse and mule, the stealing of the other person's mule, the flight, the sale of the stock, the pursuit and recovery of the property, and subsequent capture of the offenders, were all parts of one transaction, and so entirely connected that proof of the whole was admissible, as proof in regard to one part threw light upon the other. *Sartin* v. *State,* 7 Lea, 679.

On the trial of an indictment for larceny in stealing a quantity of wheat it appeared that the defendant had borrowed a wagon for hauling grain, and afterwards returned it with pieces broken off and a new singletree on it. The tracks of a wagon in which the grain had been taken were followed to a place where the wagon had broken down, and where were found pieces of a broken singletree belonging to it. It was held that, under the circumstances of this case, evidence that a horse, singletree, and shovel were stolen at night from a farm near where the wagon was broken down, and that the horse was afterwards sold by defendant, was clearly admissible as part of the *res gestæ. State* v. *Halpin,* 16 S. D. 170, 91 N. W. 605.

On a trial for larceny in stealing a horse, the owner of the animal, after testifying where he found the animal, and where he found and arrested the defendant, and that, when he brought him back to where he turned the animal loose, he went out in a bush and got the bridle with which he said he had ridden the animal, was permitted to state, against the objection of the defendant, that the bridle belonged to another man, from whom the defendant had stolen it. It was held that, while, generally speaking, it is not competent to prove a man guilty of one felony by proving him guilty of another, yet, where several felonies are connected together, and form a part of one en-

tire transaction, then one is evidence to prove the character of the other. *Dove* v. *State,* 37 Ark. 261.

On the trial of an indictment for the larceny of a hog, where the prosecutor testified that he identified the property as his, in an enclosure of the defendant, and demanded its delivery to him, it is competent for the state to prove, by the testimony of another witness, that at the same time and place, and in the presence of the prosecutor and defendant, such witness said that the other hog therein was his, and that he then and there claimed and demanded it of defendant. *State* v. *Murphy,* 84 N. C. 742.

On prosecution for the theft of a gelding evidence of confessions by defendant, after his arrest, as to the saddle with which the stolen horse had been ridden, and also as to the taking of another horse about the same time, was held admissible on the ground that the two offenses were directly connected with the offense for which he was indicted, were parts of the *res gestæ,* and links in a chain of circumstances proving his guilt of the theft with which he was charged; that, independently of any confessions by accused, these facts might have been proved as any other facts and circumstances in the case. *Speights* v. *State,* 1 Tex. App. 551.

Upon the trial of an indictment for theft of a mare, there was evidence that the mare, before she was missed, was running on her owner's range with her colt and a grey ridgeling owned by another man; that, at the time the mare was missed, the colt and grey ridgeling also disappeared from the range. On the trial it was proved that these animals were all found in another county, having been sold there by the defendant, who called himself by, and was passing under, another name. This evidence was directly connected with the main fact, and as such was properly admitted. *Satterwhite* v. *State* 6 Tex. App. 609.

In a prosecution for stealing a horse, evidence of the stealing of a saddle at the same time is admissible as part of the *res gestæ. Robinson* v. *State,* — Tex. Crim. Rep. —, 48 S. W. 176.

In *Bonners* v. *State,* — Tex. Crim. Rep. —, 35 S. W. 650, which was an appeal from conviction of the theft of a horse and two mules, the court said that there was no error in admitting testimony as to the sale to a witness of a horse stolen on the same night as said evidence was a part of the *res gestæ* of the offense charged against the defendant, and was legitimate testimony to identify the transaction, and to show the intent of the defendant.

Under an indictment for theft of silver money specifically described, and also of gold, and paper money, the specific coins and bills not being stated, it was held that, if defendant stole the silver, he was guilty of felony, whether he took the gold and paper money or not; and that evidence that he committed the theft of the gold and paper money, whether alleged in the indictment or not, was admissible to prove the theft of the silver, all

the money having been taken by one act. *Davis* v. *State,* 32 Tex. Crim. Rep. 377, 23 S. W. 794.

On an indictment for theft of money and a gold watch from a guest at a hotel, evidence of a person other than the prosecutor, who occupied a room at the hotel on the same night, that he was disturbed by someone attempting to open his door, is admissible, not for the purpose of establishing another and distinct felony, but as being a part of the same transaction. *Burr* v. *Com.* 4 Gratt. 534.

On the trial of a person for obtaining bank notes of the prosecutor by false pretenses, it appeared that the defendant falsely pretended that he had a warrant against the prosecutor for passing counterfeit money, and, by means of threats and promises in regard thereto, extracted bank notes from the prosecutor in a certain county; and on the next day defendant again pursued the prosecutor into an adjoining county, and falsely pretended that he had stolen his overcoat, and by means thereof extracted from the prosecutor articles of clothing. The indictment charged the defendant with obtaining bank notes by falsely pretending that the prosecutor had passed counterfeit money. It was held that the evidence of the transaction in the adjoining county was admissible to sustain the charge in the indictment, as it was part of the *res gestæ. Britt* v. *State,* 9 Humph. 31.

On a trial for stealing a horse, evidence that the defendant, on the same night and contemporaneously with the theft of the animal in question, took the two horses of the prosecutor, and, about a mile from the place of the first theft, took three horses belonging to another, and carried all of these horses together to another place, where he and another person arrived early on the following morning, and there disposed of all the horses,—is admissible for the purpose of developing the *res gestæ* of the transaction. *Glover* v. *State,* — Tex. Crim. Rep. —, 76 S. W. 465.

Receiving stolen property.

Where the prisoner was indicted for receiving 25 pounds weight of tin, knowing the same to have been stolen, and there was also two other indictments against the same prisoner, the one for stealing iron, and the other for receiving brass knowing it to have been stolen, it was proved by a constable on the trial, that, on his going to search the premises of the prisoner under a search warrant for stolen iron, he read the warrant over to the prisoner, and he was going to state what the prisoner said, when counsel for the prisoner objected that the witness should confine his statement to what was said respecting the tin. The court held that he must hear the whole that was said, both the part relating to the iron and also that relating to the tin,—if not it would be garbling the statement and the jury would not be able to understand it; and the evidence was given. It was further proved that the constable, on going into the prisoner's warehouse at the time

of the search, saw him with some brass in his hand, which he was endeavoring to conceal in some sand. This being objected to, the court held that it was all one transaction, and that all that took place upon the search was admissible. *Reg.* v. *Mansfield,* Car. & M. 140.

On the trial of an indictment charging the defendant with having received stolen goods, knowing them to be stolen, and which described the goods as cigars, cigarettes, and packages of tobacco of certain brands, where the proof tended to show that this property was stolen from a railroad car while in transit to the consignees of the property, evidence that dry goods owned by other persons, and consigned to other parties, in the same car with the property described in the indictment, were stolen from the car at the same time and by the same person and delivered to the defendant, is competent and admissible, since it would be difficult, if not impossible, to separate the transactions, as all the goods were in the same car, and the circumstances were such that the jury had the right to find, or infer, and all were taken therefrom by the same person. *People* v. *McClure,* 148 N. Y. 95, 42 N. E. 523, reversing 88 Hun, 505, 34 N. Y. Supp. 974.

On the trial of an indictment for receiving stolen goods which were claimed to have been taken by the person who sold them to the defendant, by burglary and theft, evidence of two other offenses of burglary and theft from another party, committed ten and eighteen days, respectively, subsequent to the burglary and theft charged in the indictment, is inadmissible, as it is no part of the *res gestæ* of the offense charged, or any part of a system showing that the person who sold the goods to the defendant, because he committed the subsequent thefts, committed the theft in question. *Bismark* v. *State,* 45 Tex. Crim. Rep. 54, 73 S. W. 965.

Burglary.

Defendant was indicted and convicted for breaking and entering a dwelling house in the nighttime, armed with a dangerous weapon, with intent to steal, rob, and kill. On the trial of the indictment the evidence of the prosecuting witness was that the accused attempted to kill him by shooting him. The trial judge admitted the testimony as part of the *res gestæ* to prove the intent to steal, rob, and kill. It was held that the evidence of intent to kill was pertinent to the charge brought, and the prosecuting witness could testify, to prove that intent, that he was actually shot while the defendant was in the act of committing the crime alleged.

State v. *Desroches,* 48 La. Ann. 428, 19 So. 250.

On a trial for burglary testimony in regard to the contemporaneous theft of other property at the time of the alleged burglary is admissible in evidence, notwithstanding the items were not alleged in the indictment, as a part of the *res gestæ* of the transaction, to aid in developing the *res gestæ,* and as evidence to establish the intent of the party in committing the offense charged.

Hayes v. *State,* 36 Tex. Crim. Rep. 146, 35 S. W. 983.

Where the defendant was indicted for burglary with an attempt to commit larceny, testimony tending to show larceny on the part of the alleged burglar was held properly as being part of the *res gestæ,* for the purpose of showing that an entry was made, and the circumstances attending the entry. *State* v. *Burton,* 27 Wash. 528, 67 Pac. 1097.

But on the trial of an indictment for burglary of a school house the court permitted evidence to be given of the theft of some wire and a cotton planter from another place, which property was found at the house of defendant's mother, where defendant and his two brothers lived. This was held to be error on the ground that evidence of other thefts, with which defendant was not connected, and of thefts of other articles of property, and from other and different places no specific time as to when said other property was actually taken from possession of said witness being given, could not be admitted as a part of the *res gestæ. Hunt* v. *State,* — Tex. Crim. Rep. —, 60 S. W. 965.

Robbery.

Upon a trial for robbery, the person whom it was alleged the defendant had robbed, upon his examination as a witness, after stating how he was made to give up his watch and money, was asked what occurred after he had given all the property he had, and answered that the defendant then turned his attention to another person, who was his witness's companion, and pointed his gun at him and on objection to this testimony was overruled on the ground that the robbery of both parties was practically one act, and the testimony was admissible as part of the *res gestæ. People* v. *Nelson,* 85 Cal. 421, 24 Pac. 1006.

Upon an appeal from a conviction of robbery it was urged by accused that, because the indictment failed jointly to charge the offenses of robbery and rape, and the court erred in admitting evidence showing that he slapped the assaulted party, "choken her down" and committed a rape upon her, immediately before committing the robbery with which he was charged, but the objection was held not tenable. As testimony was *res gestæ,* and so closely connected and interwoven with the robbery that, if excluded, an intelligent relation of the facts establishing such robbery could not be made. *Davis* v. *State,* — Tex. Crim. Rep. —, 23 S. W. 684.

Forgery.

Upon the trial of an information for forging a power of attorney purporting to convey authority to transfer real estate, evidence that the power of attorney and a deed purporting to be executed by the attorney named therein were both in the handwriting of another person, who was concerned with the defendant in the fraud which was perpetrated by means of the two documents together, is admissible

§ 34. Collateral offenses relevant to show identity.—Evidence of collateral offenses becomes relevant to the princi-

as constituting part of the *res gestæ*. *People* v. *Marion*, 29 Mich. 31.

On a prosecution for the forgery of a written instrument requesting a certain person to permit the defendant to have a bureau on the credit of the purported maker of the instrument, evidence that defendant also obtained, on the faith of the instrument, a bedstead was held to be admissible, notwithstanding defendant's objection to it on the ground that the paper alleged to have been forged did not name the bedstead, and did not appear to have been written to obtain a bedstead. *Hobbs* v. *State*, 75 Ala. 1.

Arson.

In *People* v. *Jones*, 123 Cal. 65, 55 Pac. 698, on a prosecution for arson in burning a dwelling house, evidence of the burning of other buildings at the same time was admitted, over defendant's objection, for the purpose of proving the *corpus delicti*, and also in corroboration of the confession of the defendant that his codefendant, after setting fire to the house, set fire to one of the other buildings.

In *Rex* v. *Long*, 6 Car. & P. 179, the prisoner had been charged on oath before a magistrate, by an accessory before the fact, with having set fire to three hay ricks belonging, respectively, to three different persons. When the prisoner was apprehended she was told that there was a very serious oath laid against her by the accessory, who had sworn that she had set fire to the ricks of the three different persons. The prisoner then made a statement which the trial judge allowed to be given in evidence upon the trial of the indictment. There were three indictments against the prisoner, one for firing each rick. The ricks were all set on fire, one immediately after the other, and were within sight of each other. The strongest evidence being as to the last, that indictment was tried first. The confession, however, related to all three, and the evidence of the accomplice as to all was admitted, as all constituted part of the same transaction.

Upon an indictment charging the prisoners with having feloniously, voluntarily, and maliciously set fire to a certain house, evidence was offered to prove that the prisoners were present in the house and implicated in the case by the finding of a bed and blanket in their possession, which had been taken out of the house at the time it was fired, and concealed by them from that time. Buller, J., doubted, as first, whether such evidence of another felony could be admitted in support of this charge; but, it seemed to be all one act, although the prisoners came twice to the house fired, which was adjoining their own, he admitted this among other evidence. Rickman's Case, 2 East, P. C. 1035.

pal charge when evidence thereof will serve to identify the accused or certain articles connected with the offense. Any object tending to identify the offense or the manner in which it was committed, or to point out upon whom or by whom, the place where, or time when, committed, is admissible as relevant for the inspection of the jury, but always with the provision that there has been no material alteration at the *locus* of the crime, nor conditions created subsequent to the commission of the act that change the facts as they actually existed.[1]

[1] *Reg.* v. *Rooney,* 7 Car. & P. 517; *Reg.* v. *Briggs,* 2 Moody & R. 199; *Goersen* v. *Com.* 99 Pa. 388; *Yarborough* v. *State,* 41 Ala. 405; *Satterwhite* v. *State,* 6 Tex. App. 609; *Musgrave* v. *State,* 28 Tex. App. 57, 60, 11 S. W. 927; *United States* v. *Boyd,* 45 Fed. 851, 869; *Reed* v. *State,* 54 Ark. 621, 626, 16 S. W. 819; *People* v. *McGilver,* 67 Cal. 55, 56, 7 Pac. 49, 6 Am. Crim. Rep. 106; *Cross* v. *People,* 47 Ill. 152, 161, 95 Am. Dec. 474; *Frazier* v. *State,* 135 Ind. 38, 40, 34 N. E. 817; *State* v. *Barrett,* 40 Minn. 65, 73, 41 N. W. 459; *People* v. *Murphy,* 135 N. Y. 450, 456, 32 N. E. 138; *People* v. *Schooley,* 149 N. Y. 99, 103, 43 N. E. 536; *State* v. *Fitzsimon,* 18 R. I. 236, 241, 49 Am. St. Rep. 766, 27 Atl. 446, 9 Am. Crim. Rep. 343; *Untreinor* v. *State,* 146 Ala. 133, 134, 41 So. 170.

The true distinction in this respect is well illustrated in a case before the supreme court at Albany, in September, 1868. *Hall* v. *People,* 6 Park. Crim. Rep. 671. The defendant was charged with burglariously opening the barn of J. G., and stealing certain articles, which were subsequently found on the defendant's boat, and in his possession. It was held to be erroneous to permit the prosecutor to prove that there was also found on the prisoner's boat other articles of property stolen from a third party, two or three weeks prior to the alleged burglary. "This testimony," said Peckham, J., "is loose and indirect,—inconclusive and dangerous. The people might have properly shown the condition of things where this property was found, but they could not prove another felony, unless it was so strongly connected with the felony charged as to prove, or strongly tend to prove, that the man who committed the one was guilty of the other. I remember a case of one Dunbar, tried for the murder of a boy in Albany county. It appeared that two little boys had been murdered the same afternoon and on the same farm,—were left together about midday, and were killed that afternoon. One was found, within a few days, hanging in a tree; the other, some distance off, on the same farm, killed by a flail and partly buried. There was

§ 35. Collateral offenses relevant in proving scienter.—Evidence of collateral offenses often becomes relevant where it is necessary to prove *scienter,* or guilty knowledge, even though the reception of such evidence might establish a different and independent offense.[1]

In prosecutions for receiving stolen goods, guilty knowledge is the gist or substance of the offense to be established by the prosecution; and evidence of collateral offenses is admissible to establish such knowledge.[2]

other evidence tending strongly to show that the same person must have killed both. On the trial for killing the one found buried, evidence was offered and received that the nails in the prisoner's boots fitted precisely the marks made in climbing the tree where the other body was found suspended. That testimony, I think, was clearly proper."

As illustrating the rule of the relevancy of the collateral offense to establish identity, on an indictment for arson, evidence was admitted to show that the property which had been taken out of the house was afterwards discovered in the accused's possession. *Rex* v. *Rickman,* 2 East, P. C. 1035.

So, on an indictment for stabbing, to identify the instrument, evidence was adduced of the shape of a wound given the accused by another person at the same time, although such wound was the subject of another indictment. *Reg.* v. *Fursey,* 6 Car. & P. 81.

Where an alibi is disputed, it is admissible to prove that at the time in issue the accused was present, perpetrating independent crimes. *Reg.* v. *Bleasdale,* 2 Car. & K. 765, 4 Mor. Min. Rep. 177; *Turner* v. *Com.* 86 Pa. 54, 27 Am. Rep. 683.

[1] *Showing scienter generally.*—*State* v. *Phelps,* 5 S. D. 480, 487, 59 N. W. 471; *Reg.* v. *Weeks,* Lehigh & 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. *Weil,* 243 Ill. 208, 134 Am. St. Rep. 357, 90 N. E. 751; *Cox* v. *State,* 162 Ala. 66, 50 So. 398; *Piano* v. *State,* 161 Ala. 88, 49 So. 803; *People* v. *Hagenow,* 236 Ill. 514, 86 N. E. 370; *Barnard* v. *United States.* 89 C. C. A. 376, 162 Fed. 618; *Ryan* v. *United States,* 20 App. D. C. 74, 6 A. & E. Ann. Cas. 633.

[2] *Scienter; receiving stolen goods.*—*Reg.* v. *Oddy,* 2 Den. C. C. 264, 5 Cox, C. C. 210, Temple & M. 593, 20 L. J. Mag. Cas. N. S. 198, 15 Jur. 517; *People* v. *Rando,* 3 Park. Crim. Rep. 335; *State* v. *Ward,* 49 Conn. 429, 440; *Kilrow* v. *Com.* 89 Pa. 480; *Yarborough* v. *State,* 41 Ala. 405, 408; *Beuchert* v. *State,* 165 Ind. 523, 527, 76 N. E. 111, 6 A. & E. Ann. Cas. 914; *Devoto* v. *Com.* 3 Met. (Ky.) 417, 418; *Goldsberry* v. *State,* 66 Neb. 312, 318, 92 N. W. 906; *People* v. *Crossman,* 168 N. Y.

It is equally important in forgery and counterfeiting to establish *scienter*. The accused is charged with holding or circulating forged paper. He may hold one without being justly chargeable with knowledge of its character; when three or four are traced to him, suspicion thickens; if fifteen or twenty are

47, 51, 60 N. E. 1050; *People* v. *Doty,* 175 N. Y. 165, 166, 67 N. E. 303; *Gassenheimer* v. *United States,* 26 App. D. C. 432; *Juretich* v. *People,* 223 Ill. 484, 79 N. E. 181; *Lipsey* v. *People,* 227 Ill. 364, 81 N. E. 348; *Woodward* v. *State,* 84 Ark. 119, 104 S. W. 1109; *State* v. *DuLaney,* 87 Ark. 17, 112 S. W. 158, 15 A. & E. Ann. Cas. 192; *People* v. *Whiteman,* 114 Cal. 338, 342, 46 Pac. 99.

But the other occasions on which the stolen property was received must not be so far removed in point of time as to form entirely different transactions. *Reg.* v. *Dunn,* 1 Moody, C. C. 150; *Reg.* v. *Oddy,* 2 Den. C. C. 264, Temple & M. 593, 5 Cox, C. C. 210, 20 L. J. Mag. Cas. N. S. 198, 15 Jur. 517; *Com.* v. *Hills,* 10 Cush. 530; *Coleman* v. *People,* 55 N. Y. 81; *Copperman* v. *People,* 56 N. Y. 591.

In *Reg.* v. *Nicholls,* 1 Fost. & F. 51, the prisoner was indicted for receiving a quantity of lead, knowing it to have been stolen. Cockburn, Ch. J., allowed evidence to be given that on several occasions, covering a series of months, the prisoner, in company with another person, had sold lead stolen from the same place, and taken a share of the money.

And the principal act, in order to admit the illustrative cases, must be antecedently proved. *Reg.* v. *Oddy,* 2 Den. C. C. 264, Temple & M. 593, 5 Cox, C. C. 210, 20 L. J. Mag. Cas. N. S. 198, 15 Jur. 517. And see supra, § 34.

"The positive side of the rule," says Sir J. Stephen (in Criminal Law, p. 309), "is of less importance than the negative side; but it is not easy to state precisely on what principle the line between what may and what may not be given in evidence has been drawn. The strongest case of admitting other transactions to show the character of the particular one under inquiry are the cases of the subsequent poisonings and precedent uttering of bad money.

The strongest case of excluding other transactions is the case of receiving stolen goods. Where a man is tried for this crime, it is not lawful to give in evidence the fact that the prisoner had knowingly received stolen goods on former occasions, to show that he knew that the particular goods are stolen. *Reg.* v. *Oddy,* 2 Den. C. C. 264, Temple & M. 593, 5 Cox, C. C. 210, 20 L. J. Mag. Cas. N. S. 198, 15 Jur. 517. How this differs from the case of uttering it is hard to understand.

In England, by act of Parliament, upon the trial of a person for receiving, evidence may be given

shown to have been in his possession at different times, then the improbability of innocence on his part decreases in proportion to the improbability that such papers could have been in his possession without his knowledge of the true character [3] of the paper. If the accused is charged with knowingly making or holding or passing the forged paper, the possession being shown, but knowledge of its character being disputed, the fact to be proved is that the knowledge was guilty knowledge; and it is admissible to show that, shortly before or after the fact charged, he had made or had held or had uttered simi-

of other property, stolen within the previous year, having been found in his possession at the same time as the property the subject-matter of the indictment, and evidence of his previous conviction within the preceding five years for any offense involving fraud or dishonesty may also be given. Stephen's Digest of Ev. part 1, chap. 3.

It is no objection to the proving of such receptions that they have been prosecuted in distinct indictments. *Rex* v. *Davis,* 6 Car. & P. 177.

[3] *Scienter in forgery.*—*People* v. *Sanders,* 114 Cal. 216, 230, 46 Pac. 153; *People* v. *Weaver,* 177 N. Y. 434, 444, 69 N. E. 1094; *Langford* v. *State,* 33 Fla. 233, 243, 14 So. 815; *Carver* v. *People,* 39 Mich. 786; *Ham* v. *State,* 4 Tex. App. 645, 673; *Mason* v. *State,* 31 Tex. Crim. Rep. 306, 309, 20 S. W. 564; *People* v. *Dolan,* 186 N. Y. 4, 116 Am. St. Rep. 521, 78 N. E. 569, 9 A. & E. Ann. Cas. 453; *State* v. *Calhoun,* 75 Kan. 259, 88 Pac. 1079; *Hinson* v. *State,* 53 Tex. Crim. Rep. 143, 109 S. W. 174.

Scienter, counterfeiting.—*People* v. *Clarkson,* 56 Mich. 164, 22 N. W. 258; *Mount* v. *Com.* 1 Duv. 90, 91; *Reg.* v. *Forster,* 6 Cox, C. C. 521, 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; *Rex* v. *Hough,* Russ. & R. C. C. 120; *Rex* v. *Ball,* Russ. & R. C. C. 132, 1 Campb. 324, 2 Leach, C. L. 987 note, 10 Revised Rep. 695; *Hodgson's Case,* 1 Lewin, C. C. 103; *Rex* v. *Balls,* 1 Moody, C. C. 470; *United States* v. *Craig,* 4 Wash. C. C. 729, Fed. Cas. No. 14,883; *United States* v. *Doebler,* Baldw. 519, Fed. Cas. No. 14,977; *United States* v. *Brooks,* 3 McArth. 315; *State* v. *McAllister,* 24 Me. 139, 143; *Com.* v. *Stearns,* 10 Met. 256, 257; *Com.* v. *Hall,* 4 Allen, 305, 306; *Com.* v. *Edgerly,* 10 Allen, 184, 186; *Spencer* v. *Com.* 2 Leigh, 751, 757; *Martin* v. *Com.* 2 Leigh, 745, 749; *Hendrick* v. *Com.* 5 Leigh, 708, 714; *Wash.* v. *Com.* 16 Gratt. 530, 540; *Heard* v. *State,* 9 Tex. App. 1, 20; *McCartney* v. *State,* 3 Ind. 353, 354, 56 Am. Dec. 510; *Steele* v. *People,* 45 Ill. 152, 157; *Fox* v. *People,* 95 Ill. 71, 75.

lar forged instruments to an extent that renders it improbable that he should have been ignorant of the forgery.[4]

At one time it was thought that, where a second passing of the forged instrument had been made the subject of a different indictment, evidence of such passing might, in the discretion of the judge, be refused;[5] but the fact of another indictment pending does not alter the rule as to relevancy.[6] As to the time when such passing must have taken place, in order

[4] On an indictment for uttering a Bank of England note, knowing it to be forged, the prosecution sought to show that the accused had uttered another forged note in the same manner, by the same hand, with the same materials, three months previously, and that two £10 and thirteen £1 notes had been found on the files of the company, of like fabrication, on the back of which was the accused's indorsement; but it did not appear when the company received them. The evidence was admitted. When referred to the judges for opinion, the majority were of opinion that it was admissible, "subject to observation as to the weight of it, which would be more or less considerable according to the number of notes, the distance of the time at which they had been put off, and the situation of the life of the defendant, so as to make it more or less probable that so many notes could pass through his hands in the course of business." *Rex* v. *Ball,* Russ. & R. C. C. 132, 1 Campb. 324, 2 Leach, C. L. 987 note, 10 Revised Rep. 695.

It is not necessary, in such cases, that other forged money should be of the same denomination as that under trial. *Rex* v. *Harris,* 7 Car. & P. 429; *Reg.* v. *Oddy,* 2 Den. C. C. 264, 5 Cox, C. C. 210, Temple & M. 593, 20 L. J. Mag. Cas. N. S. 198, 15 Jur. 517; *Reg.* v. *Foster,* 24 L. J. Mag. Cas. N. S. 134, Dears. C. C. 456, 3 C. L. R. 681, 1 Jur. N. S. 407, 6 Cox, C. C. 521, 29 Eng. L. & Eq. Rep. 548; *State* v. *Smith,* 5 Day, 175, 5 Am. Dec. 132; *Stalker* v. *State,* 9 Conn. 341; *Reed* v. *State,* 15 Ohio, 217.

[5] *Rex* v. *Smith,* 2 Car. & P. 633; Talfourd's Dickin. Sess. 359.

[6] *Hodgson's Case,* 1 Lewin, C. C. 103; *Kirkwood's Case,* 1 Lewin, C. C. 103; *Reg.* v. *Foster,* 29 Eng. L. & Eq. Rep. 548, 6 Cox, C. C. 521, 24 L. J. Mag. Cas. N. S. 134, Dears. C. C. 456, 3 C. L. R. 681, 1 Jur. N. S. 407; *People* v. *Curling,* 1 Johns. 320; *Hoskins* v. *State,* 11 Ga. 92.

It has frequently been decided that an acquittal of forging or uttering a particular forged paper will not preclude the state from proving the fact of the possession or the uttering of such forged paper in another prosecution against the same party for a crime of the same character. This principle was fully recognized and applied in the

to be admissible as relevant, it is impracticable to lay down any general test, but it is to be gathered from all the surrounding circumstances, taking into consideration the situation in life of the accused, his knowledge and experience, and the manner and the means and method employed.[7]

It was at one time doubted whether a guilty receiving or uttering subsequent to that charged in the indictment was admissible in evidence.[8] It is, however, now settled that such collateral offenses, in forgery and counterfeiting, even though committed subsequently, are relevant to show guilty knowledge. And in a recent English case[9] the court of criminal appeal held that, on an indictment for uttering a counterfeit Crown piece, knowing it to be counterfeit, proof that the prisoner, on a day subsequent to the day of such uttering, uttered a counterfeit shilling, was admissible to prove the guilty knowledge of the prisoner. "The uttering of a piece of bad silver," said the court, "although of a different denomination from that alleged in the indictment, is so connected with the offense charged that the evidence of it was receivable. But such subsequent utterings and passings must not be too remote, and there must be evidence showing, in addition, that the subsequent collateral offense is in the nature of a continuing offense, and similar to the charge on trial.[10]

following cases: *Smith's Case,* 4 N. Y. City Hall Rec. 167, 168; *State* v. *Houston,* 1 Bail. L. 300; *McCartney* v. *State,* 3 Ind. 354, 56 Am. Dec. 510; *State* v. *Jesse,* 20 N. C. 95, (3 Dev. & B. L. 103); *People* v. *Frank,* 28 Cal. 515; *Rex* v. *Vandercomb,* 2 Leach, C, L. 720; *State* v. *Robinson,* 16 N. J. L. 508; *United States* v. *Randenbush,* 8 Pet. 288, 290, 8 L. ed. 948, 949; *Bell* v. *State,* 57 Md. 108.

[7] *Reg.* v. *Salt,* 3 Fost. & F. 834.

[8] *Rex* v. *Taverner,* 4 Car. & P. 413; *Rex* v. *Smith,* 4 Car. & P. 411; *Reg.* v. *Oddy,* 2 Den. C. C. 264, Temple & M. 593, 5 Cox, C. C. 210, 20 L. J. Mag. Cas. N. S. 198, 15 Jur. 517.

[9] *Rex* v. *Foster,* 24 L. J. Mag. Cas. N. S. 134, 29 Eng. L. & Eq. Rep. 548, Dears. C. C. 456, 6 Cox. C. C. 521, 3 C. L. R. 681.

[10] *Com.* v. *Price,* 10 Gray, 472, 71 Am. Dec. 668; *Reg.* v. *Foster,* 6 Cox, C. C. 521, 24 L. J. Mag. Cas. N. S. 134, Dears. C. C. 456, 3 C. L. R. 681, 1 Jur. N. S. 407; *Reg.* v. *Rob-*

But evidence of the independent or collateral offense is never admissible in cases of forgery, unless the instrument forming the basis of the independent offense is produced, or accounted for by showing that the defendant took it back or destroyed it.[11] It must be proved with the same fullness and the same directness as is the instrument which the accused is charged with forging or uttering, or evidence of it cannot be received.

As will be shown later, utterings by the accused's accomplices are as admissible as utterings by himself, the accomplice-ship being first shown.[12]

§ 36. Collateral offenses relevant where intent essential.—In many criminal offenses, intent is the essence of the crime, and where not established, the prosecution fails. In crimes *malum in se,* intent is presumed, but where not a matter of presumption, it must be proven as any other fact. Where intent is material, the acts, declarations, and conduct of the accused are relevant to show that intent. Hence, evidence of collateral offenses is admissible, on the trial of the main charge, to prove the intent. To be admissible as relevant, such offenses need not be exactly concurrent, but if committed within such time, or show such relation to the main charge, as to make connection obvious, such offenses are admissible to show intent.[1]

inson, 2 Leach, C. L. 749, 2 East, P. C. 1110; *Com.* v. *White,* 145 Mass. 392, 14 N. E. 611, 7 Am. Crim. Rep. 192.

[11] *Rex* v. *Millard,* Russ. & R. C. C. 245; *Rex* v. *Forbes,* 7 Car. & P. 224; *Phillip's Case,* 1 Lewin C. C. 105; *Com.* v. *Bigelow,* 8 Met. 235; *Martin* v. *Com.* 2 Leigh, 745.

[12] Post, §§ 698 et seq.

[1] *Intent generally.*— *Rex* v. *Millard,* Russ. & R. C. C. 245; *Reg.* v. *Wylie,* 1 Bos. & P. N. R. 93; *Rex* v. *Ball,* Russ. & R. C. C. 132, 1 Campb. 324, 2 Leach, C. L. 987, Note 10 Revised Rep. 695; *Rex* v. *Dosset,* 2 Cox, C. C. 243, 2 Car. & K. 306; *Reg.* v. *Weeks,* 1 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; *Bottomley* v. *United States,* 1 Story, 135, Fed. Cas. No. 1,688; *State* v. *Watkins,* 9 Conn. 47, 21 Am. Dec. 712; *State* v. *Wentworth,* 37 N. H. 196; *Com.* v. *Tuckerman,* 10 Gray,

Thus the defendant's manner at the time of passing counterfeit money may be proved for the purpose of showing his in-

173; *Com.* v. *Bradford,* 126 Mass. 46; *People* v. *Hopson,* 1 Denio, 574; *Stout* v. *People,* 4 Park. Crim. Rep. 71; *People* v. *Lyon,* 1 N. Y. Crim. Rep. 400; *Goersen* v. *Com.* 99 Pa. 388; *Tarbox* v. *State,* 38 Ohio St. 581; *State* v. *Kline,* 54 Iowa, 183, 6 N. W. 184; *Cole* v. *Com.* 5 Gratt. 696; *State* v. *Raymond,* 20 Iowa, 582; *State* v. *Rash,* 34 N. C. (12 Ired. L.) 382, 55 Am. Dec. 420; *Johnson* v. *State,* 17 Ala. 618; *Butler* v. *State,* 22 Ala. 43; *State* v. *Larkin,* 11 Nev. 314; *People* v. *Lopez,* 59 Cal. 362; *Street* v. *State,* 7 Tex. App. 5; *Pinckord* v. *State,* 13 Tex. App. 468; *Dubose* v. *State,* 13 Tex. App. 418; *United States* v. *Watson,* 35 Fed. 358, 359; *State* v. *Stice,* 88 Iowa, 27, 28, 55 N. W. 17, 9 Am. Crim. Rep. 362; *State* v. *Burns,* 35 Kan. 387, 389, 11 Pac. 161; *Packer* v. *United States,* 46 C. C. A. 35, 106 Fed. 906, 909; *United States* v. *Kenney,* 90 Fed. 257, 267; *People* v. *Cook,* 148 Cal. 334, 341, 83 Pac. 43; *Crum* v. *State,* 148 Ind. 401, 411, 47 N. E. 833; *People* v. *Wakely,* 62 Mich. 297, 303, 28 N. W. 871; *Beberstein* v. *Territory,* 8 Okla. 467, 468, 58 Pac. 641; *Stanfield* v. *State,* 43 Tex. Crim. Rep. 10, 12, 62 S. W. 917; *Storms* v. *State,* 81 Ark. 25, 32, 98 S. W. 678; *Clark* v. *People,* 224 Ill. 554, 563, 79 N. E. 941; *State* v. *Louanis,* 79 Vt. 463, 467, 65 Atl. 532, 9 A. & E. Ann. Cas. 194; *People* v. *Weinseimer,* 117 App. Div. 603, 102 N. Y. Supp. 579, 589.

See also note in 62 L.R.A. 214.

On the trial of an indictment for accusing a person of an unnatural crime with intent to extort money, —the prisoner being a soldier, and the accusation having been made while he was on duty as a sentry, —evidence of declarations made by him on a former occasion, on coming off guard, that he had obtained money from a gentleman by threatening to take him to the guardhouse and accuse him of an unnatural crime, is admissible. *Reg.* v. *Cooper,* 3 Cox, C. C. 547; post, § 40.

The cases are thus grouped in the 8th edition of Roscoe, Crim. Ev. 99:

"In *Rex* v. *Roebuck,* 25 L. J. Mag. Cas. N. S. 101, Dears. & B. C. C. 24, 2 Jur. N. S. 597, 4 Week. Rep. 514, 7 Cox, C. C. 126, the prisoner was indicted for obtaining money from a pawn broker by falsely pretending that a chain was silver. The chain was of a very inferior metal, and evidence was admitted, apparently without objection, that twenty-six chains were found on the prisoner, and that these were of similar materials. Evidence was also admitted that the defendant, a few days after the occasion in question, offered a similar chain to another pawnbroker, under similar circumstances. This was objected to, and the point, with other points, reserved. There is no trace of any discussion on this point, or any allusion to it in the judgment of the court in any of the reports; but the conviction was affirmed. The prisoner did not ap-

pear by counsel. See *Reg.* v. *Holt*, 9 Week. Rep. 74; Bell, C. C. 280, 30 L. J. Mag. Cas. N. S. 11, 6 Jur. N. S. 1121, 3 L. T. N. S. 310, 8 Cox, C. C. 411; *Rex* v. *Balls*, L. R. 1 C. C. 328, 40 L. J. Mag. Cas. N. S. 148, 24 L. T. N. S. 760, 19 Week. Rep. 876, 12 Cox, C. C. 96; *People* v. *Larned*, 7 N. Y. 445. See post, § 39.

Intent in larceny.— *Brown* v. *United States*, 73 C. C. A. 187, 142 Fed. 1, 7; *Dorsey* v. *United States*, 41 C. C. A. 652, 101 Fed. 746; *Bacon* v. *United States*, 38 C. C. A. 37, 97 Fed. 35, 42; *Shipp* v. *Com.* 101 Ky. 518, 524, 525, 41 S. W. 856; *People* v. *Nagle*, 137 Mich. 88, 92, 100 N. W. 273; *State* v. *Phillips*, 160 Mo. 503, 506, 60 S. W. 1050; *State* v. *Rosenberg*, 162 Mo. 358, 371, 63 S. W. 435, 982; *People* v. *Lovejoy*, 37 App. Div. 52, 55 N. Y. Supp. 543, 545, 13 N. Y. Crim. Rep. 411; *State* v. *Savage*, 36 Or. 191, 205, 60 Pac. 610, 61 Pac. 1128.

See also note in 62 L.R.A. 231.

Intent in false pretenses.—*Reg.* v. *Francis*, 12 Cox, C. C. 612, 43 L. J. Mag. Cas. N. S. 97, L. R. 2 C. C. 128, 30 L. T. N. S. 503, 22 Week. Rep. 663; *Reg.* v. *Holt*, 8 Cox, C. C. 411, Bell, C. C. 280, 30 L. J. Mag. Cas. N. S. 11, 6 Jur. N. S. 1121, 3 L. T. N. S. 310, 9 Week. Rep. 74; *State* v. *Roberts*, 201 Mo. 702, 727, 100 S. W. 484; *People* v. *Levin*, 119 App. Div. 233, 104 N. Y. Supp. 647.

Intent in false pretenses; confidence games.—*Johnson* v. *State*, 75 Ark. 427, 433, 88 S. W. 905; *Housh* v. *People*, 24 Colo. 262, 264, 50 Pac. 1036; *State* v. *Brady*, 100 Iowa, 191, 195, 36 L.R.A. 693, 62 Am. St. Rep. 560, 69 N. W. 290; *State* v. *Gibson*, 132 Iowa, 53, 57, 106 N. W. 270; *Com.* v. *Blood*, 141 Mass. 571, 575; 6 N. E. 769; *Com.* v. *Lubinsky*, 182 Mass. 142, 143, 64 N. E. 966; *People* v. *Robertson*, 129 Mich. 627, 89 N. W. 340; *People* v. *Hoffman*, 142 Mich. 531, 557, 105 N. W. 838; *State* v. *Beaucleigh*, 92 Mo. 490, 493, 4 S. W. 666; *State* v. *Turley*, 142 Mo. 403, 411, 44 S. W. 267; *State* v. *Wilson*, 143 Mo. 334, 346, 44 S. W. 722; *People* v. *Putnam*, 90 App. Div. 125, 85 N. Y. Supp. 1056, 1062; 18 N. Y. Crim. Rep. 103; *Trogdon* v. *Com.* 31 Gratt. 862, 874; *State* v. *Call*, 48 N. H. 126, 132.

See also note in 62 L.R.A. 240.

Intent in homicide.—*West* v. *State*, 42 Fla. 244, 250, 28 So. 430; *State* v. *McGann*, 8 Idaho, 40, 46, 66 Pac. 823; *State* v. *Register*, 133 N. C. 746, 751, 46 S. E. 21; *O'Boyle* v. *Com.* 100 Va. 785, 792, 40 S. E. 121; *Greenwell* v. *Com.* 30 Ky. L. Rep. 1282, 100 S. W. 852.

See also note in 62 L.R.A. 227.

Intent in counterfeiting.—*Dillard* v. *United States*, 72 C. C. 451, 141 Fed. 303, 308; *Bryan* v. *United States*, 66 C. C. A. 369, 133 Fed. 495, 500; *Wright* v. *State*, 138 Ala. 69, 71, 34 So. 1009; *State* v. *Hodges*, 144 Mo. 50, 53, 45 S. W. 1093; *Burlingim* v. *State*, 61 Neb. 276, 279, 85 N. W. 76; *Leslie* v. *State*, — Tex. Crim. Rep. —, 47 S. W. 367; *Butler* v. *State*, 22 Ala. 43; *State* v. *Newman*, 34 Mont. 434, 440, 87 Pac. 462; *State* v. *Stark*, 202 Mo. 210, 222, 100 S. W. 642.

See also note in 62 L.R.A. 257.

tention.[2] For the same reason, evidence of prior sexual assaults on the prosecutrix are admissible on an indictment for rape,[3] though not of rapes on other persons.[4] On the trial, also, of an indictment for murder committed when attempting a rape, proof of prior sexual attacks on the deceased is admissible.[5] And to show an old grudge, it is admissible to prove

Intent in burglary. — *State* v. *Franke,* 159 Mo. 535, 543, 60 S. W. 1053; *Denton* v. *State,* 42 Tex. Crim. Rep. 427, 430, 60 S. W. 670; *State* v. *Ward,* — Iowa, —, 91 N. W. 898; *People* v. *Larned,* 7 N. Y. 445.

See also note in 62 L.R.A. 236.

Intent in arson.

A defendant is charged with firing his house in order to defraud the insurers. To meet this it is admissible to prove that on prior occasion houses occupied by him had been burned and that he had obtained payment for the same from separate insurance companies. *Reg.* v. *Gray,* 4 Fost. & F. 1102; *Com.* v. *McCarthy,* 119 Mass. 354.

And likewise, for the same object, evidence of an attempt three days before, at firing, by the same defendant, of the same property, may be received. *Com.* v. *Bradford,* 126 Mass. 42; *Faucett* v. *Nichols,* 64 N. Y. 377; *Reg.* v. *Bailey,* 2 Cox, C. C. 311; *Mitchell* v. *State,* 140 Ala. 118, 121, 103 Am. St. Rep. 17, 37 So. 76; *Knights* v. *State,* 58 Neb. 225, 231, 76 Am. St. Rep. 78, 78 N. W. 508; *Kramer* v. *Com.* 87 Pa. 299.

See also note in 62 L.R.A. 238.

Intent in rape.—*State* v. *Walters,* 45 Iowa, 389; *State* v. *Lapage,* 57 N. H. 245, 287, 24 Am. Rep. 69, 2 Am. Crim. Rep. 506; *Powell* v. *State,* 13 Tex. App. 244; (Burglary) *State* v. *Knapp,* 45 N. H. 148; *State* v. *Carpenter,* 124 Iowa, 5, 9, 98 N. W. 775; *Grabowski* v. *State,* 126 Wis. 447, 454, 105 N. W. 805; *State* v. *Johnson,* 133 Iowa, 38, 40, 110 N. W. 170.

[2] *Butler* v. *State,* 22 Ala. 43; Bayley, Bills, 449; Archbold, Crim. Pl. 9th ed. 103; post, § 751.

So, on a charge of sending a threatening letter, prior and subsequent letters from the prisoner to the party threatened may be shown in evidence, as explanatory of the meaning and intent of the particular letter on which the prosecution is based. *Reg.* v. *Robinson,* 2 Leach, C. L. 749, note, 2 East, P. C. 1110; post, § 756.

Guilty knowledge and intent, also, in prosecutions for the sale of intoxicating liquor, may be proved by former convictions for the same offense, post, § 39.

[3] *State* v. *Walters,* 45 Iowa, 389 and cases cited, post, § 45.

[4] *State* v. *Walters,* 45 Iowa, 389 and cases cited, post § 45; *State* v. *Lapage,* 57 N. H. 245, 24 Am. Rep. 69, 2 Am. Crim. Rep. 506.

[5] *State* v. *Lapage,* 57 N. H. 245, 24 Am. Rep. 69, 2 Am. Crim. Rep. 506; *Turner* v. *Com.* 86 Pa. 54, 27 Am. Rep. 683; post, § 39.

that the defendant had been in prison for a burglary committed in the house of the deceased.[6] It is essential, however, that such evidence, if admitted, should be simply to prove intent, and not to prove character, or establish a substantive and independent crime.[7] Thus, in 1861, in Massachusetts, a new trial was granted in a case of embezzlement, where evidence of distinct acts of fraud was admitted, but where it did not appear that such evidence was limited by the judge, in his instructions to the jury, to the question of intent.[8]

§ 37. When there is other evidence or presumption of intent.—One of the questions upon which the courts do not seem to have agreed is whether, when there is other evidence of intent in the case, evidence of another crime may be given; some of the authorities holding that, if the evidence is admissible at all, the fact that there is other evidence of intent will not render it incompetent;[1] while others decide that the exception to the general rule forbidding the receipt of this

[6] *Powell* v. *State,* 13 Tex. App. 244.

[7] See *Mayer* v. *People,* 80 N. Y. 364; *Shipply* v. *People,* 86 N. Y. 375, 40 Am. Rep. 551; *Pinckord* v. *State,* 13 Tex. App. 468.

[8] *Com.* v. *Shepard,* 1 Allen, 575. See *Rex* v. *Ball,* Russ. & R. C. C. 132, 1 Campb. 324, 2 Leach, C. L. 987, note, 10 Revised Rep. 695; *Com.* v. *Vaughan,* 9 Cush. 594.

[1] *Com.* v. *Miller,* 3 Cush. 243; *State* v. *Flynn,* 124 Mo. 480, 27 S. W. 1105; *Crum* v. *State,* 148 Ind. 401, 47 N. E. 833, overruling on this point *Strong* v. *State,* 86 Ind. 208, 44 Am. Rep. 292; *Higgins* v. *State,* 157 Ind. 57, 60 N. E. 685.

The last case cited is especially strong in asserting the doctrine that evidence of another crime, to prove intent, is not rendered inadmissible by either the fact that there is other sufficient proof of intent, or the fact that the accused admits the presence of it; and that, in the language of the court, "we do not think that the admission of any competent evidence can be rendered erroneous by statements or admissions of the accused, made to the court and jury during the trial." This decision is of peculiar value, the opinion exhibiting great research among the authorities and classifying instances in which other crimes, if they tend to prove certain facts, may be given in evidence.

kind of evidence is one of necessity, and that the introduction of the evidence should only be permitted when the exigency of the particular case demands it.[2]

§ 38. Relevancy to show motive.—Evidence of the motive which suggests the doing of the act constituting the crime charged is always admissible, notwithstanding it may tend to prove an independent crime. Motive is not infrequently regarded in the popular mind as one and the same thing as intent. And not only in the popular mind, but in the legal and judicial also, are they mixed and mingled and "jumbled together like poisons and antidotes on an apothecary's shelf." There is, however, a distinct and material difference. Criminal motive is the inducement, existing in the minds of persons, causing them, first, to intend and afterwards to commit crime. It exists as a component in every crime,—faintly in some; prominently in others; but in all, it exists. But it is not such an essential ingredient of the crime as to be necessary, and in some cases even of use, in securing a conviction. In the abstract it might be said that it is unnecessary. But in those cases in which the evidence of the crime charged is for the most part or wholly of a circumstantial character, motive frequently becomes a powerful aid in identifying the accused, and thus connecting him with the commission of the crime. And where, on the trial of a criminal action, evidence is offered which is competent proof of the presence of motive in the mind of the accused, such evidence is not to be rejected because it also shows, or tends to show, a distinct and different crime.[1]

[2] *Reg.* v. *McDonnell,* 5 Cox, C. C. 153; *Jackson* v. *People,* 18 Ill. App. 508; *People* v. *Lonsdale,* 122 Mich. 388, 81 N. W. 277, 12 Am. Crim. Rep. 256; *State* v. *Burlingame,* 146 Mo. 207, 48 S. W. 72; *State* v. *Goetz,* 34 Mo. 85.

[1] *Hawes* v. *State,* 88 Ala. 37, 7 So. 302; *Martin* v. *State,* 28 Ala. 71; *Wiley* v. *State,* 3 Coldw. 362; *Com.* v. *Robinson,* 146 Mass. 571, 16 N. E. 452; *Beberstein* v. *Territory,* 8 Okla. 467, 58 Pac. 641; *People* v. *Peckens,* 153 N. Y. 576, 47

§ 39. Collateral offenses relevant to show system.—When the object is to show system, subsequent as well as prior collateral offenses can be put in evidence, and from such system identity or intent can often be shown. The question is one of induction, and the larger the number of consistent facts, the more complete the induction is. The time of the collateral facts is immaterial, provided they are close enough together to indicate that they are a part of the system.[1] In order to

N. E. 883; *Mayer* v. *People,* 80 N. Y. 364; *Carroll* v. *Com.* 84 Pa. 107, 2 Am. Crim. Rep. 290; *Campbell* v. *Com.* 84 Pa. 187; *Hester* v. *Com.* 85 Pa. 139; *McManus* v. *Com.* 91 Pa. 57; *Duffy* v. *Com.* 6 W. N. C. 311; *State* v. *Phelps,* 5 S. D. 480, 59 N. W. 471; *Zoldoske* v. *State,* 82 Wis. 580, 52 N. W. 778; *People* v. *Ascher,* 126 Mich. 637, 86 N. W. 140; *Barton* v. *State,* 28 Tex. App. 483, 13 S. W. 783; *Leeper* v. *State,* 29 Tex. App. 63, 14 S. W. 398; *West* v. *State,* 42 Fla. 244, 28 So. 430; *Com.* v. *Ferrigan,* 44 Pa. 386; *Miller* v. *State,* 31 Tex. Crim. Rep. 609, 37 Am. St. Rep. 836, 21 S. W. 925; *Hamblin* v. *State,* 41 Tex. Crim. Rep. 135, 50 S. W. 1019, 51 S. W. 1111; *State* v. *Bradley,* 67 Vt. 465, 32 Atl. 238; *Siebert* v. *People,* 143 Ill. 571, 32 N. E. 431; *State* v. *Kent,* (*State* v. *Pancoast*), 5 N. D. 516, 35 L.R.A. 518, 67 N. W. 1052; *State* v. *McGann,* 8 Idaho, 40, 66 Pac. 823; *O'Boyle* v. *Com.* 100 Va. 785, 40 S. E. 121; *People* v. *Harris,* 136 N. Y. 423, 33 N. E. 65; *Jones* v. *State,* 63 Ga. 395; *Watts* v. *State,* 5 W. Va. 532; *People* v. *Walters,* 98 Cal. 138, 32 Pac. 864; *State* v. *Kline,* 54 Iowa, 183, 6 N. W. 184; *State* v. *Lowe,* 6 Kan. App. 110, 50 Pac. 912; *Maden* v. *Com.* 4 Ky. L. Rep. 45; *State* v. *Deschamps,* 42 La. Ann. 567, 21 Am. St. Rep. 392, 7 So. 703; *State* v. *Williamson,* 106 Mo. 162, 17 S. W. 172; *State* v. *Palmer,* 65 N. H. 216, 20 Atl. 6, 8 Am. Crim. Rep. 196.

But proof of the killing of a third person is not admissible on a trial for murder to show motive, upon the ground that accused had forged the name of both decedents to letters, where there is nothing in either set which sheds any light upon the question of motive for the other crime. *People* v. *Molineux,* 168 N. Y. 264, 62 L.R.A. 193, 61 N. E. 286.

[1] *System in general.—Reg.* v. *Rearden,* 4 Fost. & F. 76; *State* v. *Bridgman,* 49 Vt. 202, 209, 24 Am. Rep. 124; *Com.* v. *Price,* 10 Gray, 472, 71 Am. Dec. 668; *Thayer* v. *Thayer,* 101 Mass. 111, 112, 100 Am. Dec. 110; *Kramer* v. *Com.* 87 Pa. 299, 300; *Guthrie* v. *State,* 16 Neb. 667, 671, 21 N. W. 455, 4 Am. Crim. Rep. 78; *Wallace* v. *State,* 41 Fla. 547, 558, 26 So. 713; *Frazier* v. *State,* 135 Ind. 38, 39, 34 N. E. 817;

prove purpose and design, evidence of system is relevant; and in order to prove system, collateral and isolated offenses are admissible from which system may be inferred. Or, where crimes are so mutually connected or interdependent that the proof of one is not coherent without evidence of the other. But to be admissible as relevant under system, the collateral, extraneous, or independent offense must be one that forms a link in the chain of circumstances and is directly connected with the charge on trial. Such system may be common to all offenses known to the law.[2]

Again, there may be like crimes committed against the same class of persons, about the same time, showing the same general design, and evidence of the same is relevant which may lead to proof of identity.[3]

Again, crimes entirely dissimilar and apparently unconnected in design and execution may be connected, for the reason that one was the cause of the other; such as arson to conceal homicide; homicide to conceal burglary, counterfeiting, or other

People v. *Harben,* 5 Cal. App. 29, 33, 91 Pac. 398; *Reg.* v. *Ellis,* 6 Barn. & C. 145, 9 Dowl. & R. 174, 5 L. J. Mag. Cas. 1; *Gassenheimer* v. *State,* 52 Ala. 313, 318; *Com.* v. *Scott,* 123 Mass. 222, 234, 25 Am. Rep. 81; *Sapir* v. *United States,* 98 C. C. A. 227, 174 Fed. 219, 221; *People* v. *Spielman,* 20 Alb. L. J. 96; *People* v. *Stone,* 125 App. Div. 250, 109 N. Y. Supp. 199, 201; *People* v. *McLaughlin,* 2 App. Div. 419, 37 N. Y. Supp. 1005, 1013; *United States* v. *Dexter,* 154 Fed. 890, 895; *United States* v. *Stickle,* 15 Fed. 798, 802; *VanGesner* v. *United States,* 82 C. C. A. 180, 153 Fed. 46. See also note in 62 L.R.A. 199, 218; *Reg.* v. *Reardon,* 4 Fost. & F. 76; *State* v. *Bridgman,* 49 Vt. 202, 24 Am. Rep. 124; *Com.* v. *Price,* 10 Gray, 472, 71 Am. Dec. 668; *Thayer* v. *Thayer,* 101 Mass. 111, 100 Am. Dec. 110; *Kramer* v. *Com.* 87 Pa. 299.

[2] *Mason* v. *State,* 42 Ala. 532; *Gassenheimer* v. *State,* 52 Ala. 313; *People* v. *Sternberg,* 111 Cal. 3, 42 Pac. 198; *State* v. *Lee,* 91 Iowa, 499, 60 N. W. 119; *Wallace* v. *State,* 41 Fla. 547, 26 So. 713; *Frazier* v. *State,* 135 Ind. 38, 34 N. E. 817. See *Com.* v. *Robinson,* 146 Mass. 571, 16 N. E. 452; Wigmore, Ev. §§ 304, 315.

[3] *Carroll* v. *Com.* 84 Pa. 107, 2 Am. Crim. Rep. 290. See *State* v. *Davis,* 6 Idaho, 159, 53 Pac. 678.

crimes,—so that evidence of such unlike crimes is relevant, going to identity, intent, or knowledge.[4]

[4] *Morse* v. *Com.* 129 Ky. 294, 111 S. W. 714. See *Jones* v. *State,* 63 Ga. 395; *Watts* v. *State,* 5 W. Va. 532; *Rex* v. *Clewes,* 4 Car. & P. 221; *People* v. *Wilson,* 117 Cal. 688, 49 Pac. 1054; *People* v. *Pool,* 27 Cal. 573; *State* v. *Healy,* 105 Iowa, 162, 74 N. W. 916; *Baker* v. *State,* 4 Ark. 56. See *Cortez* v. *State,* 43 Tex. Crim. Rep. 375, 66 S. W. 453; *State* v. *Mulholland,* 16 La. Ann. 376; *State* v. *Travis,* 39 La. Ann. 356, 1 So. 817. The notes under the following subheadings indicate system in the particular crime mentioned.

System in arson.—On an indictment for arson, setting fire to a rick, the property of A, it was ruled that evidence could be given of the prisoner's presence and demeanor at fires of other ricks, the property respectively of B and C, occurring on the same night, although those fires were the subject of other indictments against the prisoner; such evidence being important to explain his movements and general conduct before and after the fire of A's rick. *Reg.* v. *Taylor,* 5 Cox, C. C. 138. It was, however, held in conformity with the limitation heretofore defined, that it was not admissible to prove threats, statements, or particular acts pointing only to other indictments, and not tending to implicate or explain the conduct of the prisoner in reference to the fire under immediate investigation. Ibid. See also as to system in arson, *Reg.* v. *Gray,* 4 Fost. & F. 1102; *Com.* v. *McCarthy,* 119 Mass. 354; *Kramer* v. *Com.* 87 Pa. 299, 301; *State* v. *Jones,* 171 Mo. 401, 404, 94 Am. St. Rep. 786, 71 S. W. 680; *Com.* v. *Hutchinson,* 6 Pa. Super. Ct. 405; *People* v. *Zucker,* 20 App. Div. 363, 46 N. Y. Supp. 766, 154 N. Y. 770, 49 N. E. 1102; *Reg.* v. *Zeigert,* 10 Cox, C. C. 555; *Rex* v. *Birdseye,* 4 Car. & P. 386.

System in burglary.—On trial for breaking into a booking office of a railway station, evidence was admitted that the prisoners had, on the same right, broken into three other booking offices of three other stations on the same railway, the four cases being connected. *Reg.* v. *Cobden,* 3 Fost. & F. 833; *Reg.* v. *Rearden,* 4 Fost. & F. 76; *Mason* v. *State,* 42 Ala. 532; *State* v. *Adams,* 20 Kan. 311; *State* v. *Greenwade,* 72 Mo. 298; *People* v. *Mead,* 50 Mich. 228, 232, 15 N. W. 95; *Touchston* v. *State,* — Tex. Crim. Rep. —, 53 S. W. 854; *Bright* v. *State,* — Tex. Crim. Rep. —, 74 S. W. 912.

System in counterfeiting.—An inference of system is to be drawn from the possession of masses of counterfeit money, and of the implements of counterfeiting. Such facts may be put in evidence when tending to show part of a system with the act principally charged. *Rex* v. *Fuller,* Russ. & R. C. C. 408; *United States* v. *Hinman,* Baldw. 292, Fed. Cas. No. 15,370; *United States* v. *Burns,* 5

McLean, 23, Fed. Cas. No. 14,691; *People* v. *Thoms,* 3 Park. Crim. Rep. 256; *State* v. *Twitty,* 9 N. C. (2 Hawks) 248; *People* v. *Farrell,* 30 Cal. 316, 317; *People* v. *Page,* 1 Idaho, 102; *Rex* v. *Tattershall,* Cited in *King* v. *Whiley,* 2 Leach, C. L. 984.

System in embezzlement.—People v. *Bidleman,* 104 Cal. 608, 610, 38 Pac. 502; *People* v. *Lyon,* 2 N. Y. Crim. Rep. 484, 33 Hun, 623; *Leach* v. *State,* 46 Tex. Crim. Rep. 507, 510, 81 S. W. 733. Cognate embezzlements may be proved. *Reg.* v. *Richardson,* 8 Cox, C. C. 448, 2 Fost. & F. 343.

System in false pretenses and fraud.—Rafferty v. *State,* 91 Tenn. 655, 659, 16 S. W. 728; *State* v. *Wilson,* 72 Minn. 522, 523, 75 N. W. 715; *People* v. *Peckens,* 153 N. Y. 576, 588, 47 N. E. 883; *Griggs* v. *United States,* 85 C. C. A. 596, 158 Fed. 572, 577.

Fraud being in dispute, it is admissible to prove any facts from which its existence may be logically inferred. In this the prosecution is not confined to the misstatements or representations that are the immediate subject of suit, but other fraudulent mis-statements may be put in evidence where they are a part of the system with the offense charged. *Reg.* v. *Murdock,* 2 Den. C. C. 298, Temple & M. 270, 3 Car. & K. 346, 4 New Sess. Cas. 953, 19 L. J. Mag. Cas. N. S. 162, 14 Jur. 533, 4 Cox, C. C. 198; *Reg.* v. *Wortley,* 2 Den. C. C. 334, Temple & M. 636, 21 L. J. Mag. Cas. N. S. 44, 15 Jur. 1137, 5 Cox, C. C. 382; *Reg.* v. *Betts,* 8 Cox, C. C. 140, Bell, C. C. 90, 28 L. J. Mag. Cas. N. S. 69, 5 Jur. N. S. 274, 7 Week. Rep. 239; *Blake* v. *Albion Life Assur. Soc.* 14 Cox, C. C. 246, 45 L. J. C. P. N. S. 663, 35 L. T. N. S. 269, 24 Week. Rep. 677; *Com.* v. *Jeffries,* 7 Allen, 548, 83 Am. Dec. 712; *Stockwell* v. *Silloway,* 113 Mass. 384; *Cook* v. *Moore,* 11 Cush. 216; *Com.* v. *Butterick,* 100 Mass. 1, 97 Am. Dec. 65, 100 Mass. 12; *Calkins* v. *State,* 18 Ohio St. 366, 98 Am. Dec. 121; *People* v. *Marion,* 29 Mich. 31.

Fraud being alleged, a wide range is given in proof of circumstances tending to establish it, it being a matter of secrecy generally. It is only by collecting together numerous circumstances oftentimes that it can be brought to light and exposed. *Hall* v. *Stanton,* 2 W. N. C. 578; *Brown* v. *Schock,* 77 Pa. 471, 477; *Hall* v. *Naylor,* 18 N. Y. 588, 589, 75 Am. Dec. 269; *Castle* v. *Bullard,* 23 How. 172, 16 L. ed. 424; *Hovey* v. *Grant,* 52 N. H. 569, 580. As to the latitude in fraud. *Simons* v. *Vulcan Oil & Min. Co.* 61 Pa. 202, 216, 100 Am. Dec. 628, 6 Mor. Min. Rep. 633; *Heath* v. *Page,* 63 Pa. 108, 125, 3 Am. Rep. 533; *Woods* v. *Gummert,* 67 Pa. 136, 137; *Reg.* v. *Francis,* 12 Cox, C. C. 612, 613, 43 L. J. Mag. Cas. N. S. 97, L. R. 2 C. C. 128, 30 L. T. N. S. 503, 22 Week. Rep. 663; *Strong* v. *State,* 86 Ind. 208, 214, 44 Am. Rep. 292.

Thus, upon a trial for false pretenses, it is competent, in order to prove intent, to show that the accused made similar representations about the same time to other persons, and by means of such false representations obtained goods.

Trogdon v. *Com.* 31 Gratt. 862. See *State* v. *Call,* 48 N. H. 126; *People* v. *Spielman,* 20 Abb. L. J. 96, supra, § 48; Wharton, Crim. Law 8th ed. § 1184. And other acts, part of the same system of fraud, may be put in evidence.

Reg. v. *Francis,* 12 Cox, C. C. 612, 43 L. J. Mag. Cas. N. S. 97, L. R. 2 C. C. 128, 30 L. T. N. S. 503, 22 Week. Rep. 663; *Strong* v. *State,* 86 Ind. 208, 44 Am. Rep. 292.

System in conspiracy.—Conspiracy differs from all other offenses, in that, to establish it, the evidence must show it to be the act of more than one person. Conspiracy, therefore, affords a signal illustration of the exception to the fundamental rule as to evidence of collateral offenses. While the acts of each conspirator emanate from him individually, they are part of a common purpose or design, so that evidence of such acts is relevant, although each component act may constitute an independent offense. The reason for the rule in this and similar cases is that, when system is once proved, each particular part of the system may be explained by the other parts, which go to make up the whole. Post, § 698; Wharton, Crim. Law, 8th ed. § 1398; *Com.* v. *Eastman,* 1 Cush. 189, 48 Am. Dec. 596; *Bloomer* v. *State,* 48 Md. 529, 3 Am. Crim. Rep. 37; *Marler* v. *State,* 67 Ala. 55, 42 Am. Rep. 95; *Ford* v. *State,* 34 Ark. 649, 657; *State* v. *Greenwade,* 72 Mo. 298, 300; *Hall* v. *State,* 71 Tenn. 553; *Com.* v. *Spencer,* 6 Pa. Super. Ct. 256; *Butt* v. *State,* 81 Ark. 173, 118 Am. St. Rep. 42, 98 S. W. 723; *State* v. *Barrett,* 117 La. 1086, 1089, 42 So. 513; *State* v. *Allen,* 34 Mont. 403, 411, 87 Pac. 177; *Thomas* v. *United States,* 17 L.R.A.(N.S.) 720, 84 C. C. A. 477, 156 Fed. 897, 903; *Sanderson* v. *State,* 169 Ind. 301, 312, 82 N. E. 525; *Eacock* v. *State,* 169 Ind. 488, 492, 82 N. E. 1039; *Cumnock* v. *State,* 87 Ark. 34, 112 S. W. 147; *Richards* v. *State,* 53 Tex. Crim. Rep. 400, 110 S. W. 432; *Gambrell* v. *Com.* 130 Ky. 513, 113 S. W. 476; *Price* v. *Territory,* 1 Okla. Crim. Rep. 508, 99 Pac. 157; Van *Wyk* v. *People,* 45 Colo. 1, 11, 99 Pac. 1009; *People* v. *Smith,* 144 Ill. App. 129, 159; *People* v. *Nall,* 242 Ill. 284, 293, 89 N. E. 1012; *State* v. *Kennedy,* 85 S. C. 146, 67 S. E. 152.

System in forgery.—*Com.* v. *White,* 145 Mass. 392, 394, 14 N. E. 611, 7 Am. Crim. Rep. 192; *Lindsey* v. *State,* 38 Ohio St. 507; *Com.* v. *Russell,* 156 Mass. 196, 30 N. E. 763; *Wooldridge* v. *State,* 49 Fla. 137, 160, 38 So. 3; *Pittman* v. *State,* 51 Fla. 94, 119, 8 L.R.A. (N.S.) 509, 41 So. 385.

System in homicide.—On a trial for murder, evidence was offered and held relevant, that on the same day and shortly before the killing of deceased, the defendant shot a third person, the shooting of such third person and the killing of deceased appearing to be parts of one entire transaction. *Heath* v. *Com.* 1 Rob. (Va.) 735; *Walters* v. *People,* 6 Park. Crim. Rep. 15; *State* v. *Rash,* 34 N. C. (12 Ired. L.) 382, 55 Am. Dec. 420; *Johnson* v. *State,* 17 Ala. 618; *Rex* v. *Voke,* Russ. & R. C. C. 531; *Fernandez* v. *State,*

§ 40. To prove malice; libel and murder cases.—In criminal trials, particularly in cases of murder [1] and libel, evidence of another crime is sometimes admitted to show malice.

4 Tex. App. 419, 423; *Washington* v. *State,* 8 Tex. App. 377, 380; *Carroll* v. *Com.* 84 Pa. 107, 123, 2 Am. Crim. Rep. 290; *State* v. *Lee,* 91 Iowa, 499, 503, 60 N. W. 110; *Kunde* v. *State,* 22 Tex. App. 65, 97, 3 S. W. 325; *Shaffner* v. *Com.* 72 Pa. 60, 65, 13 Am. Rep. 649; *Goersen* v. *Com.* 99 Pa. 388, 398; *State* v. *Bailey,* 190 Mo. 257, 283, 88 S. W. 733; *People* v. *Molineux,* 168 N. Y. 264, 291, 293, 62 L.R.A. 193, 61 N. E. 286; *Barkman* v. *State,* — Tex. Crim. Rep. —, 52 S. W. 69.

System in violation of liquor laws.—Evidence of collateral offenses becomes relevant when scheme or system is sought to be shown in evading the laws against the sale of intoxicating liquors. By reason of local option statutes and state prohibition laws, the number of offenses against such laws has increased very rapidly within the last ten years. Prosecutions for such offenses often engender much personal bitterness. Evidence is frequently obtained by entrapment, and there is always a tendency in the minor local courts to favor the dominant sentiment of the district where the statute is in force. But in these, as in other offenses known to the law, identity, *scienter,* and more frequently system, require proof, and when a proper predicate has been laid for the introduction of collateral offenses for such purpose, the evidence is properly relevant. *State* v. *Neagle,* 65 Me. 468; *State* v. *Gorham,* 67 Me. 247, 250; *Pitner* v. *State,* 37 Tex. Crim. Rep. 268, 39 S. W. 662; *Bennett* v. *State,* — Tex. Crim. Rep. —, 50 S. W. 945; *Young* v. *State,* — Tex. Crim. Rep. —, 66 S. W. 567; *Hollar* v. *State* — Tex. Crim. Rep. —, 73 S. W. 961; *Roach* v. *State,* 47 Tex. Crim. Rep. 500, 84 S. W. 586; *State* v. *Welch,* 64 N. H. 525, 15 Atl. 146; *State* v. *Peterson,* 98 Minn. 210, 211, 108 N. W. 6; *Skipwith* v. *State,* — Tex. Crim. Rep. —, 68 S. W. 278; *Efird* v. *State,* 44 Tex. Crim. Rep. 447, 71 S. W. 957; *Holland* v. *State,* 51 Tex. Crim. Rep. 142, 101 S. W. 1005; *Carnes* v. *State,* 51 Tex. Crim. Rep. 437, 103 S. W. 403.

See also note in 62 L.R.A. 325.

[1] Thus, upon the trial of an indictment for murder the People were permitted to prove by a witness that, on the night previous to the murder, the prisoner, while at the house where the homicide occurred, wanted the deceased to go out with him away from the house, and she would not go, and he then struck her and bit her hand, and yet she would not go. It was held that this evidence was entirely proper for the purpose of showing deliberation and malice on the part of the prisoner, and was properly received by the court. *Walter* v. *People,* 6 Park. Crim. Rep. 15, affirmed in 32 N. Y. 147.

On the trial of the defendant for murder, the mother of the deceased,

after detailing a certain altercation between several young men, among whom were the deceased and the defendant, which occurred two nights before the killing, further testified that later the same night the accused returned to the house were she lived, and commenced cursing; said he wanted to find some one to,—using a vile term, and afterward left the house. This testimony was objected to throughout. The court said, in reference to this objection and the error alleged thereon, that it is a rule of law, which is well settled, that when the *scienter* or *quo animo* is requisite to, and constitutes a necessary and essential part of, the crime with which the person is charged, and proof of such guilty knowledge or malicious intention is indispensable to establish his guilt in regard to the transaction in question, testimony of such acts, conduct, or declarations of the accused as tend to establish such knowledge or intent is competent, notwithstanding they may constitute, in law, a distinct crime. *McKinney* v. *State,* 8 Tex. App. 626.

Upon a trial for homicide the testimony of a witness that, on two occasions recently before the homicide, he came into contact with the defendant, on each of which occasions defendant drew his pistol and attempted to kill the witness; and that thereafter, apologizing for these demonstrations, the defendant explained that he took the witness to be the deceased,—is competent and admissible, as it evidences the malice he bore deceased, and that his apparent hostility toward the witness was because of his mistaken identity with the deceased. *Angus* v. *State,* 29 Tex. App. 52, 14 S. W. 443.

Defendant was indicted for murder; and proof was admitted, showing that he had beat his wife, and forced her to abandon his house and seek refuge under the protection of the deceased. It was held that the protection afforded by the deceased was an aggravating circumstance to the prisoner, and therefore proper proof of malice prepense on the part of the prisoner; and that the incidental abuse accompanying and perhaps inducing, the flight of the wife, is not such proof of a separate criminal charge as vitiates the verdict. *Stone* v. *State,* 4 Humph. 27.

Upon the trial of an information charging defendant with the murder of a woman, evidence is material and competent which shows that the defendant and his victim, while living together, had quarreled, resulting in her leaving him and fleeing to a neighbor's house for protection, in his following her and attempting to make a murderous assault upon her, and in his making threats against her when his assault was frustrated; as this tended to show malice and ill will on his part, and a motive for the murder committed a few days later. *People* v. *Chaves,* 122 Cal. 134, 54 Pac. 596.

Upon a trial for murder, the prosecution was permitted to prove, over the objection of the defendant, that on one occasion the defendant beat his wife, and the deceased, being present, witnessing the battery,

told the defendant she was going to report him for it; whereupon defendant replied: "If you do I will knock your head off. I am tired of niggers reporting me, and I am going to kill the first nigger that does so." That the deceased then left, going toward town; and at about 9 o'clock of that morning did make complaint before the justice, in which she charged defendant with an assault and battery upon his wife. It also appeared, by the other facts, that defendant took the life of the deceased, and that the only instigation thereto was a fiendish revenge for thus "reporting him for the assault and battery upon his wife." It was held that the evidence was competent. It was insisted by the counsel for the defendant that the evidence relating to the assault upon his wife was calculated to prejudice the defendant. The court said that this might be true, but because evidence showed another offense it did not always follow that it was not admissible; that this character of evidence, tending to show another offense, is frequently interwoven with facts which are clearly admissible, and should not be rejected because it develops some other offense; that in the case at bar it was of the greatest importance for the state to show malice. *Williams* v. *State,* 15 Tex. App. 104.

Upon the trial of an indictment for murder it appeared that the victim was shot dead by an unseen assassin. The state was then allowed, in connection with other circumstances, to prove that the deceased had been shot and wounded a short time previous to the murder, and that the defendant had admitted that he was the person who committed that assault. It was held that the evidence was competent as showing the *animus* of the defendant toward the deceased. *Washington* v. *State,* 8 Tex. App. 377.

Upon the trial of an indictment for murder, evidence that on the day before the fatal assault, and several days prior thereto, the prisoner had beaten, and otherwise maltreated, his victim, was admitted. In affirming this ruling, the court said: "The charge of murder against the prisoner necessarily involved the question of malice, for there must be malice, express or implied, to constitute murder. As bearing, then, upon this question, the evidence was clearly admissible. In the absence of evidence tending to show justification, excuse, or extenuation, malice, it is true, may be presumed from the proof of the homicide itself; but the state is not bound to rely upon this presumption, and may offer other and independent evidence tending to prove malice,—and this, too, without regard to the evidence offered or defense set up by the accused." *Williams* v. *State,* 64 Md. 384, 1 Atl. 887, 5 Am. Crim. Rep. 512.

For the purpose of showing malice in a prosecution for murder, any evidence which affords an inference of its existence may be admitted, and the fact that such evidence also tends to show the perpetration of another crime by defendant does not render it inadmissible. *State* v. *Deschamps,* 42

In criminal prosecutions for libel, malice is presumed from words that are actionable *per se*,[2] and this extends to words made actionable by statute.[3] Although this presumption prevails, yet where proof of malice becomes necessary, it is relevant for the prosecution to put in evidence continuous prior defamation by the defendant,[4] and for this purpose, acts of the defendant subsequent to the issue are admissible.[5] However, no subsequent libels can be admitted if they do not relate to the subject-matter charged,[6] though repetitions of the same libel, after action brought, are admissible.[7] And where motive

La. Ann. 567, 21 Am. St. Rep. 392, 7 So. 703.

[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; *White* v. *Nicholls*, 3 How. 266, 11 L. ed. 591; *Pledger* v. *State*, 77 Ga. 242, 248, 3 S. E. 320; *State* v. *Brady*, 44 Kan. 435, 9 L.R.A. 606, 21 Am. St. Rep. 296, 24 Pac. 948; *State* v. *Clyne*, 53 Kan. 8, 35 Pac. 789; *Com.* v. *Blanding*, 3 Pick. 304, 15 Am. Dec. 214; *Com.* v. *Odell*, 3 Pittsb. 449; *State* v. *Patterson*, 2 N. J. L. J. 218; *Smith* v. *State*, 32 Tex. 594; *State* v. *Conable*, 81 Iowa, 60, 46 N. W. 759; *Com.* v. *Place*, 153 Pa. 314, 26 Atl. 620; *Cox* v. *State*, 162 Ala. 66, 50 So. 398; *Butler* v. *State*, 71 Ala. 71, 50 So. 400; *State* v. *Shaffner*, 2 Penn. (Del.) 171, 44 Atl. 620.

[3] *Colby* v. *McGee*, 48 Ill. App. 294.

[4] *Barrett* v. *Long*, 3 H. L. Cas. 395, 414.

See *Reg.* v. *Robinson*, 2 Leach, C. L. 749, 2 East, P. C. 1110; *Rex* v. *Boucher*, 4 Car. & P. 562; *Reg.* v. *Cooper*, 3 Cox, C. C. 547; *Com.* v. *Snelling*, 15 Pick. 337; *State* v. *Riggs*, 39 Conn. 498; *State* v. *Lehre*, 2 Brev. 446, 4 Am. Dec. 596; *State* v. *Allen*, 1 M'Cord, L. 525, 10 Am. Dec. 687; Wharton, Crim. Law, 8th ed. 1651; *Eldridge* v. *State*, 27 Fla. 162, 9 So. 448; *Grant* v. *State*, 141 Ala. 96, 99, 37 So. 420.

[5] *Pearson* v. *LeMaitre*, 6 Scott, N. R. 607, 5 Mann. & G. 700, 12 L. J. C. P. N. S. 253, 7 Jur. 748; See also *Hennings* v. *Gasson*, El. Bl. & El. 346, 27 L. J. Q. B. N. S. 252, 4 Jur. N. S. 834, 6 Week. Rep. 601, 9 Eng. Rul. Cas. 67; *Perkins* v. *Vaughan*, 4 Mann. & G. 988, 5 Scott, N. R. 881, 12 L. J. C. P. N. S. 38, 6 Jur. 1114; *Riley* v. *State*, 132 Ala. 13, 31 So. 731; *State* v. *Heacock*, 106 Iowa, 191, 196, 76 N. W. 654.

[6] See *Finnerty* v. *Tipper*, 2 Campb. 72; *Watson* v. *Moore*, 2 Cush. 133; *United States* v. *Crandell*, 4 Cranch, C. C. 683, Fed. Cas. No. 14,885.

[7] Townshend, Slander & Libel, § 390; *Baldwin* v. *Soule*, 6 Gray, 321; *Robbins* v. *Fletcher*, 101 Mass. 115; *Mix* v. *Woodward*, 12 Conn. 262; *Williams* v. *Miner*, 18 Conn. 464; *Howard* v. *Sexton*, 4 N. Y

is to be shown, insulting acts preceding or accompanying the defamatory publication are relevant.[8]

§ 41. Evidence of other crime to rebut special defense. —It sometimes occurs in a criminal trial that the case as made by the prosecution is not denied by the defense, but the endeavor is made to avoid a conviction by introducing a special or affirmative defense. In replying to such a defense it may happen that the facts shown by the prosecution in rebuttal discover another crime, and, of course, the same discrimination must be exercised as to its admissibility as if it had been offered to make out the case in chief against the defendant.[1]

157; *Kennedy* v. *Gifford,* 19 Wend. 296; *Com.* v. *Damon,* 136 Mass. 441, 448; *Stayton* v. *State,* 46 Tex. Crim. Rep. 205, 108 Am. St. Rep. 988, 78 S. W. 1071.

[8] *Bond* v. *Douglas,* 7 Car. & P. 626; *Kean* v. *M'Laughlin,* 2 Serg. & R. 469. See *C.* v. *A. B.* 1 W. N. C. 291; *Eldridge* v. *State,* 27 Fla. 162, 9 So. 448.

[1] In *People* v. *Cunningham,* 66 Cal. 668, 4 Pac. 1144, 6 Pac. 700, 846, defendant was charged with the larceny of 5 head of cattle. At the trial the prosecution gave evidence tending to prove that the defendant was captured in the nighttime driving away the cattle, and also a steer belonging to another person. On his defense, the defendant gave evidence tending to show that he innocently came into the possession of the first-mentioned cattle by purchase from one who had them in pasture for the owner. In rebuttal, the court, against the objections of the defendant, admitted in evidence the testimony of the owner of the steer, to show that the steer which belonged to him, and was found in defendant's possession with the other cattle, was stolen. It was objected that this testimony was not admissible, because it was not rebuttal, and because it tended to prove a distinct offense from that for which the defendant was on trial. It was held that the evidence was admissible.

On the trial of an indictment for stealing a book the defendant had testified that he had in his possession several books, among others a particular one (not the book he was charged with stealing), which he stated he had purchased at a particular place. The state was permitted, in giving evidence in reply, to prove by a witness that this book was stolen from him. It was held that the evidence was properly admitted; that, where the specific property charged to be stolen is found in the possession of the accused, in connection with other property, and the possession of the

One of the affirmative defenses frequently advanced in criminal cases is insanity, and evidence which properly tends to show that the accused is of sound mind will not be rejected because it also tends to prove another offense.[2]

While the good character of the accused can hardly be said to constitute a defense, yet, as it is not matter of negation, and the issue as to it must always be tendered by the accused, the same rule as to the introduction and admission of evidence of other crimes to rebut it applies.[3]

property is attempted to be accounted for, it is proper for the state to show that the account given was untrue. And that the authorities, indeed, go farther, for it is held that in cases of larceny it is competent to show the possession of other stolen property. *Turner* v. *State,* 102 Ind. 425, 1 N. E. 869, 5 Am. Crim. Rep. 360.

[2] Upon the trial of a person for the murder of his wife the defense relied on was the insanity of the defendant, and the coolness and unconcern of the prisoner at the time he did the fatal act were made a prominent feature in the case, and inferences were sought to be drawn from it unfavorable to the people. It was held that it was proper to permit the prosecution to prove that, about thirty years before the commission of the crime charged, defendant had been engaged in a violation of the revenue laws of the country, by a career of smuggling goods and property to and from Canada, such evidence being in the nature of rebutting evidence on the point made. *Hopps* v. *People,* 31 Ill. 385, 83 Am. Dec. 231.

On a trial where the accused was charged with an assault with an intent to murder his wife, and the defense was temporary insanity produced by the recent use of intoxicating liquors, it was held that previous assaults, outrages, threats, and acts of cruelty and ill treatment towards his wife, extending back over a period of several years, were proper and legitimate evidence to meet defendant's theory of temporary insanity produced by the recent use of intoxicants, as well as to show malice, motive, ill-will, and intent on his part in making the assault. *Hall* v. *State,* 31 Tex. Crim. Rep. 566, 21 S. W. 368.

Proof that a defendant, upon trial for murder, had committed the crime of incest with his daughter, is admissible in rebuttal, where the claim of the defense is that the defendant had become insane through fear that the deceased was trying to debauch defendant's daughter. *People* v. *Lane,* 101 Cal. 517, 36 Pac. 16.

[3] Upon a trial for murder the defendant introduced evidence which tended to prove that his character as a peaceable, orderly, and

Another defense frequently raised is accident or mistake. Now, accident or mistake considered with regard to crime is the exact reverse of intent, the absence of one being indubitable proof of the presence of the other. As a consequence of the nature of this defense, evidence that goes to prove intent on the part of the accused is admissible in rebuttal, notwithstanding the fact that it proves another crime.[4] From the na-

law-abiding person, before the occurrence, had been good. The state, in rebuttal, was permitted, against defendant's objection, to introduce evidence tending to prove that he had previously been involved in personal difficulties, and that on one occasion he had threatened to shoot a person with whom he had had a difficulty. It was held, upon the authority of *State* v. *Gordon,* 3 Iowa, 410, that the court erred in admitting this evidence. *State* v. *Sterrett,* 71 Iowa, 386, 32 N. W. 387.

In *State* v. *Gordon,* 3 Iowa, 410, it was held that the evidence must be confined simply to the general character or reputation, and neither party can ask questions as to particular facts or difficulties.

Where the defendant in a criminal action had given evidence of his good character, a witness testifying thereto may, on cross-examination, be asked in regard to certain particular matters tending to destroy his evidence as to the general good character of the defendant, even though such matters relate to other offenses. *State* v. *Crow,* 107 Mo. 346, 17 S. W. 745.

Where the defendant in a criminal prosecution has introduced evidence of his good character, it is not error to permit the government to show, on his cross-examination as a witness, that he had engaged in another transaction similar to the one charged, and to introduce evidence in rebuttal to show that such transaction was also criminal. *King* v. *United States,* 50 C. C. A. 647, 112 Fed. 988.

[4] On a trial for felony, where a felonious intent is an essential ingredient of the crime charged, and the act done is claimed to have been done innocently or accidentally, or by mistake; or the result is claimed to have followed an act lawfully done for a legitimate purpose, or that there is room for such an inference, it is proper to characterize the act by proof of other like acts producing the same result, as tending to show guilty knowledge and the intent or purpose with which the particular act was done, and to rebut the presumption that might otherwise obtain. Therefore, on a prosecution for manslaughter in committing an abortion, where the proof of guilt is circumstantial, the theory of the defense being that the premature birth was due to accidental causes, evidence that the respondent had performed other abortions in the same house is admissible to show guilty knowledge

ture of the crimes and the means ordinarily used in perpetration of them, this defense is most frequently made in cases of

and intent. *People* v. *Seaman,* 107 Mich. 348, 61 Am. St. Rep. 326, 65 N. W. 203.

Upon the trial of an indictment for cheating by false pretenses in obtaining money as a loan, and by falsely pretending that a forged certificate of stock was a good, valid, and genuine certificate of stock, evidence of the possession and use of other altered and false certificates by the defendant about the same time, whether before or afterwards, is competent to show that his possession of those, for the use of which he was indicted, was not casual or accidental. *Com.* v. *Coe,* 115 Mass. 481. The opinion, states, however, that they were admitted and allowed to be used only to show guilty knowledge.

On the trial of an indictment for arson, where the first count of the information charged the burning of an insured stock of merchandise owned by the defendant, and the second charged the burning of a leased store building in which the property was kept, the court admitted evidence tending to show that, on the night this building was burned, the defendant set out other fires in adjacent buildings, and this was assigned for error. It was held that the testimony was properly received, not for the purpose of showing the commission of distinct crimes, but to establish a criminal design on the part of the defendant. That the state was not only required to show that the defendant ignited the store building mentioned in the indictment, but it was required to go further, and satisfy the jury that the act was intentional, and not an accident. *Knights* v. *State,* 58 Neb. 225, 76 Am. St. Rep. 78, 78 N. W. 508. This case would seem to be a departure from the rigidity with which the supreme court of Nebraska had clung to the general rule, appearing in the several cases upon the subject, decided by that court immediately preceding it.

See *Davis* v. *State,* 54 Neb. 177, 74 N. W. 599; *Cowan* v. *State,* 22 Neb. 519, 35 N. W. 405; *Berghoff* v. *State,* 25 Neb. 213, 41 N. W. 136; and *Morgan* v. *State,* 56 Neb. 696, 77 N. W. 64.

Upon the trial of a person for the murder of his wife, where a witness had testified that the defendant said to him, a few days before the shooting, that "the old folk and his wife were crowding him too much altogether, and they were trying to get the best of him in every respect, and he would put an end to them all some of these nights;" and the defendant had testified that, in the effort to defend himself against a person whom he had shot and killed on the same occasion, one of the shots which he had intended for that person had accidentally struck his wife and caused her death,—evidence that, immediately after the killing, the defendant drove for a distance of about 3 miles, arriving there within twenty minutes after

murder and the attempt to murder by poisoning. Ordinarily on a trial for poisoning it is, of course, not admissible to prove

the killing of his wife, got out of his buggy, went up on the porch where the father and mother of his wife were then sitting, and deliberately, without any word of warning, killed them both, is admissible, even though it might have the effect to establish another crime than that for which he was on trial. *People* v. *Craig,* 111 Cal. 460, 44 Pac. 186.

Upon the trial of a person as assistant city attorney for aiding and abetting his principal, the city attorney, in embezzling funds of a city, where evidence had been given as to false representations made by him in regard to assessments not having been paid in, and the defendant had attempted to meet this evidence by explanation to the effect that, although he might have made mistakes, yet, if any of his statements were untrue, they were not made with intention to mislead or deceive, evidence as to the testimony given by him on his cross-examination on a former trial for the same offense, to the effect that he had personally received interest on deposits made by him of the city moneys, is competent to rebut the theory of his defense that he had not intentionally made the false representations, but that they were due to mistake on his part. And this, although the receiving of such interests by him constituted a separate offense from that with which he was then charged. *Com* v. *House,* 6 Pa. Super. Ct. 92.

Upon the trial of an indictment for arson in setting fire to a barn, it appeared that the defendant had been in the employ of the owner of the burned barn as coachman and gardener, and had been discharged. A poisonous preparation had been kept in the barn. Defendant knew of this and had used it for the destruction of insects in the garden. The prosecution was permitted to prove, under objection and exception, that, upon the night of the fire, and before it occurred, certain animals in the barn, belonging to the owner, were poisoned with this preparation; that his carriages and cutters in the barn and in an adjoining one were cut and damaged, while carriages and cutters in the same barns, belonging to another, were not injured. It was held that the evidence was competent, although it may have tended to establish defendant's guilt of a crime other than the one set forth in the indictment; as it tended clearly to prove that the fire was not accidental, and that its origin was instigated by malice. *People* v. *Murphy,* 135 N. Y. 450, 32 N. E. 138.

A boy twelve years of age was indicted for an assault with a pistol. Upon his trial he testified that he thought the pistol was empty. Thereupon the government called as witnesses two boys, eight and ten years old, who testified that the defendant shot at them the day before the assault for which he was indicted. It was held that the evi-

dence was admissible as it was material to prove that the shooting was not accidental, but wilful; and in such a case other acts of the defendant of the same kind might be given in evidence to show that it was wilful. *State* v. *McDonald,* 14 R. I. 270.

On the trial of an indictment for an assault with intent to kill and murder, where the prosecuting witness was fired upon twice, about a quarter of an hour elapsing between the first and second shot, evidence of both firings was admitted, against the objection that the prosecutor ought not to give evidence of two distinct felonies, the trial judge saying that he thought it unavoidable in this case, as it seemed to him to be one continuous transaction in the prosecution of the general malicious intent of the prisoner, and that upon another ground, also, he thought such evidence proper, *viz.,* that the counsel for the prisoner, by his cross-examination of the prosecutor, had endeavored to show that the gun might have gone off the first time by accident, and the judge thought the second firing was evidence to show that the first, which had preceded it only one quarter of an hour, was wilful, and to remove the doubt, if any existed, in the minds of the jury. *Rex* v. *Voke,* Russ. & R. C. C. 531.

The prisoner, a female domestic servant of the prosecutor, was indicted for setting fire to a certain stable with intent to injure the prosecutor. It was proved on the part of the prosecution that the fire in question had been discovered at an early hour of the morning, and in a stable not far distant from the kitchen, where it was the duty of the prisoner to be; and, with the view of proving that it must have originated in the wilful act of some individual connected with the house, the prosecution proposed to call witness to show that on two former, but recent, occasions, not very far distant from each other, attempts had been made by someone from within the house to fire the warehouse and shop of the prosecutor, though there was no evidence to show that the prisoner, or any other individual in or out of the house, was in any way implicated in those attempts. The presiding justice, Sir. F. Pollock, C. B., held that this was clearly evidence, and might be used at all events for the purpose of showing that the present fire, which was the third on the same premises within so short a time, could not have been the result of accident. He further said that this course of evidence was not without precedent and authority, for, on the trial of Donallan for the murder of Sir Theodosius Boughton by administering to him some poison, evidence was given that a certain tree which hung over a deep and dangerous brook near a spot where Sir Theodosius was accustomed to fish had been sawn almost in two by some unknown person. That this was proved to show that someone entertained a design against the life of Sir Theodosius, for he was accustomed to stand on that tree while engaged in fishing; and the natural presumption was, that who-

ever cut the tree did so with the design of precipitating the deceased into the water and endangering his life. These facts were given in evidence on the trial of Donallan for murdering Sir Theodosius afterwards, and were received, though quite unconnected with the prisoner, in order to show that someone entertained a felonious design on his life, and that the probability was that he had not come to a natural death, though his life had been actually terminated in a very different way. That act was not in any way connected with Donallan, but it was received in evidence at his trial, after objection taken to it. Counsel for the defense stated that, according to his recollection of that case, there was some evidence to connect the prisoner with the circumstance alluded to, to which the court rejoined: "Oh, no! I am confident there was no attempt to do so. If the prisoner had been shown to cut the tree, there could have been no doubt whatever of the reception of proof of that fact on his trial for poisoning the deceased. I have on doubt that this is legitimate evidence to prove the *corpus delicti,* and to negative the presumption of accident." *Reg.* v. *Bailey,* 2 Cox, C. C. 311.

Upon the trial of a man for setting fire to his house with intent to defraud an insurance company, after proof of circumstances tending to show that the prisoner had set fire to the building, it was proposed on the part of the prosecution, for the purpose of showing that the fire was not the result of accident, to prove that he had previously occupied two houses in London, in succession, both of which had been insured; that fires had broken out in both, and that he had made claims upon, and been paid by, the insurance companies in respect of the loss caused by each fire. Willes, J., the trial judge, after consulting Martin, B., admitted the evidence, and refused to reserve the point for the consideration of the court for Crown cases reserved. *Reg.* v. *Gray,* 4 Fost. & F. 1102.

On the trial of an indictment for having feloniously set fire to a rick of wheat straw, it appeared that the rick was set on fire by the prisoner's having fired a gun very near to it; and it was proposed on the part of the prosecution to go into evidence to show that the rick had been on fire the day previous, and that the prisoner was then close to it with a gun in his hand. The prisoner objected to the evidence, claiming that it was seeking to prove one felony by another; and was, in effect, asking the jury to infer that the prisoner set fire to the rick on one day because he did so on the other, and that the firing of the rick on the previous day, if wilfully done, was a distinct felony. Maule, J., in deciding to receive the evidence, said: "Although the evidence offered may be proof of another felony, that circumstance does not render it inadmissible, if the evidence be otherwise receivable. In many cases it is an important question whether a thing was done accidentally or wilfully. If a person were charged with having wilfully poisoned another, and it were a question whether he knew

prior poisonings by the same defendant.[5] But suppose that the defendant, conceding the fact that the deceased was poi-

a certain white powder to be poison, evidence would be admissible to show that he knew what the powder was because he had administered it to another person, who had died, although that might be proof of a distinct felony." *Reg.* v. *Dossett,* 2 Car. & K. 306, 2 Cox, C. C. 243.

Where, on the trial of an indictment for murder, the defendant, by his testimony, presented the theory of accidental homicide, the evidence of the killing of another person by defendant, which he also claimed to have been done accidentally, is not admissible to show a system, where it does not appear how the killing of the other person occurred, as the court cannot presume, as against defendant, that it occurred in the same manner as the homicide for which the defendant was then on trial. *Barkman* v. *State,* — Tex. Crim. Rep. —, 52 S. W. 69.

On the trial of an indictment for embezzlement in which a single offense was charged, evidence of several conversions of rent occurring each month was held to be admissible upon the one charge, for the purpose of showing acts of a similar nature, to establish guilty knowledge, to exclude the possibility of accident or mistake in the accounting, and to show the felonious intent. *Edelhoff* v. *State,* 5 Wyo. 19, 36 Pac. 627, 9 Am. Crim. Rep. 256.

The following cases also show when evidence of the other crime is admissible to repel the defense of accident or mistake: *Wallace* v. *State,* 41 Fla. 547, 26 So. 713; *Goersen* v. *Com.* 99 Pa. 388, 106 Pa. 477, 51 Am. Rep. 534; *Com.* v. *Birriolo,* 197 Pa. 371, 47 Atl. 355; *State* v. *Plunkett,* 64 Me. 534; *State* v. *Neagle,* 65 Me. 468; *Com.* v. *Bradford,* 126 Mass. 42; *Reg.* v. *Francis,* L. R. 2 C. C. 128, 12 Cox, C. C. 612, 43 L. J. Mag. Cas. N. S. 97, 30 L. T. N. S. 503, 22 Week. Rep. 663; *Stanley* v. *State,* 88 Ala. 154, 7 So. 273; *Reeves* v. *State,* 95 Ala. 31, 11 So. 158; *Reg.* v. *Balls,* 12 Cox, C. C. 96, L. R. 1 C. C. 328, 40 L. J. Mag. Cas. N. S. 148, 1 Moody, C. C. 470, 24 L. T. N. S. 760, 19 Week. Rep. 876; *Reg.* v. *Stephens,* 16 Cox, C. C. 387, 58 L. T. N. S. 766, 52 J. P. 823; *People* v. *Rando,* 3 Park. Crim. Rep. 335.

[5] *Com.* v. *Blair,* 126 Mass. 40; *Shaffner* v. *Com.* 72 Pa. 60, 65, 13 Am. Rep. 649; *Farrer* v. *State,* 2 Ohio St. 64, 75; *People* v. *Millard,* 53 Mich. 63, 70, 18 N. W. 562.

"In cases of poisoning, where the symptoms and appearance during the last illness become controlling facts in determining whether the death was from poison or from disease, the charge is not made out unless the prosecution negative every thing but poison as the cause of death. And this they can only do by showing affirmatively that the combined symptoms and the absolutely certain facts with which they are associated are inconsistent with any other disease or ailment." *People* v. *Millard,* supra.

soned, sets up as a defense that the poisoning was accidental. It would then be competent for the prosecution to prove in rebuttal that several prior poisonings had taken place in the same household within a short time.

But the exception does not mean that, because A poisoned somebody ten years ago, someone else, who died yesterday under suspicious circumstances, was also poisoned by A. If such a deduction is correct, then it would be easy to provide a scapegoat on whom all new poisonings could be placed, for it would only require, as a defendant, someone who had committed some poisoning in former years. What it does mean is that when a defendant says, "I did not know that this drug was poison; or, knowing it to be poison, I administered it by mistake," it is admissible to answer, "But there are so many other cases in which you administered the same drug with fatal effect, that we must infer that your defense of accident in this case cannot be sustained." Similar reasoning leads us to regard a physician as guilty of malpractice, on facts which would not be regarded as imputing guilt to a lay attendant. The physician has a scientific knowledge and a training, to which is added an experience, all of which enable him to know the probable consequences of his treatment, when a lay attendant, by lack of those very factors, could not know the probable consequences of his act. We find difficulty, then, in believing that a series of acts, each causing the same result, is an accident, and not a design. The acts mutually illustrate the motives underlying each, and the more numerous the acts, the more apparent the motive. Poison may be given to B by accident; but where, under like conditions, like poison is administered to C, differing only in interval of time, we deduce design, and also that the same motive is present. As the number increases the defense of accident becomes more and more improbable. Then, under the excep-

tions, to meet the defense of accident or mistake, or of ignorance, evidence of such other like poisoning becomes relevant.[6]

[6] In *Reg.* v. *Geering*, 18 L. J. Mag. Cas. N. S. 215, which is one of the most important cases on the subject treated therein, and one which is more frequently referred to—and nearly always with approval—than any other English case, it appeared that the prisoner was indicted for the murder of her husband in September, 1848, by administering arsenic to him. The prisoner was also charged in three other indictments with the murder of her son George by arsenic, in December, 1848, of another son James by arsenic, in March, 1849, and of an attempt to murder another son, Benjamin, in April, 1849, by arsenic. In April, 1849 Benjamin stated to the surgeon who attended him that his symptoms were precisely the same as those exhibited by his deceased father and his two brothers, and, this statement having been reduced to writing and read over to the prisoner, she said: "It is quite right." Evidence was tendered that the four parties during their lives lived with the prisoner, and formed part of the family; that she generally made tea for them, cooked their victuals, and distributed the same to them on their leaving the house to go to their work in the morning. This evidence was objected to by the counsel for the prisoner. The prosecution claimed that the evidence was admissible for the purpose of proving that the death of the deceased husband was not accidental. Pollock, C. B., who presided at the trial said that he was of opinion that the evidence was receivable. That the domestic history of the family during the period that the four deaths occurred was also receivable, to show that during that time arsenic had been taken by four members of it, with a view to enable the jury to determine as to whether such taking was accidental or not. That the evidence was not inadmissible by reason of its having a tendency to prove, or to create a suspicion of, a subsequent felony. The trial judge considered whether he ought to reserve the point for the consideration of the judges, and afterwards intimated to the prisoner's counsel that Alderson, B., and Talford, J., concurred with him in opinion, and that the point ought not to be reserved.

Upon the trial of an indictment for the murder of a woman by poison, it appeared that between September, 1859, and February, 1860, three other persons who had been living with her successively sickened and died after a very short illness under symptoms exactly similar to those under which the woman afterwards died. She had long been ill, became worse, and so continued until June, when she died. During her illness suspicion was awakened as to its cause, and on her decease the body was opened and a post-mortem examination made, and the result was that although she had been suffering from

§ 42. Evidence of other crimes in prosecution for sexual offense.—In offenses involving carnal intercourse of the

cancer of the cecum, there were found, in addition, traces of a sufficient quantity of antimony to have caused death. Upon this being discovered inquires were made as to the other deaths. The other bodies were exhumed, and were all found to be saturated with antimony. Before the trial the counsel for the prosecution intimated to the prisoner's counsel that he proposed calling evidence on the indictment for the murder of deceased which would have reference to the other three deaths. Martin, B., the trial judge, after consulting Wilde, B., determined not to admit the evidence. *Reg.* v. *Winslow,* 8 Cox, C. C. 397.

A man and his wife were indicted for the murder of the husband's mother. Some little time before the mother's death the wife had expressed jealousy of a woman, and in the beginning of December the latter's children were seized with violent sickness, followed by great thirst, after tasting some milk which had been sent to their mother by the accused woman. The mother gave the rest of the milk to another woman; and all the persons in that woman's household who partook of it were affected in the same way. The following day a girl of the first-mentioned woman, who went to the prisoner's for milk, was told by the latter to take a particular can out of two standing together. She took the other one while the accused's back was turned; and on that day her mother's children were not affected, but several persons who were dining in the accused's house, and who had all partaken of rice pudding made with the milk, were seized with sickness followed by violent thirst. The husband's mother had partaken of this pudding, and was taken ill like the others. She was attended during her illness by the wife, who prepared all her meals for her, and died on the 20th of December. In the course of her illness she had shown constant symptoms of the presence of an irritant poison in her stomach. Two or three months after her death her body was taken up and was found on analysis to contain arsenic sufficient to cause death. The body of the husband's first wife was exhumed at the same time, and was also found to contain arsenic. She had died on the previous March after only a few days illness. All her food was prepared for her by the second wife, who then lived in the husband's house as a servant; and both the first wife and the woman who attended her, and who occasionally tasted of the food prepared for her, showed symptoms of poisoning by arsenic. During the whole continuance of the illness, the prisoners, who were the only other persons in the house, were not affected. The prosecution offered evidence of these facts touching the death of the first wife, for the purpose of showing that his mother, for whose

sexes, including adultery, fornication, seduction, rape and incest, the exception to the general rule has been most liberally

murder he and his second wife were on trial, died from poison wilfully administered to her by the prisoners, and not taken by accident. After hearing the argument the court decided that the evidence was admissible for the purpose stated. *Reg.* v. *Garner,* 3 Fost. & F. 681, 4 Fost. & F. 346.

Upon the trial of an indictment for murder, by the prisoner, of the son of her late husband by poisoning, after evidence had been given tending to prove the case of the prosecution, by an analytical doctor who had given evidence in regard to the stomach of the deceased, it was proposed by the counsel for the prosecution to ask him if he had subsequently received several other jars containing the viscera of other persons, and had examined them. This was objected to, and, after extended argument for and against the admission of the evidence, the trial judge, Archibald, said he would consult Baron Pollock, which he did; and on his return he said that he had considered the point very carefully with his learned brother Pollock, and, on the authority of *Reg.* v. *Geering,* 18 L. J. Mag. Cas. N. S. 215, *supra* and *Reg.* v. *Garner,* 3 Fost. & F. 681, 4 Fost. & F. 346, *supra,* he thought he ought to receive the evidence. Counsel for the prisoner then asked that the case be reserved for the consideration of the court of criminal appeal, as there were conflicting authorities. His lordship said he must decline to do so, having made up his mind on the point. Evidence was then given that two other children of the prisoner and a lodger in her house had died previous to the present charge from the same poison. *Reg.* v. *Cotton,* 12 Cox, C. C. 400.

The prisoner was indicted for the murder of her infant child by poison. Upon the trial, after evidence tending to show that the child died by poison, in order to show that the poisoning was not accidental it was proposed to prove that another daughter of the prisoner had died in the March previous, and had, immediately before her death, unaccountably suffered from violent vomiting, purging, cramps, and convulsions, and other similar symptoms to those noticed in the illness of the second child on the third of October and just preceding her death. Also that such daughter, in fact, died from arsenical poisoning. No objection was raised to the introduction of this evidence. It was also proposed to further strengthen the theory for the prosecution by showing that the prisoner's mother came to visit the family on the third of November (subsequent to the death of the child for whose murder the accused was on trial), and that the next day she, also, was inexplicably seized in exactly the same way as the two children who had died by poison,—that she, in

extended, and for a reason peculiar to those crimes. The courts have almost invariably decided that evidence of mere oppor-

fact, also died from it. The question arose as to whether evidence of a subsequent poisoning could be given as well as a previous one, and Lush, J., admitted the evidence upon the theory of *Reg.* v. *Dossett,* 2 Car. & K. 306, 2 Cox, C. C. 243, *supra. Reg.* v. *Heeson,* 14 Cox, C. C. 40, 20 Moak, Eng. Rep. 384.

Two women, F. & H., were jointly indicted for the murder of the husband of H. Upon the trial, after proving that the husband had died from arsenic, and had been attended by the prisoners, the prosecution, in order to establish that his death was due to arsenical poisoning, and that not accidentally taken, but intentionally administered by some person, proposed to give evidence that three other persons (to whom the prisoners had access) had died within the last three years exhibiting similar symptoms to those of deceased, and that an examination of their exhumed bodies afforded evidence of their deaths being due to arsenical poisoning. In deciding to receive the evidence the trial judge said that the question was whether, on an indictment for murder by the administration of poison, evidence might be given that the deaths of other persons than the one of whose death the original inquiry is made could be given with a view of showing that those deaths resulted from poison of the same or a similar nature; that, where the authorities are at all in conflict, the safest rule to be guided by is one's common sense, and that he could not conceive that on a charge of this nature it was consistent with common sense to exclude such evidence; after citing *Reg.* v. *Geering,* 18 L. J. Mag. Cas. N. S. 215, *supra,* and stating what was decided in that case,—namely, that in a case of poisoning by arsenic evidence of the deaths of people other than the one whose death was the subject-matter of the particular inquiry might be given, with a view to showing, not that the prisoner had feloniously poisoned the person with whose murder he is charged, but that such person had, in fact, died by poison administered by some one; that that was the extent to which that authority went, and that to that extent the court had no hesitation in saying he would admit evidence as to the other deaths in this case; that there was one matter against which he wished to guard himself; that he did not think there was any authority, neither did he think it clear that it would be altogether consistent with reason and good sense, to admit such evidence as evidence of motives; and, with that safeguard, he had no hesitation in saying that it was competent for the Crown to tender the evidence in question. *Reg.* v. *Flannagan,* 15 Cox, C. C. 403.

In a comparatively recent English case in the privy council it was

tunity to a man and woman to commit an act of sexual intercourse creates no presumption that they did so, but, if it is

held that, where prisoners had been convicted of the wilful murder of an infant child, which the evidence showed they had received from its mother on certain representations as to their willingness to adopt it, and upon payment of a sum inadequate for its support for more than a very limited period, and whose body the evidence showed had been found buried in the garden of a house occupied by them, evidence that several other infants had been received by the prisoners from their mothers on like representations and on like terms, and that bodies of infants had been found buried in a similar manner in the garden of several houses occupied by the prisoners, was relevant to the issue which had been tried by the jury. The Lord Chancellor, in delivering the judgment of their lordships, among other things, said: "In their lordships' opinion the principles which must govern the decision of the case are clear, though the application of them is by no means free from difficulty. It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offense for which he is being tried. On the other hand, the mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed, or accidental, or to rebut a defense which would otherwise be open to the accused. The statement of these general principles is easy, but it is obvious that it may often be very difficult to draw the line and to decide whether a particular piece of evidence is on the one side or the other."

Several of the leading authorities on this subject decided by the English courts are considered at length in the opinion, with a substantial approval of the rule laid down in *Reg.* v. *Geering,* 18 L. J. Mag. Cas. N. S. 215, *supra,* and with a statement that the same had been practically approved by Maule, J., in *Reg.* v. *Dossett,* 2 Car. & K. 306, 2 Cox, C. C. 243, and *Reg.* v. *Gray,* 4 Fost. & F. 1102, *supra,* and that in the latter case Willes, J., after deciding to admit the evidence, consulted with Martin, B., and thereafter refused to reserve the point for the consideration of the court for Crown cases reserved. The opinion states further that the fact that Willes, J., adhered to his decision after consulting with Martin, B., is significant and important for the reason that, in *Reg.* v. *Winslow,*

shown that they have actually done so, the presumption shifts; and proof of opportunity to repeat the act, with comparatively

8 Cox, C. C. 397, *supra,* which case it certainly seemed difficult to reconcile with *Reg.* v. *Geering,* Martin B., was supposed to have retained and expressed different views, but that in view of the circumstances to which attention had been called (*viz.,* that Willes, J., declined to reserve the point for the consideration of the court for Crown cases reserved, after consultation with Martin, B.), it could not be regarded as certain that Martin, B., had, in *Reg.* v. *Winslow,* deliberately dissented from the view which was adopted in *Reg.* v. *Geering* and other cases. The opinion also states that their lordships did not think that the judgments in *Reg.* v. *Oddy,* 2 Den. C. C. 264, Temple & M. 593, 20 L. J. Mag. Cas. N. S. 198, 15 Jur. 517, 5 Cox, C. C. 210, at all conflicted with the judgment in *Reg.* v. *Geering,* and the other cases referred to. *Makin* v. *Atty. Gen.* [1894] A. C. 57, 63 L. J. P. C. N. S. 41, 6 Reports, 373, 69 L. T. N. S. 778, 17 Cox, C. C. 704, 58 J. P. 148.

On a trial for murder in causing the death of a single woman by strychnine, it appeared that while the defendant, an unmarried woman, was an inmate of a certain family, the wife died in spasms and convulsions, manifesting symptoms of strychnine poisoning and that for several hours preceding her death she was in the exclusive care of her son ten years of age and the defendant. That after the death of the wife the defendant continued a resident of the family, and by various acts and conversations evinced a desire to become the wife's successor and that she became possessed of the idea that the deceased was likely to become the second wife instead of herself. It was held that evidence tending to show that the death of the wife was caused by strychnine poisoning was competent, and, upon such evidence being admitted, that a charge to the jury that, if they should be convinced beyond a reasonable doubt that at the time of the death of the wife the family consisted of several members, of whom the defendant was one, and that none of the others were poisoned, the fact of her death might be considered by them in determining whether the death of the woman for whose murder the defendant was on trial was chargeable to accident or not, and that to convict they must be convinced beyond a reasonable doubt that the latter did not die from strychnine accidentally taken. *Zoldoske* v. *State,* 82 Wis. 580, 52 N. W. 778. It was contended by counsel for the defendant that the effect of such testimony should have been strictly limited to the question of motive and intent. In answer to this contention the court said: "The cases cited in support of this view hold only that such evidence is competent on this question. They are none of them cases of murder

slight circumstances showing guilt, will be sufficient to justify the inference that criminal intercourse has actually taken place. And so it has been repeatedly held that, upon a trial of a charge of having committed any of the crimes known as "sexual offenses," evidence of prior acts of the same character are admissible, although such prior act is, in and of itself, a crime.[1]

by poison, and they do not hold, or assume to decide, that in such a case such evidence, while it is proper evidence of motive and intent, may not be used, as it was in this case, to show that the deceased did not take the strychnine poison, of which she died, accidentally. The correctness of the charge is abundantly sustained by many authorities, and we know of none to the contrary."

[1] The following cases exhibit the position of the various courts, as to when such evidence will be deemed competent or otherwise. It will be noticed that some of the cases hold that the evidence of the other crime is admissible, without saying whether it occurred prior to the act charged; others that evidence of prior crimes is admissible; and still others that evidence of prior crimes is admissible, but that evidence of subsequent ones is not.

In all cases, whether civil or criminal, involving a charge of illicit intercourse within a limited period, evidence of acts anterior to that period may be adduced in connection with, and in explanation of, acts of a similar character occurring within that period, although such former acts would be inadmissible as independent testimony, and, if treated as an offense, would be barred by the statute of limitations. *Lawson* v. *State,* 20 Ala. 65, 56 Am. Dec. 182.

While, as a general rule, testimony is not admissible which tends to prove a distinct and different offense from that for which the defendant is on trial, yet, in cases where incest or adultery is charged, prior acts of sexual intercourse between the parties may be proved. *People* v. *Patterson,* 102 Cal. 239, 36 Pac. 436.

Although a conviction cannot be had under an indictment for living in adultery, on proof of acts which occurred more than twelve months before the finding of the indictment, yet evidence of such acts is admissible for the prosecution, in corroboration of other evidence tending to show an adulterous intercourse between the parties within the period covered by the indictment. *McLeod* v. *State,* 35 Ala. 395.

Under an indictment for living in adultery, evidence having been adduced tending to show an adulterous intercourse between the parties during the period covered by the indictment, proof of acts or conduct prior to that time may be received, without regard to the sufficiency of the other evidence

There are also decisions to the effect that evidence, not only of prior, but also of those committed subsequent, to the act

to authorize a conviction. *Cross* v. *State,* 78 Ala. 430.

Upon an indictment for living in an open state of adultery on a certain day and on divers other days and times since said date to the day of the finding of the indictment, evidence of acts anterior to such time are admissible in evidence as tending to illustrate or explain similar acts within the period alleged in the indictment, or to corroborate testimony of such latter acts, but not to convict of a substantive offense committed anterior to such period. *Brevaldo* v. *State,* 21 Fla. 789.

When, on a trial for fornication, there was evidence for the state tending to show that the accused and the other alleged guilty party were, on a designated occasion, in a position strongly indicating that the act charged in the indictment was being committed, it was competent for the state to supplement this evidence by proving lascivious conduct between these parties on a previous occasion, such proof being relevant and throwing light upon their relations toward each other, and as tending to illustrate the real nature of their conduct, upon the occasion first-above mentioned. *Bass* v. *State,* 103 Ga. 227, 29 S. E. 966. Whether the conduct mentioned amounted to a crime is not stated. But the following would seem to indicate that it did, or the instruction stated would not have been given.

The state in such case having elected the occurrence which was the later in point of time, as the one upon which it would rely for a conviction, the court very properly instructed the jury that they could not convict the accused upon the evidence relating to the prior occurrence, but that this testimony was for their consideration "simply to show the relations between the parties, and as a mere circumstance in the case, in connection with other circumstances, to be considered" by the jury. *Ibid.*

On the trial of an indictment for living together in an open state of adultery, evidence tending to show continuous acts of improper intimacy between the defendants at different periods and places, before the commission of the offense alleged in the indictment, is competent to show the relation existing between the parties. *Crane* v. *People,* 65 Ill. App. 492.

The court, in a trial for adultery alleged to have been committed on January 6, 1890, directed the jury that they must find that defendant committed the act charged on or prior to January 6, 1890, and within eighteen months prior to the finding of the indictment; and that evidence of improper conduct on the part of defendant towards the woman with whom the act was alleged to have been committed, prior to that charged in the indictment, "was not to be considered as proof of any acts of adultery by

charged, is admissible, although showing a distinct, independent crime. These are, however, believed to be in the minority,

defendant, but for the purpose of showing his intentions and disposition towards" the woman, "and as explanatory and corroborative of the particular offense charged." It was held that, if such instructions were error, they were favorable to defendant, and would not be reviewed on an appeal by him. *State* v. *Henderson,* 84 Iowa, 161, 50 N. W. 758.

Where, upon the trial of an indictment for adultery, one act of adultery committed by the defendant with the woman named in the indictment was proved by the testimony of a witness whose credibility the defendant attempted to impeach, it was held that other instances of improper familiarity between the defendant and the same woman, not long before the act of adultery proved as above mentioned, might be given in evidence to corroborate the testimony of the witness. *Com.* v. *Merriam,* 14 Pick. 518, 25 Am. Dec. 420, note.

Where it is shown that the parties accused had an opportunity to commit adultery at the time and place charged in the indictment, evidence that they had been guilty of the offense more than eighteen months before the indictment was found, and at a later period, in another county, may be admitted to explain their conduct at the time in question. *State* v. *Briggs,* 68 Iowa, 416, 27 N. W. 358.

Upon the trial of an indictment for adultery with a married woman evidence is admissible to prove that, a year before the date named in the indictment, the defendant and the woman occupied the same room in another county than that wherein the crime was stated to have been committed in the indictment, as it is proof of the disposition of the parties towards each other, and, hence, is germane to their alleged act of adultery. Such testimony is in the same category with motive, intent, or preparation, and is in no wise related to the proof of a separate offense, or of a propensity to commit the crime in question, or crimes generally. *State* v. *Snover,* 64 N. J. L. 65, 44 Atl. 850.

In *State* v. *Hilberg,* 22 Utah, 27, 61 Pac. 215, the defendant was charged with having had unlawful sexual intercourse with a female over the age of thirteen and under the age of eighteen years on the 15th day of February, 1898. Upon the trial the prosecutrix was permitted, under objection, to testify to the first act of sexual intercourse as having occurred in April, 1897, about eleven months before the act charged in the information, and subsequently, under objection, she was permitted to testify to five several and distinct acts occurring thereafter. The prosecutrix made no election, and it was held that the law made the election, and that this election was made by the proof of the first act of intercourse as having taken place in April, 1897, and that no subsequent election

could be made; nor could the prosecution prove any other act of the kind as a substantial offense upon which a conviction could be had but it could prove the intimacy and improper relations of the parties prior to the acts shown in the month of April, 1897, but not afterwards. In this case Bartch, Ch. J., dissented, claiming that where, as in this case, there is a continuation of the relation of intimacy and illicit intercourse between the parties to the offense, evidence of improper familiarity and adulteries, both before and after the act charged, is admissible.

On the trial of an indictment for incest, after evidence of incestuous intercourse had been introduced, the state offered to prove prior acts of indecent familiarity and sexual connection between the parties for the purpose of strengthening the evidence already in. It was held that it was error to exclude the offered evidence. *State* v. *Markins,* 95 Ind. 464, 48 Am. Rep. 733. In this case the court said: "In *Lovell* v. *State,* 12 Ind. 18, it was held that evidence of acts of sexual intercourse subsequent to the time laid in the indictment, and identified by the evidence introduced by the state, was incompetent, and it is confidently asserted that the decision in that case governs the present. But the cases are very different. Previous acts of lascivious familiarity would tend strongly to show the commission of the specific offense charged by the state, for it is impossible to doubt that evidence of such a character tends to make it probable that the parties did commit the specific offense charged. Such evidence goes in proof of the main offense, because it is evidence of the probability of its perpetration. Where the acts precede the offense, they constitute the foundation of an antecedent probability; but where they follow the main offense, their force and effect are materially different. It is one thing to affirm that evidence of prior incestuous intercourse is competent, and another thing to affirm that evidence of subsequent sexual intercourse is not competent; it is, therefore, not difficult to discriminate between the two cases."

In *State* v. *Guest,* 100 N. C. 410, 6 S. E. 253, where defendant had been convicted upon an indictment for fornication and adultery, the court instructed the jury that, as to acts testified to as having taken place outside of the county, or at a period of time more than two years prior to the finding of the bill, they could only consider such testimony for the purpose of enabling them to determine whether the defendant was in the habit of having sexual intercourse with the other defendant in the county within two years. In affirming a judgment of conviction, the supreme court said: "In our own reports, *State* v. *Kemp,* 87 N. C. 538, and *State* v. *Pippin,* 88 N. C. 646 are conclusive as to the admissibility of antecedent acts, as shedding light upon acts within the time limited; and acts committed without the limits of the county are admissible for the same purpose. As evidence, they can

only be considered by the jury in determining the character of the acts committed within two years, and within the county of Transylvania, of which there must have been some evidence. They must convict or acquit, as the facts alleged are or are not proved beyond a reasonable doubt to have been committed within two years, and within the county; and the evidence was admissible in this point of view and no other.

While evidence of an act of illegal intercourse, occurring more than two years before the indictment, is not competent as substantive testimony, it may be considered, if believed, as corroborative evidence of subsequent association. *State* v. *Dukes,* 119 N. C. 782, 25 S. E. 786.

And *State* v. *Guest,* 100 N. C. 410, 6 S. E. 253, was cited as an authority for the foregoing, proposition.

The crime of open and notorious adultery is not made out by a single act, or by the conduct of a single day, but by continuing acts and conduct over a period of time of more or less duration; and, where it is shown that at some prior period, not too remote, a man and a woman, not married to each other, abided and cohabited together, and it is shown at the trial that the abiding together continued and has been unbroken, the reasonable presumption or inference is that the cohabitation has also continued. Such evidence tends to prove the offense, and is, therefore, admissible. *State* v. *Coffee,* 75 Mo. App. 88.

On the trial of an information for incest evidence was offered of other previous acts of sexual intercourse between the defendant and the woman at various times, from the year 1853 down to about the time of the act of intercourse between them on the 17th of January, 1858, to which she had already testified, and upon which the prosecution relied for a conviction. The evidence of these previous acts was admitted by the recorder, not as evidence of substantive offenses, but in explanation and corroboration of the evidence of the act charged in the information. The court, after quoting the general rule, said: "But the courts in several of the states have shown a disposition to relax the rule in cases where the offense consists of illicit intercourse between the sexes; and it is principally to the American cases that we are to look for authorities upon this subject, as such intercourse is not generally rendered criminal in England, or prosecuted by indictment, being only the ecclesiastical cognizance." Continuing its reasoning on this subject, the court further said: "Previous familiarities, not amounting to actual intercourse but tending in that direction, must have strong bearing in all cases of this kind; and we can discover no just principle on which they could have been excluded without setting at defiance the common sense of mankind. Such evidence was given in this case by the father and mother of the girl, without objection from the defendant; and, if such familiarities may be shown

because they tend to prove actual intercourse, or to corroborate other evidence of such intercourse, upon what principle can previous actual intercourse be rejected, when offered for the same purpose? It is the principal and most important act of familiarity, to which the others only tended. If offered as proof of substantive offenses on which a conviction might be had in the case, it should, of course, be excluded; but, as it was not offered for this purpose, and could not be allowed to have such effect, we can see no objection to its reception." *People* v. *Jenness,* 5 Mich. 305. This reasoning would seem to be in unison with that adopted by the supreme judicial court of Massachusetts in *Thayer* v. *Thayer,* 101 Mass. 111, 100 Am. Dec. 110, and *Com.* v. *Nichols,* 114 Mass. 285, 19 Am. Rep. 346.

In a prosecution for adultery acts of familiarity, committed two years before, are too remote to be put in evidence, but acts within a short time before, and very soon after the act complained of, if establishing a continuous intimacy, may be shown. *People* v. *Hendrickson,* 53 Mich. 525, 19 N. W. 169.

In *People* v. *Skutt,* 96 Mich. 449, 56 N. W. 11, it is stated that this case appears to be in conflict with *People* v. *Jenness,* 5 Mich. 305, *supra,* though the facts in the two cases are different. The court adhered to the rule laid down in *People* v. *Jenness.* The attempt to distinguish upon the point involved does not appear to have been very successful, and it may be pretty safely said that, taken in connection with *People* v. *Jenness, People* v. *Skutt* practically overrules the case.

Upon the trial of an indictment for rape in the second degree, evidence of the commission of prior similar acts between the same parties is competent as tending to establish the commission of the particular act in question, or to corroborate witnesses testifying thereto. *People* v. *Grauer,* 12 App. Div. 464, 42 N. Y. Supp. 721.

By the Penal Code of New York rape in the second degree can be committed where the act is done with the consent of the female, the crime consisting of committing the act with a female under a certain age.

Upon the trial of an indictment for rape the prosecutrix, after testifying to the commission of the act charged in the indictment, was permitted, against the objection of the defendant, to testify that, four days before, the defendant had made an unsuccessful attempt to commit the offense. It was held that such evidence was competent. The reasoning of the court in coming to this result was that, if witnesses other than the complainant could have been called, who witnessed the unsuccessful attempt of the defendant to ravish the complainant four days before the crime was in fact accomplished, no one would have questioned the competency of their evidence; and that the evidence was not rendered incompetent because it came from the complainant herself. *People* v. *O'Sullivan,* 104 N. Y. 481, 58 Am. Rep. 530, 10 N. E. 880. In this case the general term of the su-

preme court had reversed the judgment of conviction, on the ground that such evidence was incompetent, and was likely to prejudice the jury seriously and strengthen the chances of a conviction. 25 N. Y. Week. Dig. 196, 5 N. Y. S. R. 132. As has been seen, the court of appeals differed from the supreme court upon that proposition; but, inasmuch as it affirmed the judgment of the latter, reversing the conviction upon another ground, the suggestion is made, whether that fact detracts from the value or weight of the decision of the ultimate court on the subject.

In *People* v. *Flaherty*, 79 Hun, 48, 29 N. Y. Supp. 641, which was an appeal from a judgment rendered upon the trial of an indictment for rape committed upon a female under the age of legal consent, the people introduced evidence of eight different acts of intercourse previous to her becoming the age of legal consent. The judgment of conviction was, however, reversed and a new trial ordered upon another ground. Upon the second trial the same evidence was admitted, and, upon appeal from the judgment of conviction, the appellate division affirmed the conviction, and, in an elaborate opinion, decided that evidence of the several acts was admissible. At the commencement of the second trial, counsel for the defendant moved that the people be compelled to elect which offense would be relied upon. The trial court refused to compel the people to elect at that time, and permitted the people to make the evidence of the eight different acts. At the close of the people's testimony the district attorney elected to proceed upon one act. The admission of the evidence was also objected to by the defendant. And this was affirmed by the appellate division. 27 App. Div. 535, 50 N. Y. Supp. 574.

The judgment of affirmance by the appellate division was, however, afterward reversed by the court of appeals, the latter court holding that the several acts testified to constituted, if they were committed, seven distinct crimes, for only one of which defendant was or could have been charged in the indictment; and that the defendant was entitled to know at the beginning of the trial whether he was to be tried for a crime committed on the day alleged in the indictment; and, if not, then that the people should state the date of the crime which it was purposed to prove as the one charged in the indictment. And that the refusal of the court to compel the people to so elect was prejudicial error; as was also the permitting of the people to show seven different acts, each of which, if committed, constituted a distinct crime; and to postpone such election until the close of their evidence; and that the evidence did not come within any of the exception to the general rule which forbids evidence of distinct independent crimes. 162 N. Y. 532, 57 N. E. 73. The opinion is of considerable length on this subject, and elaborates with great particularity the reasons why this evidence was inadmissible, and dis-

tinguishes *People* v. *O'Sullivan,* 104 N. Y. 481, 58 Am. Rep. 530, 10 N. E. 880, *supra.*

In a prosecution for bastardy evidence of acts of intercourse other than that charged in the complaint is admissible as bearing upon the probability of the particular act having occurred as charged. *People* v. *Schilling,* 110 Mich. 412, 68 N. W. 233.

A general conviction of a prisoner, charged both as principal in the first degree and as an aider and abettor of other men in rape, is valid on the count charging him as principal. On such an indictment evidence may be given of several rapes on the same woman at the same time, by the prisoner and other men, each assisting the other in turn, without putting the prosecutor to elect on which count to proceed. *Rex* v. *Folkes,* 1 Moody, C. C. 354.

In a prosecution for rape, alleged to have been committed on a female under the age of legal consent, testimony of the prosecuting witness of acts of intercourse between herself and the defendant prior to the act for which the defendant is being tried is admissible. *State* v. *Peres,* 27 Mont. 358, 71 Pac. 162.

Upon the trial of an indictment for incest, prior acts of incest between the same parties may be proved. *State* v. *De Hart,* 109 La. 570, 33 So. 605.

On the trial of an information for rape, proof of other acts of defendant is competent to show that he had made attempts to commit the same offense, recently before the commission of the act for which he was on trial. *State* v. *Scott,* 172 Mo. 536, 72 S. W. 897.

On the trial of an indictment for adultery other acts of adultery by the same parties are admissible in evidence, although committed four years previous to the finding of the indictment as nearness of time is a circumstance affecting the effect of the evidence, and not its competency. *United States* v. *Griego,* 11 N. M. 392, 72 Pac. 20.

Upon the trial of an indictment for fornication or adultery evidence of acts anterior to the time in which the fornication or adultery is alleged to have been committed is admissible. *Com.* v. *Lahey,* 14 Gray, 91; *State* v. *Jackson,* 65 N. J. L. 62, 46 Atl. 767; *State* v. *Kemp,* 87 N. C. 538; *State* v. *Pippin,* 88 N. C. 646; *Com.* v. *Bell,* 166 Pa. 405, 31 Atl. 123; *State* v. *Potter,* 52 Vt. 33.

In a prosecution for incest, it is competent for the state to prove acts of sexual intercourse prior to the specific act charged in the indictment. *Taylor* v. *State,* 110 Ga. 150, 35 S. E. 161; *Lefforge* v. *State,* 129 Ind. 551, 29 N. E. 34; *People* v. *Cease,* 80 Mich. 576, 45 N. W. 585; *Com.* v. *Senak,* 9 Kulp, 558.

In a prosecution for assault with intent to commit rape, evidence is admissible of previous assaults of the same character upon the prosecutrix. *Williams* v. *State,* 8 Humph. 585; *Taylor* v. *State* 22 Tex. App. 529, 58 Am. Rep. 656, 3 S. W. 753; *Callison* v. *State,* 37 Tex. Crim. Rep. 211, 39 S. W. 300; *Hanks* v. *State,* — Tex. Crim. Rep.

—, 38 S. W. 173. And in a prosecution for rape. *People* v. *Abbott*, 97 Mich. 484, 37 Am. St. Rep. 360, 56 N. W. 862.

On a trial for rape, evidence as to a number of acts of carnal intercourse between the parties, before the age of consent was raised to fifteen years, two of such acts being outside the county of the prosecution, was held to be admissible to show the probability that defendant committed the offense, as charged, in corroboration of testimony of the prosecutrix. And it was held that the court was not required, in the charge, to limit and restrict the purposes of such evidence; that the proper practice would have been for defendant to have asked that the prosecution be required to elect upon which particular act a conviction would be asked. *Hamilton* v. *State*, 36 Tex. Crim. Rep. 372, 37 S. W. 431. To the same effect, *Cooksey* v. *State*, — Tex. Crim. Rep. —, 58 S. W. 103.

But see *Barnett* v. *State*, — Tex. Crim. Rep. —, 73 S. W. 399, holding that on a trial for rape committed upon a female under the age of consent, with her consent, testimony of former rapes committed by means of force by the defendant upon the prosecutrix is inadmissible.

The court stated that *Hamilton* v. *State*, 36 Tex. Crim. Rep. 372, 37 S. W. 431, *supra; Manning* v. *State*, — Tex. Crim. Rep. —, 65 S. W. 920, and *Cooksey* v. *State*, — Tex. Crim. Rep. —, 58 S. W. 103, *supra*, —so far as they conflict with the foregoing, were overruled. *Ibid.*

The court said that in such a case such testimony is only admissible where it tends to solve some disputed fact or issue; that there was no difference, in the introduction of testimony to other offenses, between a case of rape and any other criminal charge; and, that, indeed, the reason of the rule excluding such testimony would appear to stronger in a rape case than in any other character of offense, inasmuch as evidence of such extraneous crimes is more calculated to inflame the minds of the jury in a rape case than in any other. *Ibid.* See *Smith* v. *State*, — Tex. Crim. Rep. —, 73 S. W. 401.

To the same effect, and following and approving *Barnett* v. *State*, — Tex. Crim. Rep. —, 73 S. W. 399 *supra*, are the recent cases of *Hackney* v. *State*, — Tex. Crim. Rep. —, 74 S. W. 554, and *Smith* v. *State*, — Tex. Crim. Rep. —, 74 S. W. 566.

Upon the trial of an indictment for adultery, evidence of acts of improper familiarity, which themselves amount to adultery between the same persons, before the time relied on as the time of the commission of the adultery charged, is inadmissible, either in corroboration of witnesses for the commonwealth, or to show the disposition of the parties to commit the crime. *Com.* v. *Thrasher*, 11 Gray, 450.

This case is practically disapproved in *Thayer* v. *Thayer*, 101 Mass. 111, 100 Am. Dec. 110.

On the trial of one charged with the crime of rape, by carnally knowing a female under the age of eighteen years, several different

acts of unlawful intercourse were testified to by the prosecutrix. The state elected to rely on a particular act, and, under this election, it was held to be the duty of the trial court to exclude from the consideration of the jury all testimony with reference to other acts that did not tend directly to prove the commission of the particular act relied upon by the state for conviction. *State* v. *Bonsor,* 49 Kan. 758, 31 Pac. 736.

On a charge of fornication with the prosecuting witness, it was held that the state, in its evidence, could go back and cover a period of two years anterior to the presentment of the indictment. The testimony of acts of fornication committed before that time, as a general rule, would be inadmissible; and such testimony could only be admitted under peculiar circumstances. The same observations were held to apply with reference to the proof that the witness had had six children by accused, because the proof in that regard would go more than two years behind the date when the indictment was presented; and that this character of testimony was calculated to injure the accused. *Duncan* v. *State,* — Tex. Crim. Rep. —, 45 S. W. 921.

Upon the trial of an indictment for an assault with intent to commit a rape, evidence that the prisoner on a prior occasion had taken liberties with the prosecutrix is not admissible to show the prisoner's intent. *Rex* v. *Lloyd,* 7 Car. & P. 318.

Under an information for adultery charging but one offense, and that in a single count, a public prosecutor, having given evidence of one act of adultery, will be confined to that act, and not permitted to introduce proof of other acts, committed with the same person at different times and places. In this case the court said: "The accused comes prepared to defend against a single charge. This he may do successfully and, having done so, may find himself overwhelmed by a multitude of others of which the information gave him no notice, and against which he cannot be supposed to be prepared. And the prosecuting attorney, instead of shaping his case, at the outset, in the most favorable manner, may detain the court, and jury by proving any number of offenses, and then elect upon which to claim a conviction. And why should this be done? He is supposed to be in the possession of the proofs, and should make his election from the first. In this there can be no hardship; and such is the well-settled rule in all analogous cases." *State* v. *Bates,* 10 Conn. 372. This case would seem to be opposed in theory and principle to like cases in other states, where it has been repeatedly held that, upon the trial of informations or indictments for this offense, other acts of a kindred nature between the same parties may be proved as tending to show the character of the act charged in the indictment or information. In this case the acts, evidence of which was held to be admissible, were committed previous to the act charged in the information.

On a trial for rape, where the prosecuting witness had given testi-

and, besides, are lacking the strong reason which is given for the admission of evidence of the prior act.[2]

mony of a rape perpetrated when she was alone with the defendant, and a ravishment upon another and different and later day, in the presence of another female, it was held that it is a familiar principle of our criminal law that it is not admissible to introduce evidence tending to prove a similar, but distinct, offense for the purpose of raising an inference or presumption that the prisoner committed the particular act with which he is charged and for which he is on trial; that there are exceptions to the rule above stated, but the case at bar did not come within any of these exceptions; and it was error to admit evidence of two separate, distinct, and substantive crimes over the objection of the defendant. *Parkinson* v. *People,* 135 Ill. 404, 10 L.R.A. 91, 25 N. E. 764.

In *State* v. *Riggio,* 124 La. 614, 50 So. 600, a prosecution for assault with intent to rape, evidence of other assaults, at other times and places, was held inadmissible.

So, in *State* v. *Dlugozina,* — Del. —. 74 Atl. 1086, a prosecution for rape, it was held that the testimony must be confined to the act on which the state intended to rely.

[2] The following cases sustain the right to introduce evidence of acts subsequent to the one charged.

Acts of indecent familiarity within the limited period cannot be explained by proof of the subsequent illicit intercourse of the parties; but when such acts of indecent familiarity have been explained by previous acts of illicit intercourse, then proof of the subsequent illicit intercourse becomes corroborative or cumulative evidence, and is admissible. *Lawson* v. *State,* 20 Ala. 65, 56 Am. Dec. 182.

On a charge involving illicit intercourse during a particular period, evidence of acts anterior or subsequent to that time, which tend to illustrate or explain similar acts within the particular period, although not evidence on which to base a conviction, are admissible, in connection with evidence of similar acts during the time laid, to prove illicit intercourse as charged. *Alsabrooks* v. *State,* 52 Ala. 24.

On an indictment for rape of a child under ten years of age, evidence was admitted of subsequent perpetrations of the same offense on different days previous to complaint to the mother, it appearing that the prisoner had threatened the child on the first occasion, and it being held that in such a case it was virtually all one continuous offense. *Reg.* v. *Rearden,* 4 Fost. & F. 76.

Under an indictment charging the defendants with living together in open adultery, prior and subsequent acts of improper familiarity, or of adultery, between the parties, whether occurring in the same or other jurisdictions, may be proved in explanation of, or to characterize, the acts of the parties com-

plained of as constituting the offense charged. *Crane* v. *People,* 65 Ill. App. 492, affirmed in 168 Ill. 395, 48 N. E. 54.

In a prosecution for adultery, acts prior, and also subsequent, to the act charged in the indictment, when indicating a continuance of illicit intercourse, are admissible in evidence for the purpose of showing the relation and mutual disposition of the parties, the reception of such evidence to be largely controlled by the judge who tries the cause, explaining to the jury its purpose and effect. *State* v. *Witham,* 72 Me. 531. To the same effect, *State* v. *Williams,* 76 Me. 480.

Upon a charge of adultery in an indictment, evidence of improper familiarities between the parties, both anterior and subsequent to the time the offense is charged, may be received as corroborating proof, after evidence has been offered tending to prove the offense charged. *State* v. *Way,* 5 Neb. 283.

It is competent for the state, in the trial of an indictment for seduction, to show that there was sextual intercourse between the parties subsequent to the first alleged act. *State* v. *Robertson,* 121 N. C. 551, 28 S. E. 59.

Evidence of acts of adultery, subsequent to the date of the latest act charged in the petition, is admissible, for the purpose of showing the character and quality of previous acts of improper familiarity. *Boddy* v. *Boddy,* 30 L. J. Mag. Cas. N. S. 23.

Where defendant was convicted of incest, the sole question raised in the case was, whether the state could prove the crime of incest by evidence of more than one act. It was held that this was not an open question; that it is well settled that, in prosecutions for adultery, or for illicit intercourse of any class, evidence is admissible of sexual acts between the same parties prior to, or, when indicating continuousness of illicit relations, even subsequent to, the act specifically under trial. *Burnett* v. *State,* 32 Tex. Crim. Rep. 86, 22 S. W. 47.

Upon an indictment for adultery evidence of other acts of improper familiarity and adultery between the parties to the alleged offense, continuing from before until after the offense charged, and after indictment found, is admissible, although it proves other and distinct offenses, to show the true relation of the parties to each other,—to show that the restraints and safeguards of common deportment and conventionality, and of the natural modesty that is presumed to exist, have been broken through and displaced by the adulterous disposition and the habits of adulterous intercourse. *State* v. *Bridgman,* 49 Vt. 202, 24 Am. Rep. 124.

Upon the trial of an indictment for adultery, evidence of other acts of adultery committed by the same parties, near the time charged, though in another county, is admissible to support the indictment. *Com.* v. *Nichols,* 114 Mass. 285, 19 Am. Rep. 346. This case cites, follows, and approves *Thayer* v. *Thayer,* 101 Mass. 111, 100 Am. Dec. 110, note, which was an action for a divorce, in which the court,

disapproving of *Com.* v. *Horton,* 2 Gray, 354, infra, and *Com.* v. *Thrasher,* 11 Gray, 450 supra, note 1, said: "But by the application of the rule laid down in these cases, evidence tending to establish an independent crime is to be rejected, although all acts which are only acts of improper familiarity are to be admitted in proof. There is no sound distinction to be thus drawn. There is no difference between acts of familiarity and actual adultery committed, when offered for the purpose indicated, except in the additional weight and significance of the latter fact. The concurrent adulterous disposition of the defendant and the *particeps criminis* cannot be shown by stronger evidence than the criminal act itself. There is no one act by which the moral status of the parties is more clearly defined. And, for the purposes and with the limitations here stated, evidence of it is always admissible."

This was a civil action for a divorce, but, as the supreme judicial court of Massachusetts, by its judgment therein and in the opinion of the judge delivering such judgment, disapproves *Com.* v. *Horton,* 2 Gray, 354 and *Com.* v. *Thrasher,* 11 Gray, 450; and inasmuch as the case has been followed and approved both in Massachusetts and other states where the question which is the subject under consideration herein has arisen,—it is deemed a proper case to be inserted here. The court took occasion to say further: "The fact that the conduct relied on has occurred since the filing of the libel does not exclude it; and proof of the continuance of the same questionable relations during the intervening time, as in the case at bar, will add to its weight." The weight of authority, however, sustains *Com.* v. *Horton,* 2 Gray, 354, in which upon the trial of an indictment for adultery in one county with a woman named, evidence that the defendant, after the time alleged in the indictment, cohabited with the same woman in another county, and called her his wife, and said he had lived at the place named in the indictment was held inadmissible. The reason for holding that the evidence was inadmissible would seem to be that no act of the defendant after the time charged in the indictment for the commission of the offense with which he was charged could in any wise characterize that crime; and that a different rule applies where there is evidence of the same acts previous to the commission of the offense charged in the indictment, and such evidence is admissible.

That the weight of authority condemns the admission of evidence of facts subsequent to the one charged is shown by the following case:

Upon the trial of an indictment for adultery, evidence of the criminal conduct of the defendant and his supposed paramour, as shown by disconnected acts occurring eighteen months after the time laid as for the commission of the crime in the indictment, is inadmissible. *State* v. *Crowley,* 13 Ala. 172.

Where the indictment contained a single charge of incest, which was proved as laid, the state cannot prove that the defendant had sexual intercourse with the prosecuting

witness at any subsequent time. *Lovell* v. *State,* 12 Ind. 18. See *State* v. *Markins,* 95 Ind. 464, 48 Am. Rep. 733.

In a criminal prosecution for seduction the prosecution, after having introduced evidence tending to show an offense committed on a certain day, cannot show subsequent acts as corroborating testimony, as they would have no such tendency. Proof of previous acts of sexual intercourse would tend to show a much greater probability of the commission of a similar act charged to have occurred subsequent thereto; but the converse of this proposition would not be true, as the proof of a crime committed by parties on a certain day could have no tendency to prove that they had, previous thereto, committed a similar offense. *People* v. *Clark,* 33 Mich. 112, 1 Am. Crim. Rep. 660.

An information for adultery charged the offense to have been committed on the 17th day of February, 1892. Testimony was admitted tending to show a similar offense some three months after the offense charged in the information. It was held that the court was in error in admitting this testimony; that acts of intimacy in this class of cases, prior to the offense charged, may be shown, but it is wholly incompetent to show subsequent acts for any purpose. *People* v. *Fowler,* 104 Mich. 449, 62 N. W. 572.

Upon a trial for seduction the information charged the offense to have been committed October 22d. The testimony showed it was committed September 22d. After this testimony was given, the people were allowed to show acts of intercourse in November and December, and that pregnancy resulted therefrom. This was held to be error. *People* v. *Payne,* 131 Mich. 474, 91 N. W. 739.

Where, contrary to the rule of law, in a prosecution for adultery, evidence was admitted of an adulterous act subsequent to the one charged in the indictment, the error was held to be cured by the district attorney's withdrawing from the jury the evidence of such subsequent act. *State* v. *Donovan,* 61 Iowa, 278, 16 N. W. 130, 4 Am. Crim. Rep. 25.

Upon the trial of an indictment for the crime of adultery, the admission in evidence of acts of sexual intercourse, subsequent to the date on or about which the act of adultery declared upon in the indictment is charged to have been committed, is not reversible error, where, after the state had elected to stand upon the act testified to as being the first committed, and as occurring on or about the date alleged in the indictment, the evidence as to the other acts was stricken out, on defendant's motion. *State* v. *Oden,* 100 Iowa, 22, 69 N. W. 270.

The above case and *State* v. *Donovan,* 61 Iowa, 278, 16 N. W. 130, 4 Am. Crim. Rep. 25, *supra,* are referred to without approval in *State* v. *Smith,* 108 Iowa, 440, 79 N. W. 115, *infra,* where attention is called to the fact that in neither case was the statement of law in question necessary to the determination of the case, nor in fact applied.

In *State* v. *Smith,* 108 Iowa, 440,

79 N. W. 115, which was a prosecution for adultery, the court said that it did not find it necessary to decide whether the statement made in *State* v. *Donovan,* 61 Iowa, 278, 16 N. W. 130, 4 Am. Crim. Rep. 25, *supra,* and approved in *State* v. *Oden,* 100 Iowa, 22, 69 N. W. 270, *supra,* correctly represents the law, and that in neither of those cases was the statement of law in question, *i. e.,* that where the change is of one act of adultery only, in a single count, to which evidence has been given, the prosecution is not permitted to introduce other acts committed at different times and places,—necessary to a determination of the case; nor was it, in fact, applied. The court then decided that, if the defendant desired that an election be made of the different acts as to which evidence had been given, he should have asked it before the cause was submitted to the jury, and, having failed to do so, he was not entitled to relief on the ground that the election was not made.

Where an indictment charged a rape to have been committed upon a female under the age of consent, on the 25th day of May, and the evidence showed several rapes proved on the part of the state, and the state having elected to prosecute, under the insistence of accused, for a rape committed in February of the same year, it was proper for the court to limit the consideration of the jury to that offense. *Price* v. *State,* 44 Tex. Crim. Rep. 304, 70 S. W 966.

Upon the trial of an indictment for rape in the second degree, alleged to have been committed on the 13th day of January, 1894, upon a female under the age of sixteen, and not the wife of the defendant, evidence was admitted that, from the 9th of May to the 11th of June, the defendant and the female lived together in a flat in the city of New York. The court, in holding that the admission of such evidence was error, after citing cases in Maine, Massachusetts, and Vermont, and commenting upon them, said: "Applying the principle of these cases to the facts of the case at bar, we think it clear that the evidence tending to show cohabitation in the Thirty-sixth street flat was inadmissible. The cohabitation inferable from this evidence took place four months after the act for which it was sought to convict the defendant. There was no proof of intercourse, or even of familiarity, in the interim. Almost immediately after the alleged occurrence in January, the girl went to live with her mother at a flat in Twenty-eighth street, and she remained there until the following May. The defendant was in the city part of the time, and he was traveling in the west for a short period. There is not a suggestion of intercourse, proper or improper, during all this time. In fact, there is a complete gap in that direction, covering this whole period of four months. How, then, can evidence tending to show illicit relations in May and June be said to corroborate proof of the intercourse in January? If the defendant and the complainant had conceived an illicit passion for each other in January, is it probable that they

would have postponed its gratification until May? Nothing, so far as it appears, put any restraint upon them save those dictates of decency which had already proved inadequate. The proof which was objected to quite fails, it seems to use, to show a mutually amorous disposition between the parties four months before. Still less does it tend to show continuousness of illicit relations throughout those four months and down to and including the later periods." *People* v. *Freeman,* 25 App. Div. 583, 50 N. Y. Supp. 984.

After the state had introduced the prosecutrix as a witness, and she testified to an act of sexual intercourse between her and defendant at a certain time and place, that this was the first time he had had sexual intercourse with her, and that prior to this act he promised to marry her, evidence, against defendant's objection, to show by her that, a week after this first connection, defendant had sexual intercourse with her again, and that they continued to have sexual intercourse "regularly" for some months afterwards, is inadmissible. *Pope* v. *State,* 137 Ala. 56, 34 So. 840.

The rule that in prosecution for incest or adultery proof of subsequent acts of the same character between the parties are admissible has no application to a prosecution for rape which is a completed and not a continuous transaction. *Ball* v. *State,* 44 Tex. Crim. Rep. 489, 72 S. W. 384.

The reason for the exception to the general rule forbidding the admission of evidence of a separate crime,—which, on a trial for a sexual offense, permits evidence of acts of prior intercourse between the parties,—is not applicable to an act of intercourse occurring after the time charged in the indictment, as it is manifest that the illicit relations may have commenced subsequent to the crime for which the accused is being prosecuted. And the admission of evidence of such subsequent act is error, for which a conviction will be reversed. *People* v. *Robertson,* 88 App. Div. 198, 84 N. Y. Supp. 401.

On a trial for rape committed on a female under the age of consent, evidence of subsequent acts of intercourse between the parties is inadmissible, as such acts do not form part of a system, or part of the *res gestæ,* or serve to identify the accused. *Smith* v. *State,* — Tex. Crim. Rep. —, 73 S. W. 401; *Hamilton* v. *State,* 36 Tex. Crim. Rep. 372, 37 S. W. 431; *Callison* v. *State,* 37 Tex. Crim. Rep. 216, 39 S. W. 300; *Hanks* v. *State,* — Tex. Crim. Rep. —, 38 S. W. 173; *Cooksey* v. *State,* — Tex. Crim. Rep. —, 58 S. W. 103,—so far as they announce a doctrine contrary to the foregoing, overruled.

In the above case the court repudiated the doctrine stated to have been held in the *Hamilton* and *Cooksey Cases,*—that such evidence was admissible to show the probability that defendant committed the offense as charged in corroboration of the testimony of the prosecutrix; and very correctly scouted the idea that the complaining witness in a prosecution for rape can corrobate herself by swearing to one

Offenses against other persons than the one against whom the offense with which defendant is charged was committed are inadmissible.[3]

fact, and then swearing to another fact, and insisting that such other fact was corroborative of the previous statement. The case, in connection with *Barnett* v. *State,* 44 Tex. Crim. Rep. 5927, 100 Am. St. Rep. 873, 73 S. W. 399, would seem to have almost completely changed the doctrine theretofore prevailing in Texas.

From the foregoing decisions it would appear that the weight of authority seems to be in favor of the doctrine that, in this class of cases, evidence of acts occurring prior to the act for which the accused is being tried may be given to characterize and explain the latter; but that evidence of subsequent acts may not. The minority in favor of the admission of subsequent acts is, however a strong one; but it is thought that the reasoning in favor of their admission lacks a great deal of the force of that generally used in the arguments in favor of the admission of evidence of prior acts.

[3] On a trial for an assault with intent to commit a rape, the prosecution should not be permitted to introduce in evidence the declarations of the defendant concerning his misconduct with females, other than the one he is charged with having attempted to violate. *People* v. *Bowen,* 49 Cal. 654.

On a trial for detaining a woman with intent to carnally know her, she testified that the accused had often tempted her virtue. Asked by the defense why she had not made complaint, she said because his wife (her aunt) had had so much trouble about him. It was held that it was error to allow her to detail his sexual offenses with other women, in response to questions by the state. *Cargill* v. *Com.* 12 Ky. L. Rep. 149, 13 S. W. 916.

On a trial for assault with intent to rape, evidence of an attempt of the defendant to commit a similar crime on another person, an hour before the assault charged, is inadmissible. *McAllister* v. *State,* 112 Wis. 496, 88 N. W. 212.

The following are cases of sexual offenses which have been placed in other parts of the note because peculiarly applicable to the particular subject discussed in the several divisions of the note in which they will respectively be found, *viz.*: *State* v. *Lapage,* 57 N. H. 245, 24 Am. Rep. 69; *Janzen* v. *People,* 159 Ill. 441, 42 N. E. 862, 10 Am. Crim. Rep. 489; *State* v. *Desmond,* 109 Iowa, 72, 80 N. W. 214; *State* v. *Walters,* 45 Iowa, 389; *Palin* v. *State,* 38 Neb. 862, 57 N. W. 743; *State* v. *Kavanaugh,* 133 Mo. 452, 33 S. W. 33, 34 S. W. 842; *Parkinson* v. *People,* — Ill. —, 24 N. E. 772; *State* v. *Taylor,* — Mo. —, 22 S. W. 806, 118 Mo. 153, 24 S. W. 449, 11 Am. Crim. Rep. 51; *Thompson* v. *State,* 11 Tex. App. 51; *Davis* v *State,* — Tex. Crim. Rep. —, 23 S. W. 685; *Reg.* v.

§ 43. Distinctive rule in cases of marital homicide.—It is settled that the state has a right to prove a course of ill-treatment and of quarrels with his wife, on trial of the husband for her murder.[1] Also, that a complaint was filed against the defendant, by the deceased, and was pending, as tending to show motive and animus on the part of the defendant to kill the deceased.[2] This testimony, while in and of itself inadmissible, under the rule adverted to, yet taken in connection with other relevant facts in the case, tends to establish the motive which actuated the defendant in his hostility towards the

Chambers, 3 Cox, C. C. 92; *Strang* v. *People,* 24 Mich. 1; *Mitchell* v. *People,* 24 Colo. 532, 52 Pac. 671; *State* v. *Higgins,* 121 Iowa, 19, 95 N. W. 244; *Bigcraft* v. *People,* 30 Colo. 298, 70 Pac. 417; *Taylor* v. *State,* 22 Tex. App. 529, 58 Am. Rep. 656, 3 S. W. 753; *People* v. *Fultz,* 109 Cal. 258, 41 Pac. 1040.

[1] Post, § 785; also §§ 784, 796; *State* v. *Watkins,* 9 Conn. 47, 54, 21 Am. Dec. 712; *Sayres* v. *Com.* 88 Pa. 291; *State* v. *Langford,* 44 N. C. (Busbee, L.) 436, 442; *Stone* v. *State,* 4 Humph. 27, 36; *Cole* v. *Com.* 5 Gratt. 696; *State* v. *Wisdom,* 8 Port. (Ala.) 511, 513; *Johnson* v. *State,* 17 Ala. 618, 622.

Also the adultery of the husband with another woman. *Stout* v. *People,* 4 Park. Crim. Rep. 132; *State* v. *Rash,* 34 N. C. (12 Ired. L.) 382, 55 Am. Dec. 420; *People* v. *Jenness,* 5 Mich. 323; *Templeton* v. *People,* 27 Mich. 501; *St. Louis* v. *State,* 8 Neb. 405, 1 N. W. 371.

And in one case all the evidence of the relations and intercourse between the defendant and deceased for six months preceding the homicide was admitted, and it was ruled defendant had no ground of exception. *Com.* v. *Costley,* 118 Mass. 1; *Williams* v. *State,* 15 Tex. App. 105, 110.

[2] *Robinson* v. *State,* 16 Tex. App. 347, 354; *Taylor* v. *State,* 14 Tex. App. 340, 350; *Rucker* v. *State,* 7 Tex. App. 549, 560; *Phillips* v. *State,* 62 Ark. 119, 34 S. W. 539; *Painter* v. *People,* 147 Ill. 444, 463, 35 N. E. 64; *People* v. *Blake,* 1 Wheeler C. C. 272; *Persons* v. *People,* 218 Ill. 386, 75 N. E. 993; *People* v. *Benham,* 160 N. Y. 402, 55 N. E. 11, 14 N. Y. Crim. Rep. 188; *People* v. *Decker,* 157 N. Y. 186, 193, 51 N. E. 1018.

And these threats may be shown as extending against the entire family, to show motive, where that family includes the wife as a member, or the person threatened. *Sebastian* v. *State,* 41 Tex. Crim. Rep. 248, 251, 53 S. W. 875; *Hamilton* v. *State,* 41 Tex. Crim. Rep. 644, 652, 56 S. W. 926; *State* v. *Kohne,* 48 W. Va. 335, 37 S. E. 553; *Gravely* v. *State,* 45 Neb. 878, 882, 64 N. W. 452; *Moore* v. *State,* 31 Tex. Crim. Rep. 234, 20 S. W. 563.

deceased, and for that reason is competent to be considered and weighed by the jury, in connection with the other testimony, in determining the question of motive, and, under some circumstances, in fixing the identity of the murderer.

§ 44. Other offenses irrelevant in criminal negligence; exception.—Upon a criminal prosecution for injuries caused by negligence, evidence of other disconnected though similar acts is irrelevant. Criminal negligence, like many other crimes, may involve both criminal and civil responsibility; criminal responsibility to the state, for the violation of the law, upon conviction of which punishment may be inflicted; civil responsibility to the party injured, upon proof of which damages, and in some states, in addition exemplary damages, are recoverable.

Those statutes which define the elements that enter into a crime or misdemeanor recite that the crime or misdemeanor consists in "the violation of a public law in the commission of which there shall be an union or joint operation of act and intention," following this with a disjunctive, "or criminal negligence." [1]

Culpable or criminal negligence, under the authorities, is defined to be a dereliction of duty under circumstances showing an actual intent to injure; or such a conscious and intentional breach of duty in such act or omission to act, that the law will imply and impute criminal intent; under the implication that the injuries were intended.[2] The law so implies a guilty intent, because, knowing the natural and probable conse-

[1] Ga. Code 1895, § 31, *Owens* v. *State,* 120 Ga. 296, 299, 48 S. E. 21; *Yoes* v. *State,* 9 Ark. 42, 43; *Kent* v. *People,* 8 Colo. 563, 573, 9 Pac. 852, 5 Am. Crim. Rep. 406; Hurd's Rev. Stat. (Ill.) 1901, p. 645; *Spalding* v. *People,* 172 Ill. 40, 49 N. E. 993.

[2] *Thomas* v. *People,* 2 Colo. App. 513, 31 Pac. 349; 21 Am. & Eng. Enc. Law, 2d ed. p. 459.

quences of the act which he did or which he neglected to do, he must have intended the result.[3]

This intent is implied only from the act itself, and therefore cannot be proved nor inferred from other similar acts.[4]

[3] *James* v. *Campbell,* 5 Car. & P. 372; *Reg.* v. *Towers,* 12 Cox, C. C. 530; *Reg.* v. *Macleod,* 12 Cox, C. C. 534; *Reg.* v. *Jones,* 12 Cox, C. C. 625; *People* v. *Fuller,* 2 Park. Crim. Rep. 16; *Rice* v. *State,* 8 Mo. 561, 564; *State* v. *Vance,* 17 Iowa, 138, 147; *Lee* v. *State,* 1 Coldw. 62, 67; *Sparks* v. *Com.* 3 Bush, 111, 115, 96 Am. Dec. 196; *Chrystal* v. *Com.* 9 Bush, 669, 672.

"If persons in pursuit of their lawful and common occupations see danger probably arising to others from their acts, and yet persist, without giving sufficient warning of danger, the death which ensues will be murder. Thus, if workmen throwing stones, rubbish, or other things from a house, in the ordinary course of their business, happen to kill a person underneath, the question will be whether they deliberately saw the danger, or betrayed any consciousness of it. If they did, and yet gave no warning, a general malignity of heart may be inferred." *Lee* v. *State,* 1 Coldw. 62, 66.

"The law always presumes that a party intended the probable and natural effects of his deliberate acts. . . . We remark . . . that a person in the commission of a crime may determine to do the wrong or act with such indifference as almost if not quite, to supply the place of the more positive mental condition. *State* v. *Vance,* 17 Iowa, 138, 147.

Other illustrations of an act committed or a duty omitted are familiar to the profession as constituting criminal and culpable negligence; and so, manslaughter. Thus, if a parent without intent or malice, but negligently only, fails to discharge his plain duty towards an offspring and death results in consequence, it is manslaughter. *Lewis* v. *State,* 72 Ga. 164, 53 Am. Rep. 835, 5 Am. Crim. Rep. 381; *Com.* v. *Macloon,* 101 Mass. 1, 100 Am. Dec. 89; *State* v. *Smith,* 65 Me. 257; *United States* v. *Meagher,* 37 Fed. 875; *Pallis* v. *State,* 123 Ala. 12, 82 Am. St. Rep. 106, 26 So. 339.

So, where a defendant publicly practised as a physician, and being, called to attend a patient, poured a quantity of kerosene on her underclothing and body and ordered it renewed from time to time, and death resulted, it was manslaughter, although he acted in the premises with the consent of the deceased and no evil intent. *Com.* v. *Pierce,* 138 Mass. 165, 52 Am. Rep. 264, 5 Am. Crim. Rep. 395; Roscoe, Crim. Ev. 723.

As to culpable negligence in running automobiles at excessive speed and cases cited, see *Weil* v. *Kreutzer,* 134 Ky. 563, 24 L.R.A.(N.S.) 557, 121 S. W. 471.

[4] *People* v. *Thompson,* 122 Mich. 411, 421, 81 N. W. 344 (and Michigan cases there cited); *Hatt* v. *Nay,* 144 Mass. 186, 10 N. E. 807; *Chris-*

The intent being implied through the act itself, both upon principles of logic and upon authority, other disconnected though similar offenses have no relevancy to the charge under trial. Thus, on an indictment against a surgeon for manslaughter, other acts of negligence by the defendant are inadmissible.[5]

The civil and criminal responsibility are so far separated that a conviction of the crime cannot be used as evidence in the civil action.[6]

But when a party is charged with the negligent use of a dangerous agency, and the case against him is that he did not use care proportionate to the danger, then the question becomes material whether he knew or ought to have known the extent of the danger. On such an issue as this it is relevant for the party aggrieved to prove disconnected acts, of which the defendant should have been cognizant, and which, if he were cognizant of them, would have divulged to him the extent of the danger, and would have made it his duty to take precautions which would have averted the danger.[7]

So, in a suit for damages for negligently keeping a ferocious animal, it is relevant to show attacks upon others and that they had complained to the party of injuries so sustained.[8]

tensen v. *Union Trunk Line,* 6 Wash. 75, 82, 32 Pac. 1018; *T. & H. Pueblo Bldg. Co.* v. *Klein,* 5 Colo. App. 348, 351, 38 Pac. 608; *Little Rock & M. R. Co.* v. *Harrell,* 58 Ark. 454, 469, 25 S. W. 117; *Atlanta & W. P. R. Co.* v. *Smith,* 94 Ga. 107, 110, 20 S. E. 763; *East Tennessee, V. & G. R. Co.* v. *Kane,* 92 Ga. 187, 192, 22 L.R.A. 315, 18 S. E. 18; *Louisville & N. R. Co.* v. *Berry,* 88 Ky. 222, 225, 21 Am. St. Rep. 329, 10 S. W. 472; *Adams* v. *Chicago, M. & St. P. R. Co.* 93 Iowa, 565, 569, 61 N. W. 1059; *Hall* v. *Rankin,* 87 Iowa, 261, 264, 54 N. W. 217.

[5] *Reg.* v. *Whitehead* 3 Car. & K. 202.

[6] Cooley, Torts, p. 86, and authorities.

[7] *Mobile & M. R. Co.* v. *Ashcraft,* 48 Ala. 15, 32; *State* v. *Boston & M. R. Co.* 58 N. H. 410, 412; *State* v. *Manchester & L. R. Co.* 52 N. H. 528, 549; *Shailer* v. *Bumstead,* 99 Mass. 112, 122; *State* v. *Hoyt,* 46 Conn. 330, 336.

[8] Stephen's Digest of Ev. 17, citing Roscoe at Nisi Prius, 739;

Such testimony is admissible in civil cases where it tends to show that the common cause of the accident was a dangerous or unsafe thing, to show notice of such on the part of the defendant, of a previous, continuous defective condition, or knowledge of the dangerous character of the thing or act, or to defeat justification. This notable exception to the rule applies only in civil cases, where the issue is not strictly the culpability of the defendant, but where the issue is, Who was responsible for or was the author of the act? In such issues, evidence of other acts, performed at other times, similar to the act charged under investigation, is admissible.[9]

The rule as to the relevancy of other offenses in criminal or culpable negligence is:

(a) In prosecution to enforce the criminal responsibility for the alleged violation or omission of plain duty in law, evidence of other offenses is not relevant to the principal charge.

(b) In civil actions for damages, to show notice, or knowledge of a continuous, defective condition of, or the dangerous nature of the agency, or of the act done or omitted to be done, evidence of other like offenses is relevant.

§ 45. Proof of prior attempts in like manner admissible.—What has been said of crimes is applicable to attempts. They may be put in evidence, when relevant, under

Wharton, Neg. § 912; *Worth* v. *Gilling,* L. R. 2 C. P. 1; *Kittredge* v. *Elliott,* 16 N. H. 77, 79, 41 Am. Dec. 717; *Whittier* v. *Franklin,* 46 N. H. 23, 26, 88 Am. Dec. 185; *Arnold* v. *Norton,* 25 Conn. 92, 95; *Buckley* v. *Leonard,* 4 Denio, 500, 501; *Cockerham* v. *Nixon,* 33 N. C. (11 Ired. L.) 269, 271; *M'Caskill* v. *Elliot,* 5 Strobh. L. 196, 197, 53 Am. Dec. 706; *Keenan* v. *Hayden,* 39 Wis. 558, 560.

See fully *Grand Trunk R. Co.* v. *Richardson,* 91 U. S. 454, 470, 23 L. ed. 356, 362.

[9] *Colorado Mortg. & Invest. Co.* v. *Rees,* 21 Colo. 435, 441, 42 Pac. 42; *Patton* v. *Southern* R. Co. 27 C. C. A. 287, 42 U. S. App. 567, 82 Fed. 979, 984; *New York Electric Equipment Co.* v. *Blair,* 25 C. C. A. 216, 51 U. S. App. 81, 79 Fed. 896; *Propsom* v. *Leatham,* 80 Wis. 608, 50 N. W. 586.

the same restrictions as have heretofore been stated with regard to crimes.[1] On an indictment for rape, therefore, prior attempts to ravish may be put in evidence, when intention is at issue.[2] But such collateral attempts must be shown to be connected with the crime on trial.[3]

§ 46. Relevancy as applicable to confessions.—As will be shown later [1] confessions are not, strictly speaking, evidence, but rather the absence of evidence, that is, the technical proof of the fact is waived by the confession that the fact existed or

[1] See post, § 753; *Rex* v. *Voke,* Russ. & R. C. C. 531; *Mimms* v. *State,* 16 Ohio St. 221; *Templeton* v. *People,* 27 Mich. 501; *State* v. *Walters,* 45 Iowa, 389; *Defrese* v. *State,* 3 Heisk. 53, 8 Am. Rep. 1; *Rex* v. *Roberts,* 1 Campb. 400, 2 Leach, C. L. 987, note; *Reg.* v. *Hunt,* 3 Barn. & Ald. 566, 22 Revised Rep. 485.

See *Snyder* v. *State,* 59 Ind. 105.

On an indictment against persons for a conspiracy to carry on the business of common cheats, evidence is admissible of the defendant's having made false representations to other tradesmen besides those named in the indictment. *Rex* v. *Roberts,* 1 Campb. 400, 2 Leach, C. L. 987, note; post § 53.

In another case, upon an indictment for conspiring and unlawfully meeting for the purpose of exciting disaffection and discontent among his magesty's subjects at Manchester, it was held that the previous conduct of a portion of the assembly, in training, etc., and in assaulting persons whom they called spies, was competent evidence as to the general character and intention of the meeting, although the effect of it as to each particular defendant was a distinct matter for the consideration of the jury. It was held competent to show, also, as against Hunt (who, though a stranger, except by political connection, had been invited to preside as chairman at the meeting) that at a similar meeting in another place, held for an object professedly similar, certain resolutions had been proposed by that person; it being in its nature a declaration of his sentiments and views on the particular subject of such meetings, and of the topics there discussed. *Reg.* v. *Hunt,* 3 Barns. & Ald. 566, 22 Revised Rep. 485.

[2] *State* v. *Knapp,* 45 N. H. 148; *Strang* v. *People,* 24 Mich. 1; *State* v. *Walters,* 45 Iowa, 389; *Williams* v. *State,* 8 Humph. 585, and cases cited supra, §§ 35, 38.

[3] *State* v. *Freeman,* 49 N. C. (4 Jones, L.) 5; post, § 753; *Bottomley* v. *United States,* 1 Story, 135, Fed. Cas. No. 1,688.

[1] Post, § 624.

exists. Hence when applied to confessions, to be relevant the confession must relate solely to the past or the existing condition,[2] so that the confession relating to an intention to commit an independent crime is not relevant.

A statement of an intention, or the expression of a purpose as to something future, is not a confession, though very frequently confessions and admissions are wrongly confused. But a statement of purpose or intention is relevant to the charge under trial, as showing a contemplation or preparation for the commission of the crime.[3]

§ 47. Other crime committed in resisting arrest, or attempting to escape after commission of crime charged.—Evidence of all that was done by one charged with crime, in resisting arrest or attempting to escape, is admissible on his trial for the crime with which he is charged; and the fact that such evidence discloses the commission of another crime does not affect its admissibility.[1]

[2] *State* v. *Cox,* 65 Mo. 29, 32.

[3] *State* v. *Hayward,* 62 Minn. 474, 482, 65 N. W. 63.

[1] Evidence that defendant, charged with the theft of a saddle, while in possession of the saddle and a horse taken the same night, began firing before being spoken to, when approached by the sheriff and his posse, killing one of the posse, was held in *Willingham* v. *State,* — Tex. Crim. Rep. —. 26 S. W. 834, to be admissible, the court saying that resistance to arrest is always admissible against the party making such resistance, and that the fact that a killing occurred did not render the evidence inadmissible; that the trial court instructed the jury to disregard the killing as evidence, which was favorable to the accused.

On a trial for murder evidence was admitted showing that, at the time of his arrest, or shortly thereafter, defendant shot two of the rangers who had him in charge, and made his escape. It was held that these acts of the defendant after his arrest, and while in custody, were properly admitted in evidence. *Cordova* v. *State,* 6 Tex. App. 207.

Evidence that a person charged with murder, upon being seized by a witness to the homicide and pulled away from his victim, requested to be turned loose, and, when this was refused, struck at the person holding him with a knife, is admissible on his trial for the murder, the act

being contemporaneous with the killing, and evidently committed in an effort to get away or escape. *State* v. *Sanders*, 76 Mo. 35.

Evidence that a man accused of murder, knowing that he was suspected, went to the house of another the night after the homicide, and, while the owner was asleep, broke open his trunk and took therefrom some clothing, leaving his own soiled clothes in the house, was held to be admissible on his trial for the murder, notwithstanding the fact that it showed the commission of another crime than that charged. The court said that, while this evidence showed another offense, the facts evidently proved that defendant was endeavoring so to disguise himself as to be able to elude his pursuers and make good his escape; that this certainly was his purpose or he never would have left his clothing at the very spot of the theft, thus furnishing indisputable evidence of his guilt. *Williams* v. *State*, 15 Tex. App. 104.

Upon the trial of a woman for the murder of her stepdaughter evidence was admitted to show that defendant committed an assault upon her husband with an axe upon his return to his home the day of the homicide, and when the death of the daughter could no longer be concealed unless he was removed, or his life destroyed. This was objected to on the ground that it involved proof of one crime to establish defendant's guilt of another, but the court of appeals, in approving the admission of this evidence and affirming a conviction, stated that the demeanor, conduct, and acts of a person charged with crime, such as attempted flight, a desire to elude discovery, an anxiety to conceal the crime, or the evidence of it, are always proper subjects of consideration, as indicative of a guilty mind, and in determining the question of the guilt or innocence of the person charged. And, by way of illustration, the court added that, if the defendant, instead of assaulting her husband to prevent his discovery of the death of his daughter before she effected her contemplated escape, had set fire to the building to avoid detection, there would be no doubt that evidence of that fact would be admissible. And that, if she had stolen a horse and carriage to aid her in her flight, there would be no doubt that evidence of it should be received. And thereupon the court reasoned that the jury might well have found that the purpose of her assault was to kill her husband and thereby prevent a discovery of her crime until she had an opportunity to escape, and that there was no error in the receipt of that evidence which would justify a reversal of the judgment. *People* v. *Place*, 157 N. Y. 584, 52 N. E. 576.

Upon the trial of an information charging the defendant with breaking and entering a dwelling house with intent to commit a felony, evidence that the defendant, subsequent to the alleged breaking, intentionally burned the building alleged to have been broken, in order to conceal the physical evidence of such breaking, is admissible. *Roberson* v. *State*, 40 Fla. 509, 24 So. 474. In this case the court said:

§ 48. Effect of indictment for, or conviction or acquittal of, evidential crime; limitation of actions.—The question has been raised in criminal trials whether a previous indictment for, or acquittal or conviction of, the other crime, has any effect upon the admissibility of the evidence of such other crime. It may be safely stated that the almost universal judgment is that neither of these circumstances will operate to the rejection of such evidence.[1] And it is believed that most of

"We think the evidence subsequently introduced by the state, tending to connect defendants with the alleged breaking, and the defendant Roberson with the burning, rendered the testimony objected to relevant and material. It is true that evidence of another and distinct crime committed by a defendant, in no way connected by circumstances with the one for which he is being tried, is inadmissible. It is equally true that proof of any fact with its circumstances, even though amounting to a separate crime, if it has some relevant bearing upon the issue being tried, is admissible in evidence."

Evidence showing that a person on trial for murder, six weeks after the homicide with which he was charged and twelve days before the term of the court at which he was tried began, attempted to break jail and escape, is admissible on such trial. *Anderson* v. *Com.* 100 Va. 860, 42 S. E. 865.

Indictment.

[1] The question has been raised in criminal trials whether a previous indictment for, or acquittal or conviction of, the other crime, has any effect upon the admissibility of the evidence of such other crime. It may be safely stated that the almost universal judgment is that neither of these circumstances will operate to the rejection of such evidence. And it is believed that most of the cases that have touched the subject have not only so held but, on requirement, have decided that in cases of indictment and conviction the record itself may be introduced.

It has been sometimes strenuously urged that, while an indictment (which is merely a public or official accusation), or a conviction, might be admissible, yet, where the fact is that the accused has been acquitted of the crime sought to be used as evidence, that fact should render it inadmissible; as to receive it would be to put the accused again in jeopardy, and would also contravene the record.

But the courts which have spoken upon the subject have all said, in substance, that he could not be put in jeopardy of a crime of which he had been acquitted, but that he was in jeopardy of the crime for which he was being tried; and that

the cases that have touched the subject have not only so held, but, on requirement, have decided that in cases of indictment and conviction the record itself may be introduced.

evidence of the transactions which had resulted in his acquittal was admissible if competent to show a fact material to the issue being tried; and that, as to the other objection, the particular ground of his acquittal was not matter of record, but matter of presumption only, which would be allowed only until the fact itself appeared. And so it could not be said that the record was contravened.

The prisoner was indicted for uttering a forged £1 Bank of England note, knowing the same to be forged. There was a second indictment against the prisoner for uttering another forged £1 note to another person. On the trial of the first indictment the prosecution, to show that the prisoner knew the note in that indictment to be forged, wished to give evidence of the other uttering to the person named in the second indictment, which was objected to as an endeavor to prove a man guilty of one offense by showing him guilty of another. Vaughan, B., said: "I think, as the second uttering is made the subject of a distinct prosecution, we are not at liberty to go into evidence of it, even to show a guilty knowledge in a previous uttering. Other utterings, for which no prosecution had been commenced, have been held to be evidence to show a guilty knowledge. But even that was much questioned by many able lawyers; and I am of opinion that, if the prosecutors have made the second uttering the subject of a substantive charge, I cannot receive evidence of it in support of the present indictment." *Rex* v. *Smith*, 2 Car. & P. 633.

This case and the one immediately following it are the only English cases holding that evidence of another distinct crime cannot be admitted on a criminal trial if such other crime is the subject of another indictment. All the other English cases, and all the American cases, with the exception, possibly, of *Bell's Case*, 6 N. Y. City Hall Rec. 96, are to the effect that the fact that the accused has been indicted, convicted, or even acquitted, of the distinct offense, cuts no figure whatever.

The case is sharply criticized in *State* v. *Robinson*, 16 N. J. L. 507, in which case the court said, among other things, that, as to the argument of Vaughan, B., it seems to be confuted by his own admission that it may be done, if there is no indictment yet depending.

Upon the trial of an indictment for poaching in the night, with other persons armed, in order to prove the identity of the prisoner the prosecution proposed to show that one of the game keepers lost his coat during an affray which occurred on the occasion in question, and that this coat was found in the prisoner's house. This was objected to by counsel for the prisoner,

It has been sometimes strenuously urged that, while an indictment or a conviction might be admissible, yet where the

as there was a separate indictment against him for the stealing of the coat. The court said that in the case of *Rex* v. *Ellis,* 9 Dowl. & R. 174, 6 Barn. & C. 145, 5 L. J. Mag. Cas. 1, it was held that, where several felonies formed part of one transaction, evidence may be given of them all, to which the counsel for the prisoner responded that in that case there was only one indictment; whereupon the court said: "That distinguishes the two cases; and I therefore shall not receive the evidence, unless the prosecutor consents to an acquittal on the indictment for larceny;" and the evidence was rejected. *Rex* v. *Westwood,* 4 Car. & P. 547.

In *Rex* v. *Salisbury,* 5 Car. & P. 155, it was held that, on an indictment for felony, a matter which was the subject of another indictment for a felony was material to be given in evidence, where it formed a part of the facts of the case.

The prisoner was indicted for stabbing the prosecutor, there being another indictment against him for stabbing another person on the same occasion. It was held that, on the trial of the indictment for stabbing the prosecutor, both the person for stabbing whom the second indictment was found, and the surgeon, might be asked as to what kind of a wound that person received, with a view of identifying the instrument used. *Rex* v. *Fursey,* 6 Car. & P. 81.

The prisoner was indicted for uttering a forged £5 note of the Bank of Ireland. To show guilty knowledge, it was proposed to give in evidence the uttering by him of two forged notes of bankers in Dublin, which was objected to, on the ground, first, that, these notes being the subject-matter of another indictment, they were inadmissible as evidence on this; second, that, being notes of a different description, they could not be given in evidence to show guilty knowledge of the forged character of the note set forth in the indictment. The objections were overruled, and the evidence admitted. *Kirkwood's Case,* 1 Lewin, C. C. 103. To the same effect, *Martin's Case,* 1 Lewin, C. C. 104.

The prisoners were indicted for robbing a person of bank notes, gold coin, and silver. The same prisoners were also indicted for robbing another of a silver watch and silver coin. On the trial of the first indictment it appeared that on a certain evening the prosecutors in both indictments were traveling in a gig, and were stopped by five persons, who beat and robbed them. Counsel for the prosecution proposed, on the trial of the first indictment, to ask the prosecutor in the second indictment what he had lost, which was objected to by the prisoner because it was the subject of the other indictment. The court held that it made no difference that the watch was the subject of an-

fact is that the accused has been acquitted of the crime sought to be used as evidence, that fact should render it inadmissible,

other indictment, though he thought a part of the evidence was inadmissible. That evidence might be given of the loss of the watch at the same time and place, but that the prosecution must not go into evidence of the violence that was offered to its owner; and the prosecutor in the second indictment was allowed to state in evidence that he lost his watch and part of his fob, which were afterwards found on one of the prisoners. *Rex* v. *Rooney,* 7 Car. & P. 517.

The prisoner was indicted for arson by setting a rick of wheat on fire. There were two other indictments against him, for firing two other ricks on the same night, the respective properties of two other persons. There was evidence given on the trial that the prisoner had complained that the prosecutor had sent a lawyer's letter to his father for a debt which the prisoner owed him, and, after much violent language, the prisoner said he would be even with him, and would light the parish from end to end, and burn the whole lot. There was other evidence tending to show that the prisoner was in the vicinity of other ricks that were burned on the same night as that of the prosecutor's. It was held that evidence might be given, upon the trial, of the prisoner's presence and demeanor at the fires of other ricks on the same night, although those fires were the subject of other indictments against him, such evidence being important to explain his movements and general conduct before and after the firing of the rick set out in the indictment. *Reg.* v. *Taylor,* 5 Cox, C. C. 138.

On an indictment for uttering a forged Bank of England note, Alderson, B., admitted another forged Bank of England note in evidence, although the subject of another indictment. *Rex* v. *Aston,* cited in 2 Russell, Crimes, 6th ed. 678.

In *Reg.* v. *Lewis,* cited in 2 Russell, Crimes, 6th ed. 678, Lord Denman, Ch. J., said that "he could not conceive how the relevancy of the fact to the charge could be affected by its being the subject of another charge;" and offered to admit the evidence.

On the trial of a prisoner indicted for feloniously and without lawful excuse having in his possession a stone upon which was engraved part of an undertaking for the payment of 2 guilders, of a body corporate in the Kingdom of the Netherlands, evidence of what was on a second lithographic stone found in the prisoner's lodging, in respect of which another indictment had been preferred against him, was held to be competent. *Reg.* v. *Zeigert,* 10 Cox, C. C. 555.

Upon trial of an indictment for uttering forged notes of the Edinburgh Bank, the prosecution tendered in evidence the uttering by the prisoner of certain forged notes of the Paisley Bank, to show guilty knowledge. These notes formed

as to receive it would be to put the accused again in jeopardy and would also contravene the record. But the courts which

the subject of another indictment. The trial judge had great doubts as to the admissibility of the Paisley notes under these circumstances, observing that, if the prisoner had been indicted for uttering the Edinburgh notes only, there would have been no question. He intimated that his own opinion was in favor of receiving the evidence; but added that many of the judges had great doubts about it. He finished by saying that he should reserve the point, but regretted being placed in the dilemma. *Hodgson's Case,* 1 Lewin, C. C. 103.

Upon the trial of persons indicted for stealing and receiving, knowing to have been stolen, a quantity of brass, the prosecution proposed to give evidence of other property found in the possession of the prisoners, and alleged to have been stolen within the six months preceding the date of the commission of the offense charged. This other property was the subject of a second and similar indictment found against the prisoners and about to be tried in the same assizes. This was objected to by the counsel for the prisoners on the ground that the prosecution sought to prove the second indictment on the trial of the first, and the effect was to prejudice the prisoners in one or other of the trials. It was held that the evidence was admissible. *Reg.* v. *Jones,* 14 Cox, C. C. 3. This evidence was offered under 34 & 35 Vict. chap. 112, § 19, which was the same statute as was considered in *Reg.* v. *Drage,* 14 Cox, C. C. 85.

On the trial of an indictment for treason the prosecuting attorney offered testimony to prove that, in the course of the insurrection, the prisoner joined in robbing the public mail of the United States; and that several of the letters thus intercepted were read at an alleged treasonable meeting or assemblage. This was objected to on behalf of the prisoner, upon the ground that the robbery of the mail was a felony, for which, as a substantive and independent crime, he was actually charged by another indictment; and that, therefore, evidence relating to it should not be given on the present issue, as the prisoner was not prepared to answer, and a prejudice might be excited against him in the mind of the jury. The court said: "An act committed with a felonious intention cannot be given in evidence upon the trial of an indictment for high treason. It does not yet appear that the mail was intercepted and rifled with a traitorous intention; and, as far as it respects the prisoner, there is another indictment against him, charging the offense merely as a felony. Under these circumstances the testimony cannot be admitted." *United States* v. *Mitchell,* 2 Dall. 357, 1 L. ed. 414, Fed. Cas. No. 15,789. Inasmuch as it did not appear that the mail was intercepted and rifled with a traitorous intention, did the fact that the defendant

have spoken upon the subject have all said, in substance, that he could not be put in jeopardy of a crime of which he had

was under indictment for that felony change the situation?

In the trial of an indictment for uttering a counterfeit bank bill, it is competent to show the passing of other counterfeit bills about the same time, although other indictments are pending against the prisoner for those acts. *Com.* v. *Percival,* Thacher, Crim. Cas. 293.

Upon the trial of an indictment for taking illegal fees, the state was permitted to introduce in evidence a prior indictment against the defendant for demanding, in the same official capacity, fees not allowed by law. It was held that the evidence was properly admitted as tending to show a knowledge on the part of the defendant that the fees mentioned in the indictment were not lawful,—the trial court having expressly limited said evidence to such purpose by its charge. *Brackenridge* v. *State,* 27 Tex. App. 513, 4 L.R.A. 360, 11 S. W. 630.

In *Dubose* v. *State,* 13 Tex. App. 418, the court said: "Defendant's bills of exception, so far as they relate to the admissibility of the indictments and records in other cases, wherein defendant was charged with assault with intent to murder and theft of the property of the deceased (J. T. Benton), are wholly untenable. Such evidence was admissible to show motive on the part of the defendant to murder Benton."

On the trial of a complaint for keeping a shop open on the Lord's Day, a portion of the evidence offered to show that the defendant kept his shop open as alleged was the same that had been offered and relied upon to sustain an indictment previously tried, in which the same defendant was charged with illegal sales of liquors under another statute; and it was objected that such evidence was incompetent. It was held that there was no reason for rejecting such evidence. That the offense charged in the other indictment was entirely a distinct offense, and the fact that the liquor was sold without license, on the Lord's Day, did not aggravate that offense or the punishment therefor. *Com.* v. *Harrison,* 11 Gray, 308.

In *People* v. *Wood,* 3 Park. Crim. Rep. 681, the court said that the acts, the declarations, and the conduct generally, of a party charged with the commission of an offense, both before and after its alleged commission, are competent to be proved upon the trial, to establish any fact essential to be proved, if they tend legitimately to establish such a fact, and they are as competent to establish the existence of motive as any other fact. That the atrocity of an act cannot be used as a shield under such circumstances, or a bar to its legitimate use by the prosecution. That the rule appears to be well settled, both by elementary writers and by adjudged cases, that separate and distinct felonies may be proved upon a trial for the purpose of establishing the

been acquitted, but that he was in jeopardy of the crime for which he was being tried; and that evidence of the transactions

existence of a motive to commit the crime in question, even though an indictment is then pending against the prisoner for such other felonies.

For the purpose of proving the motive on the part of the defendant upon the trial of an indictment for murder, it is competent for the state, having made proof of the *corpus delicti*, to show that, previous to the murder, the defendant was under indictment for larceny, and that the deceased was mainly, if not entirely, relied upon for his conviction for that offense; and, to show that he was thus indicted, there could be no higher or better proof than the record of the indictment itself. *State* v. *Morris*, 84 N. C. 756.

Upon the trial of an indictment for receiving goods knowing them to be stolen, a witness was called to prove that other property than that mentioned in the indictment had been stolen from her and found in the house of the prisoner. This evidence was objected to by the counsel for the prisoner, because, as they alleged, a separate indictment was pending before the court against him, for receiving the goods stolen from this witness. The counsel for the prosecution admitted that there was such an indictment, but offered the testimony with the single view to show that, when the prisoner received the goods laid in the present indictment, he knew them to have been stolen. The recorder, in pronouncing the opinion of the court, said that the testimony was inadmissible. That this crime was different from that of passing counterfeit money; it was a specific offense, and must depend upon its own peculiar circumstances. *Bell's Case*, 6 N. Y. City Hall Rec. 97.

The following cases are also to the effect that evidence of the other crime is not rendered inadmissible by the fact that an indictment for it is pending against the accused: *Kitchen* v. *State*, 26 Tex. App. 165, 9 S. W. 461; *Hudson* v. *State*, 28 Tex. App. 323, 13 S. W. 388; *Jacobs* v. *State*, 28 Tex. App. 79, 12 S. W. 408; *Martin* v. *Com.* 93 Ky. 189, 19 S. W. 580; *State* v. *Travis*, 39 La. Ann. 356, 1 So. 817.

Conviction.

Upon the trial of an indictment for a fraudulent use of the post-office where the crime was charged to have been committed in August and September, it appeared from the evidence that the defendant had once before been before the court on a similar charge, alleged to have been committed in the March or April previous, and that he pleaded guilty to the information, and was thereupon convicted and punished. The court held that, while the defendant could not be again convicted of the offense charged in that case, yet it was entirely competent, in order to de-

which had resulted in his acquittal was admissible if competent to show a fact material to the issue being tried; and that, as to

termine the true character of the defendant's business in August and September, that the history of the facts attending the establishment and conduct of the business previously, should go to the jury for what they were worth; that, so far as those facts threw any light upon the charge made in the information, it was entirely proper that they should be considered by the jury. *United States* v. *Stickle,* 15 Fed. 798.

On a trial for burglary, where it appeared that defendant had pleaded guilty in the county court on the prosecution for a theft committed at the time of the burglary, and which was part of the same transaction, the plea of guilty in the theft case was admissible in evidence against the defendant in the burglary case. *Johnson* v. *State,* 39 Tex. Crim. Rep. 625, 48 S. W. 70.

In the trial of an indictment for keeping a drinking house and tippling shop, or for being a common seller of intoxicating liquors, the record of a former conviction for a single sale, or upon a search and seizure complaint covering the same time charged in the indictment, is competent evidence. *State* v. *Gorham,* 67 Me. 247.

Evidence of an indictment charging the defendant on trial for murder with the burglary of the storehouse of the deceased and another, and also the judgment of the court reciting the verdict of the jury finding the defendant guilty of the crime charged in such indictment, and the final judgment and sentence of the court upon such conviction, is competent evidence as tending to establish a motive for the shooting. *Powell* v. *State,* 13 Tex. App. 244.

Crass v. *State,* 31 Tex. Crim. Rep. 312, 20 S. W. 579, and *World* v. *State,* 50 Md. 49, are also cases where evidence of the conviction of the accused of a crime other than that for which he was on trial was properly admitted.

Acquittal.

On the trial of an indictment for uttering a forged note, it is competent evidence, in order to show a *scienter,* to prove that the prisoner uttered another forged note of the same bank on the same day, although he had been acquitted on a trial for that offense. *State* v. *Robinson,* 16 N. J. L. 507. In this case, in answer to the objection that, to permit the evidence in regard to passing a bill for uttering which the defendant had been tried and acquitted, would contravene the record of his acquittal, the court said that the record acquits him of the charge in that indictment, but does not aver the ground of that acquittal. The particular ground of his acquittal is not matter of record, it is a matter of presumption only, wholly collateral to the record; and mere presumption of a fact is allowed to stand only till the fact

the other objection, the particular ground of his acquittal was not matter of record, but matter of presumption only, which

itself appears. That here the very fact is offered, and it neither puts him in jeopardy for it as a crime, nor is contrary to anything found by the record; that the evidence is clear of both the objections, and was legally admitted by the court. The court in this case also proceeded to discuss and criticize the decision of Vaughan, B., in *Rex* v. *Smith,* 2 Car. & P. 633, showing that, if that decision were correct, it would be extremely difficult, if not impossible, to prove a *scienter* in a case of uttering forged paper.

The prisoner had been indicted for passing two counterfeit bills, and on his trial was acquitted. Thereafter, he and another were indicted for passing other counterfeit bills, and the prosecutor, for the purpose of establishing the *scienter,* offered evidence which had been introduced on the former trial, which was objected to on the ground that the prisoner had been acquitted, and also because the time at which the former offenses were committed, if at all, was too remote, and no connection existed between them and the one charged in the indictment. The court held that the evidence was admissible, and that it was immaterial whether the prisoner had been acquitted on the former trial or not, for the evidence now offered was not for the purpose of convicting him for that offense, but to show that when he passed the bill laid in this indictment he knew it to be counterfeit. *Dougherty's Case,* 4 N. Y. City Hall Rec. 166.

On the trial of an indictment for uttering and publishing a forged promissory note, knowing it to be forged, it is admissible, in proof of the defendant's knowledge, to show that another note passed by him was also forged. Nor does it render such evidence inadmissible, that the defendant had been formerly acquitted, upon an indictment for uttering the last-mentioned note knowing it to be forged; but the objection goes only to weaken its effect with the jury. *State* v. *Houston,* 1 Bail. L. 300.

On the trial of an indictment for forgery in passing a counterfeit bank bill, evidence was admitted that, the day following, the accused passed to other persons counterfeit bills on the same and other banks, for the passing of which other indictments had been found, some of which were pending, and on one of which he had been tried and acquitted. The court said that the law is well settled that the uttering of other counterfeit notes of the same kind with that charged in the indictment, and about the time that it was passed, may be given in evidence on the trial of the indictment, to prove guilty knowledge; and that the court could see no reason why the fact that indictments had been found, or that convictions or acquittals had been had upon them, should affect the admissibility of such utterings.

would be allowed only until the fact itself appeared; and that so it could not be said that the record was contravened.

That neither the indictments, nor the records of conviction or acquittal, need be, nor should be, given in evidence; but the facts and attendant circumstances alone of the utterings, as though no indictments had been found. *McCartney* v. *State,* 3 Ind. 353, 56 Am. Dec. 510.

Upon the trial of an indictment against a person for forging the indorsement of a firm to whose order a draft was made payable, the people called a witness, and showed him a draft other than the one described in the indictment, payable to the order of the same firm, and offered to prove by the witness that the signature of the firm was not the signature of any member of it, or of anyone authorized by them, and that the defendant passed that draft with the forged indorsement of the firm thereon. This was objected to by the defendant. Thereupon the district attorney admitted in open court, such admission being taken as proof of the fact, that defendant had been indicted in the same court for writing the alleged forged indorsement of the firm on the back of the draft in question, and for passing it with such alleged forged indorsement, knowing it to be forged; that he had been tried on such indictment and acquitted, and a judgment of acquittal duly entered thereon. Another draft payable to the order of the same firm, which was proved to have been found with the vouchers of the company by whose superintendent it was made, and payable to the order of the same firm, on the back of which was indorsed the name of the firm, was also admitted in evidence. In affirming a judgment of conviction, the court said: "The exception to the admission of certain other drafts claimed to have been forged and uttered by defendant about the same time, for the purpose of proving guilty knowledge, on the score that they had been the subject of other indictments upon which the defendant had been tried and acquitted, is not, in our judgment, well taken. It is well settled that, in cases like the present, it may be shown that the defendant uttered, at or about the same time, other forged notes or bills, whether of the same kind or a different kind or that he had in his possession other forged notes or bills, tending to prove that he knew the note or bill in question to be forged. . . In order to render the verdict and judgment of not guilty upon the draft offered in evidence conclusive upon the facts which the prosecution sought to prove for the purpose of showing guilty knowledge, it must appear with certainty from the evidence offered in support of the alleged estoppel that those facts were directly and necessarily found by the verdict in that case in favor of the defendant; or in other words, that the jury could not have found the verdict which they did without having passed directly upon the facts offered to be proved, and

found them against the prosecution; for, if it be doubtful upon which of several points the verdict was founded, it will not be an estoppel as to either." *People* v. *Frank,* 28 Cal. 507.

The defendant was charged on two indictments for passing counterfeit money, $10 notes, on a bank. Upon his trial on one indictment the point was raised in his behalf that none of the notes had been read in evidence, or offered. They were proved, but it was insisted that this did not put them in evidence. The court was of the opinion that the notes were not in evidence, and the defendant was acquitted; but he was then tried on another indictment for passing another of these notes, and the same evidence was, by consent, admitted, except that the defendant objected to any evidence of passing the notes on which there had been a trial and acquittal, as proof of the guilty knowledge with which the note now on trial was passed. The court said it did not think the acquittal prevented proof of the fact of passing these notes; that, if it had been followed by an acquittal, that would be immediately offered, as fully rebutting any inference of guilty knowledge in this case arising from that; and it would tell the jury that, on proof of acquittal the weight of that evidence was entirely destroyed, and the fact could no longer be considered as evidence of guilty knowledge. *State* v. *Tindal,* 5 Harr. (Del.) 488.

Upon the trial of an indictment for forging an order for the payment of money usually denominated a bank check, a witness testified that the accused entered the bank and presented at the desk of the paying teller, where the witness was standing, the check described in the indictment, and received the money. The state then offered to prove, by the same witness, that on the following day the same party came to the bank in the morning and presented another check, similar, except in its amount, the amount of which the witness paid. The state then offered to prove that this second check, as also that which was presented and paid the day previous, was a forgery, and also offered in evidence the conversation that took place between the witness and the accused on each occasion. The accused objected to the admission of the conversation, and of everything connected with the presentation and payment of the second check and the proof that it was forged, because he had been indicted and tried before a jury and acquitted of forging and uttering that check. The objection was overruled, and this ruling was the ground for the first exception. It was held that the proof so offered by the state was clearly admissible. *Bell* v. *State,* 57 Md. 108.

The defendant was indicted for obtaining a check by falsely pretending that another check which he then gave to the prosecutor was a good and valid order for the payment of money. The prosecutor deposed that he gave his check on the faith of the defendant's statement that the check which he offered to the prosecutor was good. The check given by the defendant

was dishonored. The defendant stated that, when he gave the check he expected a payment which would have enabled him to meet it. The defendant was acquitted. He was then tried on a second indictment, charging him with obtaining from other persons three sums of money on three checks, which were dishonored. To prove guilty knowledge, the prosecutor in the first case was called, and gave the same evidence as in the first case. The defendant was convicted, and the question as to the admissibility of the evidence was reserved. It was held (two judges dissenting) that the evidence which had been given on the first indictment, upon which the defendant had been tried and acquitted, was legally admissible upon the trial of the second indictment, for the purpose of proving guilty knowledge, and the conviction was right. *Reg.* v. *Ollis,* [1900] 2 Q. B. 758, 69 L. J. Q. B. N. S. 918, 83 L. T. N. S. 251, 49 Week. Rep. 76, 64 J. P. 518. As justifying the holding that such evidence was admissible, the Lord Chief Justice said, among other things, that, on the first indictment, the accused was acquitted upon that particular charge. That his acquittal might have proceeded upon the ground that the representation was not fraudulently made; or, if fraudulently made, that the prosecutor had not been induced by that fraud to part with his money. That it was clear that there was no estoppel; the negativing by the jury of the charge of fraud on the first occasion did not create an estoppel. That the evidence was not less admissible because it tended to show that the accused was, in fact, guilty of the former charge. That the point was, Was it relevant in support of the three subsequent charges? and that in the opinion of the majority of the court, and in his own opinion, it was relevant as showing a course of conduct on the part of the accused, and a belief on his part that the checks would not be met.

Defendant and another were indicted for theft of a steer. There was a severance, and defendant alone was put upon trial. Both defendants had been indicted in four indictments for the theft of that number of cattle, and at subsequent terms they were tried and acquitted upon three. Upon this trial the defendant objected to the testimony as to the other beeves stolen and found in a certain pasture, and, after it was admitted, defendant asked the witnesses who had testified that they had been called as witnesses on the trial of the defendants for the theft of the others, "What was the result of the trials?" The court, on objection of the district attorney, excluded the question and answer. The defendant offered the records of the court in the three other cases for theft, and the verdict and judgment in each case of acquittal. This evidence was also excluded. It was held that the court erred in permitting the state to prove that other stolen stock, taken from the same neighborhood, were found in the pasture under the control of this defendant's codefendant. That, to make this evidence admissible as against

And in some instances such evidence has been held not barred by the statute of limitations.[2]

§ 49. Election of offense relied on.—In order that the accused in an indictment or information for crime, particularly when of the degree of felony, may not be called upon to defend against a charge of more than one offense when two or more distinct acts are alleged and sought to be proved, the court should, on proper application of the accused, require the prosecution to elect upon which accusation it will rely. And, where the prosecution fails to make a formal election, it will be deemed to have elected to rely upon the transaction first proved.[1]

this defendant, it must be shown that the stolen stock and the steer in question were taken at the same time, and formed but one transaction, and that this defendant's acts were such as to show a guilty connection with his codefendant when it was so taken or while it was under his control. That the rule is different where acts of theft are separate and unconnected. And that, the evidence having been admitted, the defendant should have been allowed to prove that he had been acquitted of the charge. *Ivey* v. *State,* 43 Tex. 425.

For other cases on this subject, see *Kitchen* v. *State,* 26 Tex. App. 165, 9 S. W. 461; *State* v. *Travis,* 39 La. Ann. 356, 1 So. 817; *Dill* v. *State,* 1 Tex. App. 278; *Hudson* v. *State,* 28 Tex. App. 323, 13 S. W. 388; *Crass* v. *State,* 31 Tex. App. 312, 20 S. W. 579; *Trogdon* v. *Com.* 31 Gratt. 862.

[2] *State* v. *Pippin,* 88 N. C. 646, *Adams* v. *State,* 78 Ark. 16, 92 S. W. 1123; *Weatherford* v. *State,* 78 Ark. 37, 93 S. W. 61.

[1] On the trial of a man and woman who were indicted, tried, and convicted of the crime of attempting to procure and produce the miscarriage of an unmarried woman, it affirmatively appeared at the close of the testimony that the male defendant had attempted the crime at the residence of the prosecutrix, but that the female defendant was in no manner connected with that transaction, and that thereafter the attempt to commit the crime was made by both defendants at the house of the female defendant. It was held that the people should have been put to their election whether they would proceed against the male defendant alone for what occurred at the house of the prosecutrix, or against them both for what occurred at the house of the female defendant. That, assuming the evidence of the prosecutrix to be true, it estab-

§ 50. Right to question defendant concerning other crimes, on cross-examination.—The question has at times

lished two distinct offenses, one committed by the male defendant alone, and the other by him and the other defendant jointly; and, if the prosecution elected to proceed for the latter offense, all evidence of the former should have been excluded from the jury, as it is well settled that, upon the trial of a party for one offense growing out of a specific transaction, you cannot prove a similar substantive offense founded upon another and separate transaction, but in such case the prosecution will be put to its election. *Baker* v. *People,* 105 Ill. 452.

On the trial of a prosecution charging a defendant with having perpetrated an assault and battery upon a person named, the state gave evidence of an assault and battery committed by the defendant upon such person, and afterward offered evidence of a subsequent, but distinct and separate, assault and battery, perpetrated by the defendant upon the same person. It was held that the admission of evidence of the other distinct assault and battery having been given, the state could not select the second assault and battery as the one upon which it would rely; that when the state gave evidence of the first assault and battery, it elected to try him for that offense, and could not afterward abandon the election thus made, and put in evidence another offense. *Richardson* v. *State,* 63 Ind. 192, 3 Am. Crim. Rep. 302.

In a prosecution for rape various acts of sexual intercourse were testified to. The evidence of different acts was not objected to, nor was any motion made requiring the prosecution to elect upon which of them it would rely for a conviction. It was held that the accused was not in a position to now complain that an actual election was not made, and that testimony as to more than one offense was permitted to go to the jury. That all the acts proved were within the period of the statute of limitations applicable to the offense charged; and the prosecution had the right to select from among them, upon which it would rely for a conviction; and that, in the absence of any express election from the record, it is to be presumed that the prosecution elected to stand by the offense it first introduced evidence to establish; and that evidence of other acts of sexual intercourse between plaintiff in error and the prosecuting witness was not introduced to prove substantive offenses, upon which a conviction might be had, but in corroboration and explanation of the evidence of the act charged. *Mitchell* v. *People,* 24 Colo. 532, 52 Pac. 671.

On a trial for gaming, where the state had introduced evidence to show that the defendant had bet at a game of cards at a particular house, at a specified time, it thereby elected to prosecute for that offense; and it was not competent

arisen as to how far a cross-examination, by the prosecution, of a defendant in a criminal trial, who has offered himself

thereafter to introduce evidence of other and distinct offenses, comprehended within the indictment, committed by the defendant at the same or other places. *Wickard* v. *State,* 109 Ala. 45, 19 So. 491. To the same effect, *Cochran* v. *State,* 30 Ala. 542; *Fields* v. *Territory,* 1 Wyo. 78, 3 Am. Crim. Rep. 318.

A statute of Alabama (Code, § 3931) prohibits a purchase by a public officer of any claim payable out of the county treasury, or out of the fine and forfeiture fund of the county, and each separate purchase by a public officer of such a claim is a violation of this statute; and, where an indictment under said statute avers in a single count more purchases than one, the state should be required to elect on which offense it will proceed; and, if but a single offense is charged, it is error to admit evidence, against defendant's objection, of other purchases than the one averred. *Scruggs* v. *State,* 111 Ala. 60, 20 So. 642. In this case the court said that, while there are exceptions to the general rule, that evidence of other violations of law than the one for which the party is being tried is inadmissible, there was nothing in the present record to bring the case within the exception.

Upon the trial of an indictment for stealing a quantity of boots and shoes and a quantity of leather, it appeared that the prisoners were son and father in the employ of the prosecutors; that they lived together in the same village up to a certain date, when the elder prisoner removed into another county. It appeared that when he so removed he took with him a hamper, which passed and repassed afterwards repeatedly between the father and son, backwards and forwards, down to a certain time, about a month after which the lodgings of the younger prisoner were searched, when a quantity of shoes and leather was found there, belonging to the prosecutors, and at the same time and place were also found letters from the father to the son, the contents of which induced the prosecutors to search the shop of the elder prisoner, who was then carrying on business as a shoemaker at the place to which he had removed, and in that shop there was also found property of the prosecutors, consisting of boots, shoes, and leather; and letters from the son to the father were also found there. Counsel for the prosecution proposed to put in the letters, both from the father to the son, and from the son to the father, and he stated that those letters were dated at various periods between May and the month of October following, and that they were all found to refer to the transmission from the son to the father of goods of the nature of those found at the father's house. The counsel for the elder prisoner objected to the reading of the letters upon the ground that if they did

as a witness in his own behalf, may be extended to questions in regard to the commission of distinct offenses. There would

refer continually, as suggested on the part of the prosecution, to the transmission of the property, the effect of giving them in evidence would be to assist the proof of a single felony by proof of other felonies. That the prosecutors must elect on which offense they would proceed, and give in evidence such matter only as related to that felony. In deciding to admit the evidence Maule, J., said: "There is no rule of law that more than one felony may not be charged in a single indictment; if there were such a rule, the great majority of indictments would be bad on error. It is true that judges are in the habit of not allowing several felonious acts to be given in evidence under one indictment, where, as will often be the case, the effect of so doing will be to create confusion, or to surprise the prisoner, or otherwise embarrass the defense. But here embarrassment and injustice would be produced by putting the prosecutors to their election. They cannot possibly know at what time the several larcenies and receivings (if more than one) took place; the whole, according to the opening, seems to constitute a continuous transaction; therefore, I shall admit evidence relating to any takings and receivings under the circumstances suggested, provided the indictment contains corresponding charges." *Reg.* v. *Hinley*, 2 Moody & R. 524, 1 Cox, C. C. 12.

In *Rex* v. *Jones*, 2 Campb. 132, 11 Revised Rep. 680, Lord Ellenborough said: "In point of law, there is no objection to a man being tried on one indictment for several offenses of the same sort. It is usual in felonies for the judge, in his discretion, to call upon the counsel for the prosecution to select one felony, and to confine themselves to that; but this practice has never been extended to misdemeanors. It is the daily usage to receive evidence of several libels, and of several assaults upon the same indictment; and here I see not the slightest objection to evidence of various acts of fraud committed by the defendant in his office of commissary general, though ranged under different counts as distinct and substantive misdemeanors."

One of two of defendant's daughters engaged in an altercation with the prosecutrix, a school teacher, and had a personal re-encounter. Somewhere from ten to fifteen minutes after the cessation of this difficulty, and while the parties were still engaged in more or less angry conversation, the defendant approached the scene, and thereupon another of his daughters engaged in another personal difficulty with the prosecutrix. During this altercation,—either immediately preceding or during the fight,—the defendant was heard to say, "Hit her;" or, "Double up your fist and hit." And this, it was claimed, was intended to encourage his daughter in the dif-

seem to be some difference of opinion, as shown by the cases in the note,[1] which would indicate that it is one of those sub-

ficulty. It was held that it was error to refuse to require the state to elect as to the transaction on which a conviction would be sought, as the state had not shown any criminal connection of defendant with the first fight between the prosecutrix and the one daughter, and it was clear that there were two fights at an interval of fifteen or more minutes. *Williams* v. *State,* 44 Tex. Crim. Rep. 316, 70 S. W. 957, 13 Am. Crim. Rep. 144.

Where two murders were committed at the same place, on the same occasion, and under such circumstances that the proof in respect to one necessarily threw light upon the other, the rights of the accused were not prejudiced by the refusal of the court to compel a prosecutor to elect upon which of the two charges he would proceed; but the government may be required, at any time before the trial is concluded, to elect upon which charge it will ask a verdict. *Pointer* v. *United States,* 151 U. S. 396, 38 L. ed. 208, 14 Sup. Ct. Rep. 410.

The prisoner was indicted for setting fire to the house of a person, several persons named in the indictment being therein. There were five other charges of, in like manner, setting fire to the houses of four other persons. It was opened for the prosecution, that the five houses in question were a row of adjoining houses, and that the house of the prosecutor was first set on fire, and that the fire communicated to the others. Counsel for the prisoner asked that the prosecutor's counsel should be put to his election which count he would go upon, as the burning of each house was a distinct felony. The court said: "As it is all one transaction we must hear the evidence, and I do not see how, in the present stage of the proceedings, I can call upon the prosecutor to elect. I shall take care that, as the case proceeds, the prisoner is not tried for more than one felony. The application for a prosecutor to elect is an application to the discretion of the judge, founded upon the supposition that the case extends to more than one charge, and may, therefore, be likely to embarrass the prisoner in his defense." *Reg.* v. *Trueman,* 8 Car. & P. 727.

Upon a trial for adultery, distinct acts of the character charged may be proved in explanation of, or as characterizing, the acts and conduct of the parties complained of, as constituting the particular act of the offenses charged, particularly when the proof shows a continued adulterous relationship extending over a given period of time. And the prosecution will not be required to elect to rely upon any single act during that period. *State* v. *Higgins,* 121 Iowa, 19, 95 N. W. 244.

[1] On a trial for the murder of one party, it is not error for the court to compel a defendant, when testifying as a witness, to answer

jects upon which no iron-bound rule can be founded, but that each case must stand on its own circumstances.

whether or not he had killed another party in the same difficulty, his objection being that he could not be made to subject himself to another prosecution for murder. It was held that the evidence was admissible, as the two killings were *res gestæ*. *Hargrove* v. *State*, 33 Tex. Crim. Rep. 431, 26 S. W. 993.

On a trial for murder evidence drawn from the accused, on his cross-examination by counsel for the state, as to having a dispute and drawing a razor on a third person, is incompetent; but if at all competent on cross-examination, being irrelevant and immaterial, the state is bound by the answer of the witness, and it lays no foundation for the right to contradict him in that respect by the testimony of the person mentioned. And where such person is called as a witness, and testifies, under objection, to an assault upon him by the accused, such testimony is clearly incompetent. *Bullock* v. *State*, 65 N. J. L. 557, 86 Am. St. Rep. 668, 47 Atl. 62.

It is error to allow one accused of forgery, on trial therefor, to be interrogated as to other similar papers, unless it is first shown that such papers were forged, and the accused had culpable connection therewith. *State* v. *Lowry*, 42 W. Va. 205, 24 S. E. 561.

Questions asked on cross-examination of a defendant charged with the crime of grand larceny by the district attorney, in good faith, for the purpose of laying a foundation for the impeachment of the defendant as a witness, by proof of inconsistent statements, and calling his attention to time, place, and parties present, specified with particularity, are not reprehensible, notwithstanding a claim of the defendant, urged upon appeal, that they tended to show that he was guilty of another offense, if it appears that the questions were not asked for that purpose; and the permission of them, and the proof of the inconsistent statements, is not ground for reversal. *People* v. *Pete*, 123 Cal. 373, 55 Pac. 993.

A defendant testifiying in his own behalf on a trial for robbery may be contradicted, impeached, and sustained in the same manner, and occupies the same place, and is to be treated, as other witnesses; and, on cross-examination, his credibility may be attacked by questions, and he may be made to answer whether or not he has been previously arrested for other crimes. *Jackson* v. *State*, 33 Tex. Crim. Rep. 281, 47 Am. St. Rep. 30, 26 S. W. 194, 622.

On a trial for assault with intent to rape, where defendant has testified as a witness in his own behalf, he may, on cross-examination, be asked if he has not been previously indicted for a similar offense. *Clark* v. *State*, 38 Tex. Crim. Rep. 30, 40 S. W. 992.

On a trial for larceny the defendant, as a witness in his own behalf, testified that, at the time of the al-

§ 51. When evidence of other crime is not prejudicial. —Whenever a conviction has been reversed for the reason

leged larceny, he was under the influence of liquor, and that, as he was walking along, he fell over something, and the first thing he knew somebody grabbed him. This was all he testified to on his examination in chief. On cross-examination, after being asked his true name, he was asked whether or not he had gone by several other names, and whether he had ever been convicted of a felony. It was held that the cross-examination was proper. *People* v. *Meyer,* 75 Cal. 383, 17 Pac. 431.

Upon a prosecution for the wrongful removal of certain papers contrary to the provisions of a statute, consisting of an enrolled decree containing bill of complaint, pleadings, and other papers filed in and belonging to a certain cause in the circuit court, wherein the wife of accused was complainant and he and another were defendants, accused was cross-examined in regard to what were known as the green deed and mortgage contained in the papers supposed to have been stolen by him, and it was objected that such examination looked towards his having been, before that, charged with forgery, and this was alleged as error. The court held that here it was legitimate to show a motive for the commission of the offense charged. That it was the theory of the prosecution that the "green deed and mortgage" were forgeries, or, at least that they were alleged by accused's wife to be forgeries; and that accused had been charged with such forgery in the very case in which they formed a part of the enrolled decree; and that the "practice paper," so called, was one upon which the accused had been experimenting in the direction of forgery. That, if this were true, it furnished an ample motive for the carrying away, or the destruction, of these papers; and testimony in support of this theory was, therefore admissible; that accused, having furnished himself as a witness in his own behalf, was subject to any cross-examination which went directly to the merits of the case. *People* v. *Bussey,* 82 Mich. 49, 46 N. W. 97.

Upon the trial of an indictment for wife murder, the trial court permitted the state, over the objection of the defendant, to ask the defendant, upon cross-examination, the following question: "Were you indicted for aggravated assault upon your wife?" To which question defendant answered, "Yes, sir! I was indicted for aggravated assault upon my wife." It was held that it was proper, on cross-examination, to elicit any fact from the defendant that goes to show *animus* towards deceased, or motive for committing the crime. That certainly, if defendant admitted an assault upon his wife previous to her murder, this testimony would be legitimate, going to show the *animus* on the part of defendant towards deceased. That, where a

that evidence of another distinct crime was improperly admitted, it has been because such admission was prejudicial to the

person on trial for crime takes the stand in his own behalf, it is proper and legitimate to ask him, on cross-examination, if he has been indicted for a felony. *Powell* v. *State,* — Tex. Crim. Rep. —, 70 S. W. 218, 14 Am. Crim. Rep. 5.

A defendant examined as a witness in his own behalf in a criminal action, in which he was charged with violation of the law against lotteries, may be asked if he had been engaged in the business of lottery tickets and lottery policies; and also whether he had been tried and convicted in the United States court, for violating the law prohibiting the sending of matters through the United States mail with reference to the drawing of any lottery, under N. Y. Penal Code, § 714, providing that a person convicted of any crime may, notwithstanding, be a competent witness in any cause of proceeding; but that the conviction may be proved, for the purpose of affecting the weight of the testimony, either by the record or his cross-examination, upon which he must answer any particular question relevant to that inquiry. *People* v. *Noelke,* 29 Hun, 461, affirmed in 94 N. Y. 137, 46 Am. Rep. 128.

Defendant in a prosecution for carrying a pistol being on the stand as a witness on his own behalf, the state asked him if it was a fact that he had been theretofore charged, in a number of instances, in that county, with like offenses, to which he replied that he had been charged before with like offenses; he didn't know how many times. It was held that this evidence was clearly inadmissible; that the fact that a man unlawfully carries a pistol has no bearing upon his credibility as a witness, and the illegal testimony may have caused the jury to assess a larger fine than they would otherwise. *Bain* v. *State,* 38 Tex. Crim. Rep. 635, 44 S. W. 518.

On a trial for homicide the accused became a witness in his own behalf, and, after detailing what he claimed were the facts with reference to the killing of the person for whose murder he was being tried, the court compelled him to detail facts with reference to the killing of two other persons, thus forcing the accused to admit that he had killed one, and probably the other, of those persons. They were killed at the same place as the person for whose killing he was on trial, and immediately after. It was held that, to admit these facts certainly was calculated to influence the action of the jury in its consideration of the case on trial. It was held, further, that it is a rule that a witness is not bound to answer any question which tends to subject him to punishment, resentment, or infamy. That, under the Bill of Rights, he cannot be compelled to give evidence against himself, but, when he becomes a witness for himself in a criminal prosecution,

he waives that right so far as the charge under investigation is concerned; but that the fact that he does so waive it does not give the commonwealth the right to compel him to admit the commission of other offenses which would subject him to punishment, resentment, or infamy. That, if this was done, it would be in utter disregard of the Bill of Rights and in many instances deter persons accused of offenses from going on the stand as witnesses for themselves; as a forced confession of another offense might subject them to punishment far greater than the charge under investigation. *Saylor* v. *Com.* 97 Ky. 184, 30 S. W. 390.

Upon the trial of an indictment for murder, it appeared that the crime was committed by someone who had burglariously entered the house of the deceased. The evidence was circumstantial, and the defendant, being sworn in his own behalf, on cross-examination was asked as to his connection with another burglary at the house of another person in the nighttime, which he denied. The owner of the latter house was subsequently called by the prosecution and permitted to testify, under objection, to facts showing that defendant did burglariously enter his house in the nighttime. It was held that the evidence was incompetent and damaging in its nature, and could not be said to have been harmless; and, on account of its reception, the judgment was reversed and a new trial granted. *People* v. *Greenwall,* 108 N. Y. 301, 2 Am. St. Rep. 415, 15 N. E. 404.

In a prosecution for horse stealing it is error to compel defendant, who has offered himself as a witness, to testify that he had once before been convicted of horse stealing, since the tendency of such testimony would be to prejudice the jury, and the demands of the statute permitting conviction of a crime to be shown to affect the credibility of a person offered as a witness are met by proof of the conviction, without unnecessarily parading before the jury that the defendant had at one time been guilty of the exact crime for which he is at the time on trial. *State* v. *Gottfreedson,* 24 Wash. 398, 64 Pac. 523.

Upon the trial of an indictment for burglary, during the cross-examination of one of the defendants who testified in behalf of himself and his codefendant, he was asked, and required to answer over their objection, if he had not theretofore pleaded guilty to larceny for stealing a bee gum. It was held that, while the defendant answered in the affirmative, the offense had no connection whatever with the one for which he was on trial; that it is only where other specific crimes tend to throw light on the crime charged, and for which a defendant is upon trial, that he may be impeached by proof of them; and that the objection to the question should have been sustained. *State* v. *Hale,* 156 Mo. 102, 56 S. W. 881.

On the cross-examination of defendant indicted for manslaughter in producing an abortion upon a woman, he testified that he did not know a young woman in court then

accused. Where the evidence, although within the inhibition of the general rule, did no injury, the conviction is allowed to stand.[1]

pointed out to him; that he had never seen her in his life; and that he had never procured an abortion upon her. The young woman was afterwards sworn, and testified, against objection and exception by the prisoner's counsel, that the prisoner had produced an abortion upon her person about two years before. It was held that the admission of this testimony was error upon well-established authority. That it was not competent to impeach the prisoner as a witness, nor any other witness, by contradicting him as to facts disconnected with, or collateral to, the subject-matter at issue and on trial, and that no person can be required to come into court, on a trial under an indictment for a specific offense, prepared to defend or explain other transactions, not connected with the one on trial. *Rosenweig* v. *People,* 63 Barb. 634.

On a trial for homicide it is error to permit the prosecutor to ask the accused, on his cross-examination, if he had not been implicated in the theft of a horse which the proof showed to have been stolen by another person a short time before the homicide. *Nix* v. *State,* — Tex. Crim. Rep. —, 74 S. W. 764.

[1] Thus the admission, on a prosecution for fornication, of evidence showing that one of the defendants was a prostitute, though it is irrelevant, is not reversible error, where it was inseparably connected with evidence relied upon to establish the offense charged, and no injury resulted to the defendants therefrom, the punishment assessed being the lowest permitted by law. *Perigo* v. *State,* 25 Tex. App. 533, 8 S. W. 660.

The admission, on a trial for murder committed in breaking and entering a dwelling house, of evidence that the owner of the house had lost some small things from a drawer on the occasion of a previous entering a few days before, even if erroneous, is harmless. *State* v. *Cannon,* 52 S. C. 452, 30 S. E. 589.

Error, if any, in the admission, on a trial for burglariously breaking and entering a hen house, of testimony of witnesses narrating a conversation with defendants, in which they admitted, not only the stealing of the chickens of the prosecutor, but also of chickens belonging to other persons, and a hatchet, at about the same time, is immaterial, where the defendants themselves testified on the trial to stealing other chickens and the hatchet. *State* v. *Cowen,* 56 Kan. 470, 43 Pac. 687. The court held, however, that the evidence was competent, and there was no error in admitting it, since the conversation was admissible as being the declaration of the defendants as to their doings on the night of the burglary, and their statements as

§ 52. Statement or insinuation by prosecution of other crime.—Judgments of conviction have frequently been set aside because of the conduct of counsel for the prosecution in stating and insinuating other offenses than the one for which the accused was on trial, either in argument, or by repeatedly asking rejected questions and commenting on what the answers would have been if allowed.[1]

to the larceny of the other chickens and the hatchet could not well be separated from those with reference to the taking of prosecutor's chickens.

Failure to instruct the jury, on a prosecution for horse stealing, as to the purpose of evidence introduced on the trial tending to show that at the same time and place that defendant took the horses mentioned in the indictment he took a horse not mentioned, the property of a person other than the prosecutor, and that they could not convict the defendant of the theft of any horse not mentioned in the indictment, though erroneous, will not require the reversal of a judgment of conviction, where the error is for the first time called to the attention of the trial court in a motion for new trial, unless it appears from the whole evidence adduced on the trial that the defendant's rights may have been injured in consequence of it. *Gentry* v. *State,* 25 Tex. App. 614, 8 S. W. 925. In this case the court stated that, after considering all the evidence, it did not seem probable that the defendant could have been injured by reason of the failure to give such instructions.

Error in the admission of evidence on trial of an indictment for obtaining money under false pretenses, which tends to show other distinct offenses, or that the defendant was in the habit of making false representations and resorting to fraudulent practices will not authorize a reversal where the competent proof clearly justified the finding, and it must have been the same had the incompetent evidence not been admitted. *Jackson* v. *People,* 126 Ill. 139, 18 N. E. 286.

On a trial for homicide, where a witness had testified to the good character of the defendant, it is not proper to allow him to be asked, on cross-examination, if the defendant had been indicted for murder in another county, to which he answered that he "had heard of that." *Harris* v. *Com.* 25 Ky. L. Rep. 297, 74 S. W. 1044. The court, however, held that the appellant was not prejudiced thereby, as the witness was unwilling to say that his good character was injured by the charge. and further explained that it was not proved on him, but finally came out on others.

[1] Defendant had been convicted of maliciously cutting and wounding another with intent to kill. A witness for the commonwealth, called to rebut the defense of good char-

acter, was asked whether or not he and defendant had ever had a difficulty, which question the court permitted to be answered, notwithstanding the objection of the defendant. The witness was then asked what occurred at that difficulty, the objection to which was sustained. But the court permitted the commonwealth's attorney, although the defendant objected, to state, in the presence of the jury, that he expected the witness to state that, "on one occasion the defendant attacked witness on the street and knocked him off the sidewalk with a wagon spoke." It was held that in this case the court erred, in the first instance, in permitting the witness to state that he had ever had a difficulty with the defendant, for there was no connection whatever between that difficulty and the one in which the cutting and wounding were done, for which the defendant was then being tried; and evidence of what occurred at the time of the difficulty with the witness, and which the commonwealth's attorney, with the permission of the court, improperly and irregularly put before the jury, was obviously not competent for any purpose. *Flint* v. *Com.* — Ky. —, 23 S. W. 346.

On trial for wife murder, where the defendant had, on a former occasion, been charged with having murdered a person other than his wife, of which charge he was acquitted, and such former homicide was in no way connected with the one for which he was on trial, it was held improper for the attorney for the state, in cross-examining a witness, to propound questions or make remarks relating in any way to the prisoner's connections with such former homicide; he not having put his character in issue. *State* v. *Sheppard,* 49 W. Va. 582, 39 S. E. 676.

A conviction will be set aside where counsel for the state persisted in asking improper and prejudicial questions, and was allowed to cross-examine the accused as to other offenses, though he was told that he need not answer, and the closing speech to the jury was of an extraordinary and reprehensible character, and it was evident that there had not been a fair and impartial trial. *Cargill* v. *Com.* 12 Ky. L. Rep. 149, 13 S. W. 916. In this case it was further held that the fact that the court excluded the evidence did not do away with the prejudicial effect of the improper question.

On the trial of an indictment for murder, where the defendant claimed that the deceased had seduced his daughter, and that the information of the seduction excited him to uncontrollable passion and to an insane impulse to kill the seducer, "the defendant's wife was called as a witness in his behalf, and, on cross-examination, the court, over objection and protest, permitted the state to ask a num-

§ 53. Instructions to jury where evidence of other crimes is admitted.—In many instances the courts have

properly admitted evidence of another crime, it being competent for a certain purpose, and then neglected to instruct the

ber of questions as to other and distinct offenses committed by the defendant which would tend to blacken and degrade him in the eyes of the jury. She was interrogated as to whether he had not maintained a 'joint' in the hotel, harbored lewd women there, and whether he had not used, and permitted the use of, rooms in his hotel for gambling purposes. To most of the inquiries she gave a negative answer, but the state was thereby allowed to insinuate charges and offenses other than the one alleged in the information, and the questions implied an assertion of belief on the part of the attorneys for the state that the defendant was guilty of the other offenses." The witness was compelled, on persistent questioning, to admit that she had seen men playing cards in the rooms of the hotel, but did not know that they were gambling. It was held that the charge of gambling, imputed by this question, was a felony, and had no connection whatever with the offense of murder, which was in issue; and that there was no justification or excuse for the allowance of these questions. The court said, further, that these offenses and misconduct, which were made the subject of inquiry, were not linked in any way with the offense charged in the information. That the general rule is that the charge upon which a person is being tried cannot be supported by proof that he committed other offenses, even of a similar nature. That, while evidence which legitimately tends to support the charge, or show the intent with which it is committed, is not to be excluded on the ground that it will prove other offenses, the other offenses inquired about in this case did not fall within any of the exceptions to the general rule. *State* v. *Kirby,* 62 Kan. 436, 63 Pac. 752, 15 Am. Crim. Rep. 212.

For the purpose of rebutting a presumption created by evidence introduced by the government upon the trial of an indictment for murder in the Indian territory, that the defendant had fled from the Indian country, the defendant, as a witness in his own behalf, testified that he went back to Mississippi, the state of his former residence, to stand his trial there upon a charge of murdering a negro whom he had killed there previous to coming to the Indian territory, and that he was thereupon arrested, tried, and acquitted of that charge. In his closing argument to the jury the district attorney made use of the following language: "We know what kind of trials they have in the state of Mississippi of a white man for killing a negro. We know from reading the newspapers and magazines that such trials there are farces. We are not living in Egyptian darkness, but in the light of the nineteenth century. The defendant came from Mississippi with his hands stained with the

jury that the evidence must be considered by them only for such purpose, and by reason thereof the conviction has been

blood of a negro, and went to the Indian country, and in less than four months had slain another man." And other like expressions and declarations that the killing of the negro in Mississippi, for which the defendant had been tried and acquitted there, was murder, were made use of, all of which were objected to, but the objections were overruled by the court, and the defendant excepted. He was convicted, and brought error to the United States Supreme Court. In reversing the judgment, the court said the attempt of the prosecuting officer of the United States to induce the jury to assume, without any evidence thereof, the defendant's guilt of the crime of which he had been acquitted, as a ground for convicting him of a distinct and independent crime for which he was being tried, was a breach of professional and official duty, which, upon the defendant's protest, should have been rebuked by the court, and the jury directed to allow it no weight; but that, if the defendant had murdered the negro in Mississippi, and had been there convicted therefor, evidence, either of the murder, or of the conviction, would have been incompetent to support the indictment against him for the murder for which he was being tried. *Hall* v. *United States,* 150 U. S. 76, 37 L. ed. 1003, 14 Sup. Ct. Rep. 22.

In a prosecution for theft, where defendant's counsel had stated privately to the court that defendant had been indicted for seduction in a part of the county where some of the jury were from, and had afterwards married, it was error not to sustain defendant's objection to questions asked his mother, as to whether she would know her daughter-in-law if she saw her, and as to whether she ever saw defendant with his wife, etc., as immaterial and calculated to prejudice the jury. *Mercer* v. *State,* (Tex. Crim. Rep.) 66 S. W. 555.

The observations of the district attorney on a trial for burglary, to the effect that the defendant's purpose was not alone to commit the crime with which he was charged, but another, the vilest known, is highly improper, as the statement could have but one meaning, and that at once understood; and that, when understood, it would almost surely inflame a jury beyond control. *Long* v. *State,* 81 Miss. 448, 33 So. 224.

Repeated attempts on the part of the prosecuting officer, upon the trial of a prosecution for malicious mischief, to show that the defendant had been guilty of other crimes, is such prejudicial error as will reverse a judgment of conviction. *State* v. *Roscum,* 119 Iowa, 330, 93 N. W. 295.

On the trial of a person for rape in having sexual intercourse with a female under the age of sixteen years, it is reversible error for the

district attorney repeatedly to ask questions the apparent object of which is to leave the impression on the mind of the jury that defendant had committed other crimes, and that he had changed his name; notwithstanding objections to such questions are sustained by the court. *People* v. *Derbert,* 138 Cal. 467, 71 Pac. 564.

Upon a trial for theft, the sheriff, while on the stand as a witness, was asked by the prosecuting attorney if he did not arrest the defendant several years ago for burglary. The defense objected, and the prosecuting attorney remarked, in the hearing of the jury, that he proposed to prove by the sheriff that defendant was arrested two or three years ago for a burglary committed at the same time and place as the theft with which he was now charged. It was held that such evidence was inadmissible, and afforded no reasonable presumption or inference pertinent to the issue for which the defendant was on trial, and the trial court should so have instructed the jury; and, for a failure to do so, the judgment was reversed. *Taylor* v. *State,* 27 Tex. App. 463, 11 S. W. 462.

On a trial for rape, where an assistant prosecutor asks the son of the accused, on cross-examination, if he had not stated to A that he suspected his father of having committed a similar offense with other girls, one a member of his family, and that such conduct on the part of the accused caused the death of witness's mother, and that, if at such conversation witness did not cry and say, "I can't go against my father, even if he is guilty," and repeatedly asks substantially the same questions, such conduct of the prosecutor is reversible error. *State* v. *Irwin,* 9 Idaho, 35, 60 L.R.A. 716, 71 Pac. 608, 13 Am. Crim. Rep. 620.

Where counsel for the prosecution, on a trial for murder, in his concluding argument to the jury urges upon them the force of a claim made by him in his opening, of the commission by the defendant of another crime, but which the evidence fails to substantiate, he should be restrained by the court from so doing; and a refusal of the court to do so, followed by a charge in which the question mentioned was submitted for the consideration of the jury, the whole following a refusal by the court of a request to charge that there was no evidence to support the claim of the prosecuting counsel,—is error for which a conviction will be reversed. *People* v. *Montgomery,* 176 N. Y. 219, 68 N. E. 258.

From the foregoing cases, it would seem that, where the prosecution is allowed to insinuate charges and offenses other than the one alleged in the information, by asking questions in regard to such pretended charges and offenses, even though those questions are answered in the negative, and no proof is made of such charges and offenses; and where such other charges and offenses are alleged and pretended by the counsel for the prosecution in his address to the jury,—the error is just as great, and

reversed.[1] And in Texas it has been repeatedly held that a failure on the part of the court so to instruct the jury is re-

a conviction will be reversed, the same as though the improper evidence of such other charges and offenses was actually given to the jury.

[1] On the trial of an information for unlawfully selling intoxicating liquors, the testimony of numerous witnesses was admitted, tending to show various unlawful sales of intoxicating liquors other than those upon which the state, by direction of the court, elected to rely for conviction. The defendant requested the court to instruct the jury not to take into consideration the evidence as to such other sales in determining the guilt or innocence of the defendant as to the particular sales upon which the state elected to rely. This the court refused, and nothing upon the subject was given in the general instructions. This was held error. That, while it is proper, in the first place, for the state to introduce evidence concerning any unlawful sales made by the defendant, yet, when an election has been made of a particular transaction upon which the state relies for conviction, the evidence as to other illegal sales is practically eliminated from the case. It cannot be used or referred to merely for the purpose of bolstering up and strengthening the case made by the state upon the elected transaction; and the defendant is entitled to have the jury so instructed. *State* v. *Nield,* 4 Kan. App. 626, 45 Pac. 623; *State* v. *Reynolds,* 5 Kan. App. 515, 47 Pac. 573.

On the trial of an indictment for rape the state was permitted, over objection, to prove other acts of sexual intercourse between the prosecuting witness and the defendant, some of which were not within the period of limitations. It did not appear whether such acts were introduced to prove substantive offenses or in corroboration and explanation of the evidence of the act upon which the prosecution relied; and it did not appear that in the charge to the jury the purpose of such testimony was explained. It was held that it was error to permit evidence to be introduced of any offenses which were barred by the statute of limitations, and of acts other than the one relied on, for any other purpose than such corroboration and explanation; and that the court, on request, should, in the charge to the jury, have explained the purpose of such testimony. *Bigcraft* v. *People,* 30 Colo. 298, 70 Pac. 417.

The defendant was indicted for burning a dwelling house. The report states that the case is silent as to any direct evidence of the prisoner's guilt. To show that she was guilty, the prosecuting officer offered to prove that two previous attempts had been made to burn the same house,—one about the middle of January preceding the actual burning, and the other, on the night of the 24th of February,

the day previous thereto. The introduction of this evidence was objected to by the counsel of the prisoner. The prosecuting officer then stated that he expected to prove facts and circumstances tending to show that the prisoner was the person who made the attempt each time. Upon this statement the evidence was admitted. Upon review, the court held that the connecting facts were the sole ground upon which the proof of the attempts was admitted. That they were in the nature of a condition precedent. But that the state did not redeem its pledge, and the evidence ought to have been withdrawn by the court from the attention of the jury,—certainly as to one of the attempts, if not as to both. That, on the contrary, by suffering the jury to consider it, the trial court added to it the weight of its authority, and thereby suffered the jury to be misled by such irrelevant testimony. And the judgment was reversed. *State* v. *Freeman*, 49 N. C. (4 Jones, L.) 5.

Defendants were tried for and convicted of the theft of a cow, the property of a certain person. On the trial it was proved that eight other animals, belonging to other parties, were stolen in the same manner, if not at the same time. Defendants, by special instruction, asked the court to limit the purposes for which this evidence with regard to the theft of these other animals could and should only be considered by the jury, which instruction was refused, and the charge as given failed to apprise the jury of the only purposes of said proof. It was held that it was error to refuse the instruction. *Hanley* v. *State*, 28 Tex. App. 375, 13 S. W. 142.

On the trial of a man for killing his wife by shooting her, where the prosecution had claimed that the defendant, previous to the shooting, assaulted his wife with a stick or billet of wood, and had introduced the stick in evidence, but had not made sufficient proof of the assault; and the whole evidence in the case failed to show such assault,—it is error to refuse to charge the jury, upon request, that there was no evidence that the stick had been used by the defendant in the commission of an assault upon the wife prior to the shooting. *People* v. *Montgomery*, 176 N. Y. 219, 68 N. E. 258.

On the trial of a person indicted for fraudulently converting to his own use, and fraudulently taking and secreting, certain moneys belonging to a savings bank of which he was treasurer, where the indictment alleged the wrongful taking and secreting of a certain sum deposited by one person, evidence was admitted tending to show another embezzlement by the defendant committed near the time of the act charged in the indictment. On setting aside the verdict the supreme judicial court said: "Evidence of another act of embezzlement by the defendant during the same week in which that charged in the second count of the indictment was alleged to have been committed was competent only for the single purpose of proving a guilty intent in the mind of the

versible error, even when such instruction is not requested.[2] But where the nature and circumstances of the case were such

defendant in the commission of the principal act. It is a dangerous species of evidence, not only because it requires a defendant to meet and explain other acts than those charged against him, and for which he is on trial, but also because it may lead the jury to violate the great principle, that a party is not to be convicted of one crime by proof that he is guilty of another. For this reason, it is essential to the rights of the accused, that, when such evidence is admitted, it should be carefully limited and guarded by instructions to the jury, so that its operation and effect may be confined to the single legitimate purpose for which it is competent. . . . In the present case there is nothing in the report which shows that any specific instructions were given on this point. For ought that appears, this evidence was admitted as general proof of the guilt of the defendant, and the jury were left to draw such inferences from it as they might think proper." *Com.* v. *Shepard,* 1 Allen, 575.

But while a court, after properly admitting evidence of another crime, should limit the effect of such proof by a proper instruction, if it fails to do so, and the defendant does not ask for such an instruction, no error can be assigned, and the judgment will not be reversed for that reason. *Glover* v. *People,* 204 Ill. 170, 68 N. E. 464.

In a prosecution for a rape, committed by the defendant upon his daughter, a child under twelve years of age, evidence of other rapes and acts of lewdness committed by him upon her is admissible, in explanation of the fact that there was no outcry and no pain suffered by the child, and also to account for the absence of laceration; and the defendant, if he wished the court to instruct the jury to limit the consideration of the evidence to such purposes, should have so requested. *People* v. *Fultz,* 109 Cal. 258, 41 Pac. 1040. See also *Reg.* v. *Chambers,* 3 Cox, C. C. 92.

[2] On a trial for passing a forged instrument, where testimony has been introduced showing that defendant had other alleged forged instruments in his possession, the failure of the court to limit and restrict the purposes for which such testimony could alone be considered by the jury is fundamental error, although the charge was not excepted to for such omission. *Thornley* v. *State,* 36 Tex. Crim. Rep. 119, 61 Am. St. Rep. 837, 34 S. W. 264, 35 S. W. 981.

On the first hearing of this case the judgment was affirmed, one of the reasons being that the omission in the charge was not excepted to at the time, nor mentioned in the motion for a new trial; but the court held, further, that the omission, under the circumstances of the case, was not at all calculated to injure the accused. Upon rehear-

that the jury could not possibly have applied the evidence to any other purpose than that for which it was properly admitting the court, in reversing the judgment and remanding the case, said: "We have examined the authorities referred to, and they indicate, with but few exceptions, an unbroken line of decisions to the effect that when evidence is adduced, on the trial of a case against a defendant, tending to show the commission of another crime by him, it is the duty of the court, whether asked or not, to properly instruct the jury with reference to the purposes and object of such testimony. The exceptions to this rule, when examined, will be found to recognize the general rule, and to be predicated upon some peculiarity in the particular case." After citing with approval *Burks* v. *State,* 24 Tex. App. 326, 6 S. W. 300, and *Hennessy* v. *State,* 23 Tex. App. 340, 5 S. W. 215, the court said further: "Upon the former hearing of this case we were of the opinion that it came within the line of decisions which hold it unnecessary to charge upon and limit the effect of extraneous crimes when admitted as testimony; and, not coming within that category, and being of a criminative nature, the court should not have charged with reference to the matter, as it would have had a tendency to call the attention of the jury to this circumstance, so as to affect the appellant adversely. Upon a closer examination of the record and the authorities, we believe that we were wrong, and that the case comes strictly under the authority of *Hennessy* v. *State,* 23 Tex. App. 340, 5 S. W. 215, and *Burks* v. *State,* 24 Tex. App. 326, 6 S. W. 300 and that line of authorities."

On a trial for theft, where the court has properly admitted evidence of other and different offenses charged against the defendant, it is error not to limit and restrict the effect and consideration of such evidence to its legitimate purposes by proper instructions in the charge to the jury, and this whether requested by the defendant to do so or not. *Warren* v. *State* 33 Tex. Crim. Rep. 502, 26 S. W. 1082.

On the trial of an indictment for swindling, the court admitted in evidence before the jury another alleged fraudulent transaction between the defendant and another party, of the same character as that charged in the indictment, and still another of the same character with another person, but failed to limit the purpose and object of the testimony. It was held that it was the duty of the court to have so limited it, without any request or exception; and, in order to revise the action of the court in this regard, an exception was not necessary. *Martin* v. *State,* 36 Tex. Crim. Rep. 125, 35 S. W. 976.

Upon the trial of an indictment for placing an obstruction upon a railroad track, evidence that the defendant placed another obstruction upon the track, was admitted by the

trial court. It was held that such evidence was competent for the purpose of showing the motive or intent with which the first obstruction was placed upon the track, and also for the purpose of developing the *res gestæ* of the first offense. But that, whilst said testimony is admissible, it devolves upon the court to instruct the jury as to the purpose for which it was admitted, and to restrict their consideration of it to that purpose only; and a failure to do so is fundamental error, even if an exception has not been reserved to the charge, and for the error of such omission a judgment of conviction will be reversed. *Barton* v. *State,* 28 Tex. App. 483, 13 S. W. 783.

Upon the trial of an indictment for perjury, the record and judgment in the action in which the perjury is claimed to have been committed are admissible in evidence as matter of inducement, but not to prove the main offense. And in such case it is the duty of the trial court to instruct the jury as to the purpose for which the evidence is admitted, and to restrict them, in considering it, to such purpose. *Davidson* v. *State,* 22 Tex. App. 372, 3 S. W. 662.

While it is proper, upon the trial of an indictment for passing a forged instrument, to permit the state to prove that the defendant attempted to pass said instrument, on the same day, at a different time and place, to another person, for the purpose of proving the defendant's fraudulent intent with respect to the attempt for which he is on trial, the court, in its charge to the jury, should restrict such evidence to the purpose for which it is admitted by proper instructions, and an omission to do so, is reversible error, although not excepted to. *Burks* v. *State,* 24 Tex. App. 326, 6 S. W. 300.

Where testimony as to the commission of other independent crimes has been permitted to be shown on cross-examination of the defendant when a witness, it is the duty of the court to charge the jury in writing that such testimony was admitted, not as proof of defendant's guilt of the crime charged, but only as affecting his credibility as a witness, and a failure to so instruct is fatal and reversible error. *Oliver* v. *State,* 33 Tex. Crim. Rep. 541, 28 S. W. 202.

While it is admissible, on a trial for theft, to prove contemporaneous theft, yet, when this has been done, it is error for the court, in its charge to the jury, to fail to limit the effect of such testimony to the only purposes for which it could be considered by the jury. *Mask* v. *State,* 34 Tex. Crim. Rep. 136, 31 S. W. 408.

Upon a trial for larceny it was proved by the state that, about the same time that the animal named in the indictment was stolen, other horses were stolen from the same neighborhood, and that these horses were recovered by the owners, at the same time and place that the owner of the animal mentioned in the indictment recovered hers. It was held that this evidence required from the court a charge to the jury explaining and limiting the purpose for which it was admitted; and the

ted, a failure to instruct will not be considered prejudicial error.[3]

court, having omitted to give such charge, committed error for which the judgment was reversed. *Mayfield* v. *State,* 23 Tex. App. 645, 5 S. W. 161.

Where a trial court, upon the trial of an indictment for the theft of a horse, has permitted the state to prove the contemporaneous theft of other property at the time and place of the theft charged in the indictment, it is incumbent upon the court, in its charge to the jury, to explain the purposes for which such testimony was admitted, and to instruct and direct the jury that it could only be considered for those purposes, and that the defendant could not be convicted for any other theft than that of the horse named in the indictment. *Reno* v. *State,* 25 Tex. App. 102, 7 S. W. 532.

While evidence tending to show that at the same time and place that the defendant took the horses mentioned in the indictment he took another horse not mentioned therein, belonging to another person, is admissible on the trial of such indictment; it is error to omit instructing the jury as to the purpose of such testimony, and that they could not convict the defendant of the theft of any other horse than those named in the indictment. *Gentry* v. *State,* 25 Tex. App. 614, 8 S. W. 925.

On the trial of an indictment for rape, while it is proper to admit evidence of other criminal acts of the defendant perpetrated upon the prosecutrix, of a like nature as that for which he was on trial, the charge of the court should explicitly explain to the jury the purpose for which, alone, the testimony was admitted; and in such case such a charge is indispensable, as, without it, the jury might give the testimony unwarranted weight as evidence proving the main fact. *Taylor* v. *State,* 22 Tex. App. 529, 58 Am. Rep. 656, 3 S. W. 753.

Defendant was convicted for horse theft, and on his trial evidence was adduced of the theft of several other animals at the same time and place as the one for which defendant was being prosecuted. It was held that, though this evidence was admissible and legitimate, it was, nevertheless, the imperative duty of the court, in its charge, to so limit and restrict such evidence to the purposes for which, alone, it was admissible, as that the jury might not use it improperly in considering it in connection with the defendant's guilt of theft of the animal for which he was upon trial; and that the omission of the court to so limit and restrict the evidence was error. (In this case the error was admitted by counsel for the state.) *Barnes* v. *State,* 28 Tex. App. 29, 11 S. W. 679. To the same effect, *Williamson* v. *State,* 30 Tex. App. 330, 17 S. W. 722.

[3] The rule which requires that the jury should be instructed to restrict their consideration of extraneous

When evidence of a separate, independent crime has been improperly introduced, and it is apparent that the effect of its

matter adduced in evidence to the specific purpose for which it was admitted was held, in *Leeper* v. *State,* 29 Tex. App. 63, 14 S. W. 398, on a prosecution for murder committed in attempting to rob, not to apply to evidence of other assaults committed at the same time and place, all forming part of the general scheme of robbery, and being essential to identify the defendants as the persons who committed the murder charged, and thus bearing directly on the main issue in the case. The court, furthermore, said that the main, if not the sole, reason of the rule which requires the court to restrict the jury in the consideration of extraneous matter admitted in evidence did not obtain in this case; that defendants were being prosecuted for the murder of the party named in the indictment by shooting him, and, it being conclusively proved that he died within a few hours from the effects of the shooting, and none of the other parties assaulted being killed, the jury could not have been influenced or misled by the testimony of the other assaults to convict the defendants of those assaults.

So in *Carroll* v. *State,* — Tex. Crim. Rep. —, 58 S. W. 340, it was held that it was only necessary to limit this character of evidence when there might be danger of its being used injuriously to defendant, or for the purpose of convicting him of an offense for which he was not on trial.

And where defendant had been convicted for receiving a stolen horse, knowing it to have been stolen, and it was urged, upon appeal from a conviction therefor, that the trial court erred in failing to instruct the jury that testimony introduced on the trial as to the theft of a saddle and bridle taken with the stolen horse, and which were on the horse at the time he was taken, could only be used for the purpose of establishing the identity, in developing the *res gestæ* of the offense, to show the connection of defendant therewith, or the intent with which he acted in regard to the horse, it was held that, while it has been held that with reference to this character of cases the charge should usually be given, it was not absolutely necessary to be given, unless the character of the property stolen contemporaneous with the theft charged was such that the jury might convict for that offense. And that there was no danger of a conviction for stealing a saddle and bridle under a charge of theft of a horse, or receiving said horse after it was stolen. *Moseley* v. *State,* 36 Tex. Crim. Rep. 578, 37 S. W. 736, 38 S. W. 197.

Again, on the trial of an indictment for burglary, where the state offered evidence of theft committed at the same time, and also that the building was set fire to, it was held that it was not necessary in this

case for the court, in its charge, to eliminate, and properly direct the jury as to the effect of, the evidence with reference to the theft and arson in connection with the alleged burglary; that this testimony was properly admitted as a part of the *res gestæ*, and there was no danger of a conviction for either of said last-mentioned offenses, and it was not necessary for the court to warn the jury against a conviction of said offenses. *Mixon* v. *State*, — Tex. Crim. Rep. —, 31 S. W. 408.

And on a trial for stealing a horse the failure of the court to instruct the jury that evidence that the defendant had been confined in the penitentiary for house breaking merely affected his credibility is not error, if such evidence was voluntarily introduced by the defendant himself. *Turpin* v. *Com.* 25 Ky. L. Rep. 90, 74 S. W. 734.

Correctness of instructions.

On the trial for the theft of a horse the trial court admitted evidence of the contemporaneous theft of other property than that involved in the trial, and instructed the jury that the defendant was on trial for the theft of the horse, and that they should give no attention to the testimony about the other property as evidence to show the theft of the horse; that this testimony could only be considered by the jury, if at all, for what they might deem it worth as tending to show the intent of the defendant, in whatever action, if any, they might find from the evidence was taken by him. It was held that there was no error, either in the admission of the evidence, or in the instruction. *Moore* v. *State*, 28 Tex. App. 377, 13 S. W. 152.

In *Holt* v. *State*, 39 Tex. Crim. Rep. 282, 45 S. W. 1016, on rehearing, 46 S. W. 829, it is said that, whenever extraneous crimes are introduced in evidence before the jury, and there might be danger of a conviction of these extraneous crimes, the court should limit the effect of such testimony to the purpose for which it is introduced. In this case, which was a prosecution for theft, an exception was taken to the action of the court limiting the effect of testimony of other thefts, on the ground that it was a charge upon the weight of the evidence; but, on appeal, it was held that the charge, under an unbroken line of state decisions, was a correct enunciation of the law, and that the trial court did not err in giving the same.

On a trial for theft of a mule, where defendant's confession, introduced in evidence, admitted the fraudulent taking of other animals, a charge to the jury that they might consider the evidence of other offenses for the purpose of tending to connect defendant with the theft alleged in the indictment was held proper, in *Tidwell* v. *State*, 40 Tex. Crim. Rep. 38, 47 S. W. 466, 48 S. W. 184. Defendant contended, in his motion for a new trial, that there was no evidence of contemporaneous thefts, and that the court erred in thus charging; but it was held that, in view of defendant's confession, the court certainly could not be said to have given a

charge to his injury, since the instruction complained of limited the evidence to its proper purpose; but that, if the court had failed to do this, there might have been some ground for complaint on the part of defendant.

In *Camarillo* v. *State,* — Tex. Crim. Rep. —, 68 S. W. 795, the accused was convicted of burglary, and appealed. In affirming the conviction, the court said: "There is no bill of exceptions in the record. In the motion for new trial, appellant criticizes the charge of the court. Among other things, he objects to the charge in regard to other houses shown to have been entered by appellant on the same night. There is no objection to the evidence in this respect. However, we think the testimony was properly admitted. 1 Bishop, Crim. Proc. 2d. ed. § 1066. We also think the charge properly limited the testimony in regard to the entry of the other house to the intent with which appellant may have entered the house he is charged to have burglarized in this case."

By a statute of Alabama prohibiting the distillation of spirituous or intoxicating liquors from grain, each act of distillation was made a distinct offense, and the subject of a separate indictment.

Upon the trial of an indictment for a violation of the statute, the court permitted the state to prove acts of distillation not charged in the indictment, and instructed the jury that they might look to the evidence of such acts "in aggravation of the fine, but for no other purpose." It was held that, in giving this charge, the court clearly erred, the rule being that, in giving evidence of matter in aggravation, the distinction is, that where the aggravating matter is the immediate consequence of the offense for which the defendant is on trial, it may be shown; but, if it is a distinct crime, not necessarily connected with the offense charged in the indictment, it cannot be received. *Ingram* v. *State,* 39 Ala. 247, 84 Am. Dec. 782. To the same effect, *Skains* v. *State,* 21 Ala. 218; *Baker* v. *State,* 4 Ark. 56.

On an indictment for a conspiracy to obtain money from a county by false pretenses by means of fraudulent bills for work, labor, and materials, the prosecution having, in obedience to a rule of court, furnished the defendants a bill of particulars relating to bills for work done on a particular building, evidence of other fraudulent bills for labor and materials for other buildings is inadmissible; and, where such evidence is introduced, a refusal to instruct the jury that defendants are not upon trial for conspiracy to defraud the county by any transactions other than those set out in the bill of particulars is erroneous. *McDonald* v. *People,* 126 Ill. 150, 9 Am. St. Rep. 547, 18 N. E. 817, 7 Am. Crim. Rep. 137. The court said that, this evidence of other fraudulent bills for work on other buildings being before the jury, they were as likely to convict the defendants of a conspiracy in regard to the work performed on such other buildings as in regard to the work done on the building specified in the bill of par-

ticulars, unless they were properly instructed; that the jury were left entirely in the dark as to which transactions they were entitled to consider in returning a verdict; and that the manner in which the case was submitted to them left it impossible to determine whether defendants were convicted of the offense for which they were put upon trial, or for some other and different offense.

Testimony in regard to the contemporaneous theft of other property than that stated in an indictment for burglary having been properly admitted in evidence on the trial to establish the intent of the accused in committing the offense charged, it is error for the court to tell the jury that, in considering the case, they should not look to any evidence of theft of any other property than that charged in the indictment to have been stolen; but that, in passing on the credibility of the defendant as a witness, they might consider such evidence of other thefts. *Hayes* v. *State,* 36 Tex. Crim. Rep. 146, 35 S. W. 983. By this instruction, the court said, the jury were told that they could not regard such testimony for the only purpose for which it could properly be considered by them, but that they might use it for a purpose for which it was not legitimate evidence, *viz.,* in passing upon the credibility of the defendant as a witness, adding: "The defendant was a witness in the case, and testified to material facts on his behalf; and for the jury to be told by the court that they could consider certain testimony to discredit him, not authorized by law to be considered, was to impair his credibility before the jury. We are unable to tell what effect it may have had upon the jury, but the fact that they may have considered this testimony, improperly applied under the charge of the court, is enough to reverse this case."

In a prosecution for an illegal sale of intoxicating liquor, it is error for the court to instruct the jury that evidence of other unlawful sales may be considered, without any restriction, to determine whether the defendant is guilty of making the sale on which the state elects to rely for a conviction. *State* v. *Marshall,* 2 Kan. App. 792, 44 Pac. 49; *State* v. *Hughes,* 3 Kan. App. 95, 45 Pac. 94.

In *Fletcher* v. *State,* 49 Ind. 124, 19 Am. Rep. 673, it appeared that the trial court, in an instruction to the jury, said that a witness when upon the stand was permitted to give in evidence any statements made by defendant in conversation with him, in relation to the forgery charged in the indictment. That, if there was anything in such evidence tending to show that defendant was charged with, or was guilty of, forgery before that time, it would be legitimately before the jury, simply as being a part of that or those conversations, and could not be withdrawn from the consideration of the jury. That it was not competent, however, to prove, as an isolated fact, that defendant had at any time before been guilty of, or charged with the commission of, any crime, as a circumstance to prove that defendant was guilty of

the crime charged. Upon appeal from a judgment of conviction and the action of the court in overruling a motion for a new trial, the court held that the trial court should have expressly withdrawn such admissions from the consideration of the jury, and charged them that they were not to be considered for any purpose of the trial. That the charge was erroneous. That inasmuch as the declarations constituted part of conversations which were relevant, they were properly admitted in evidence; but the court should have charged the jury that they were admitted solely because they were so connected with conversations that they could not be separated, and that they were not to be considered for any purpose connected with the question of the guilt or innocence of the appellant, or of the extent of punishment, if found guilty. That, the court having charged the jury that such admissions were "legitimately in evidence," and "could not be withdrawn," the jury must have understood that they were to be considered for some purpose, though they were told that they were not to be considered in determining whether the appellant had committed the crime charged in the indictment. That, if they were not competent for such purpose, they were not competent for any, for that was the sole subject of inquiry. That the error in the instruction consisted in telling the jury that such admissions were "legitimately in evidence," and "could not be withdrawn," as the jury might have understood that they were to be considered in fixing the punishment, and may have so considered them.

Upon the trial of a person charged with the murder of his wife by poison, testimony was introduced which it was claimed tended to show that the respondent, at the same time he was poisoning his wife, was also poisoning her sister, who was an inmate of his household during the last illness of his wife. The court charged the jury that they might consider this evidence in determining the fact as to the death of the wife, and as to whether she came to her death by poison, and, if so, by whom the same was prepared or administered. He further charged them that they might consider the testimony in relation to the powder found in the food and water prepared for the wife's sister, and whether the same was poisonous, if they found such powder was found in her food and drink; and that if, after a full and careful consideration of the evidence in the case, and all of it, they should find, beyond a reasonable doubt, that the wife came to her death, or that her death was hastened, by poison, they could then proceed to consider the further question as to the respondent's responsibility in relation thereto. It was held that this was only another way of saying to the jury that, if they found the respondent poisoned the wife's sister, it was probable he poisoned his wife; or, in other words, that the evidence of an offense committed by the respondent of which he was not charged in the information might be considered to establish his guilt of the offense

which was charged against him in the information. It was held, distinguishing *People* v. *Seaman,* 107 Mich. 348, 61 Am. St. Rep. 326, 65 N. W. 203, that the charge was an erroneous one. The court, however, stated that, if there was evidence in the case at bar that the respondent had administered poison to his wife, it would have been competent, as bearing upon his motive or intent in administering the poison, to show that, at about the same time, he was giving poison to the sister of his wife, who was also an inmate of his household. The court proceeded to say further: "Had the trial judge limited the use of this testimony to that purpose, there would have been no error; but, when he went further, and informed the jury that they might consider this testimony for the purpose of establishing whether the respondent in fact administered poison to his wife, he went further than any of the cases go, and announced a doctrine that it would be exceedingly dangerous to follow." *People* v. *Thacker,* 108 Mich. 652, 66 N. W. 562.

Upon the trial of an indictment for setting fire to a dwelling house on December, 1888, the prisoner, on his cross-examination, had testified to six other fires occurring between 1877 and 1883, but his explanation of the causes of the fires, if true, showed him to be blameless in regard to them. In charging the jury, the court said that the testimony as to those fires was relevant on the questions, whether the fire then being investigated was accidental, and whether the prisoner had a motive or intent to defraud anybody at the time that fire occurred. Upon appeal, the court, after stating the general rule that, upon the trial of a person for one crime, evidence that he has been guilty of other crimes is irrelevant, and after stating various exceptions thereto and citing and quoting largely from authorities, both American and English, said that, in general, it may be said that, whenever the defendant's guilt of an extraneous crime tends logically to prove against him some particular element of the crime for which he is being tried, such guilt may be shown. That in the present case, the fires which the jury were instructed to regard as relevant testimony on the inquiry whether the fire in issue was accidental, and whether the prisoner had a motive to defraud anybody by it, occurred between five and eleven years previously, and no ground existed for a suspicion that there was the slightest connection between it and them, except such as would bind together the different crimes of any habitual offender. That it was impossible to reason from those fires to this, save by the inference that, if the prisoner was to be benefited by the destruction of those buildings, and on that account set them afire, then, if he was to be benefited by the destruction of this building, he probably set it afire also. That such reason derives its whole force from the character of the prisoner, which can never be thrown into the scales on a criminal charge, except at the instance of the accused; that, had the state offered to prove the pris-

reception must have been to prejudice the rights of the accused, a charge to the jury to disregard the evidence will not cure the error in admitting it.[4]

oner's connection with those fires as a substantive part of its affirmative case, the offer would have been unhesitatingly overruled; its being brought out on cross-examination of the prisoner, while it might legalize the evidence as possibly bearing upon his credit as a witness, did not render the testimony any more relevant to the main issue of his guilt. And that there was error in the charge on this point. *State* v. *Raymond,* 53 N. J. L. 260, 21 Atl. 328.

Upon the trial of an indictment for libel, where the state, for the purpose of proving malice, introduced in evidence other libelous publications by the defendant in regard to the same person, a charge to the jury that such other articles might be considered by them as showing that defendant was in a state of mind unfriendly to the person libeled, and, therefore, more likely to be the author of the libel charged in the indictment, was held to be erroneous. *State* v. *Riggs,* 39 Conn. 498. The court stated that this was, in a word, telling the jury that proof that defendant had published a libel on the person named in the indictment before or after that prosecuted on was competent evidence that he published the latter; but that, even if the charge was justifiable as matter of law, it was not justifiable under the circumstances of the case; that, the evidence of the other publications having been offered and admitted solely for the purpose of proving malice, it was a surprise to the defendant for the court to give it to the jury at the last moment for a new purpose, to prove, not the intent, but the fact of publication.

Upon a trial for robbery, where the defendant was a witness in his own behalf, an instruction that the jury might take into consideration the fact, if the same was proved (which was admitted by the defendant), that he had been convicted of a felony, and confined in the penitentiary of another state, as affecting his credibility as a witness, is not erroneous. *Keating* v. *State,* 67 Neb. 560, 93 N. W. 980.

[4] On a trial for murder, evidence of other crimes, such as robberies, committed by the defendants, is inadmissible; and the error of admitting such evidence is not cured by the judge's charge that defendants were not to be convicted because of the commission of such other crimes. *Boyd* v. *United States,* 142 U. S. 450, 35 L. ed. 1077, 12 Sup. Ct. Rep. 292, reversing 45 Fed. 851.

A conviction under the first count of an information charging defendant, in the first count, with stealing certain goods, and in the second count with receiving such goods knowing them to be stolen, must be reversed where the prosecution was permitted to introduce, under the second count, testimony of oth-

§ 55. Good faith.—The good faith of the defendant is often in issue in criminal prosecutions, and it is relevant to put in evidence facts from which such good faith is inferable.[1] In homicide, evidence is relevant to show the good faith of the defendant, who pleads that he was acting in self-defense, after recent threats by the deceased to take his life and when some overt act accompanies such threats. An honest, non-negligent belief of such impending danger is a defense; but if he negligently believed in such danger, and so acted, he would be guilty of manslaughter.[2]

er alleged larcenies committed at the same time, and for which other suits were pending against accused, although defendant was not found guilty under that count, and the court charged that the objectionable testimony could only be taken into account in considering the second charge; since such evidence tended to make defendant a common thief, and required him to defend against all the other prosecutions, in order to show his innocence of the crime with which he was charged. *People* v. *Jacks,* 76 Mich. 218, 42 N. W. 1134. The court stated that this testimony could hardly have failed to impress the jury strongly against accused upon the charge in the first count, and that it would be impossible to say that the subsequent charge of the court entirely removed such impression, or to what extent the rights of the defendant were prejudiced thereby; and that, therefore, the rule of safety required that a verdict obtained under such circumstances should not be allowed to stand.

Where, upon a trial for illegal branding and marking of property which had been stolen, evidence of stealing and branding and marking of other stolen property is improperly admitted, the error in so admitting the incompetent testimony is not cured and rendered harmless by the court afterward instructing the jury to disregard it. *Welhousen* v. *State,* 30 Tex. App. 623, 18 S. W. 300.

See also *State* v. *Ditton,* 48 Iowa, 677; *House* v. *State,* 16 Tex. App. 25; *Hamilton* v. *State,* 36 Tex. Crim. Rep. 372, 37 S. W. 431; *State* v. *Clawson,* 32 Mo. App. 93; *Gentry* v. *State,* 25 Tex. App 614, 8 S. W. 925.

[1] Post, § 727.

[2] Wharton Homicide, 3d ed. § 222; *Com.* v. *Woodward,* 102 Mass. 155, 161; *State* v. *Jaggers,* 58 S. C. 41, 46, 36 S. E. 434, 12 Am. Crim. Rep. 228; *Wiggins* v. *Utah,* 93 U. S. 465, 470, 23 L. ed. 941, 943, 4 Am. Crim. Rep. 494; *Powell* v. *State,* 52 Ala. 1; *State* v. *Bryant,* 55 Mo. 75, 78; *Palmore* v. *State,* 29 Ark. 248, 262; *Allison* v. *United States,* 160 U. S. 203, 216, 40 L. ed. 395, 400, 16 Sup. Ct. Rep. 252, 10 Am.

So, where the defense is insanity at the time of the homicide, it is admissible for him to sustain the good faith of this hypothesis by evidence of conduct subsequent to the homicide by proving a continuance of the mental disorder. All such *indicia* occurring after the commission of the offense—conversation, exclamations, and declarations of the defendant—may be shown. While it is true that mania is often simulated, and the danger of simulation may increase after the homicide, this relates rather to the effect of the testimony, than its relevancy. It may have little weight, but such as it is, it is relevant.[3]

§ 56. Prudence and diligence.—Prudence and diligence at a particular juncture, in criminal issues, is often relevant, and may be proved by facts from which such diligence and prudence are logically deduced. On a question as to whether a company's employees in the management of a train at a collision acted prudently, the declarations of the company's employees [1] and those of fellow passengers [2] and those of per-

Crim. Rep. 432; *Smith* v. *United States,* 161 U. S. 85, 88, 40 L. ed. 626, 627, 16 Sup. Ct. Rep. 483; *May* v. *State,* 90 Ga. 793, 797, 17 S. E. 108; *State* v. *Turpin,* 77 N. C. 473, 476, 24 Am. Rep. 455; *State* v. *Helm,* 92 Iowa, 540, 547, 61 N. W. 246; *State* v. *Doris,* 51 Or. 136, 16 L.R.A.(N.S.) 670, 94 Pac. 44; *State* v. *Tarter,* 26 Or. 38, 42, 37 Pac. 53; *Warford* v. *People,* 43 Colo. 107, 112, 96 Pac. 556.

[3] Wharton, Homicide, 3d ed. § 541; *Green* v. *State,* 64 Ark. 523, 531, 43 S. W. 973; *Flanagan* v. *State,* 106 Ga. 109, 32 S. E. 80, 11 Am. Crim. Rep. 534; *French* v. *State,* 93 Wis. 325, 339, 67 N. W. 706, 10 Am. Crim. Rep. 606; *State* v. *Lewis,* 20 Nev. 333, 343, 22 Pac. 241, 8 Am. Crim. Rep. 574; *People* v. *Wood,* 126 N. Y. 249, 262, 27 N. E. 362; *State* v. *Newman,* 57 Kan. 705, 709, 47 Pac. 881; *State* v. *Kelley,* 57 N. H. 549, 553, 3 Am. Crim. Rep. 229; *Com.* v. *Buccieri,* 153 Pa. 535, 26 Atl. 228; *Com.* v. *Pomeroy,* 117 Mass. 143, 148; *Guiteau's Case,* 10 Fed. 161, Judge Cox's Charge, Wharton's note.

[1] *Stokes* v. *Saltonstall,* 13 Pet. 181, 191, 10 L. ed. 115, 121; *Ensley* v. *Detroit United R. Co.* 134 Mich. 195, 198, 96 N. W. 34; *Maury* v. *Talmadge,* 2 McLean, 157, 161, Fed. Cas. No. 9,315; *O'Connor* v. *Chicago, M. & St. P. R. Co.* 27 Minn. 166, 172, 38 Am. Rep. 288, 6 N. W.

sons injured,[3] made at the time of the accident or immediately thereafter, are admissible as relevant. But such relevancy does not extend to the contents of a statement in writing, published immediately after, to the effect that, in the opinion of the passengers signing it, the trainmen did all in their power to prevent such accident.[4] So in all cases in which prudence and diligence are to be shown, it is relevant to offer in evidence all the facts by which prudence and diligence are to be gauged.[5]

§ 57. Character in criminal issues.—In early times, on trial for a capital crime accused might show good character, but it is now generally admitted in all criminal issues, whether at common law or under the statute, and from such generality of admission certain well-defined rules govern its admissibility. Now, character is always presumed to be good until it is impeached, but notwithstanding such presumption it is always relevant for the defendant to offer affirmative evidence of character, and to prove that it was such as to make it unlikely that he would have committed the act charged against him.[1] Some-

481; *Lightcap* v. *Philadelphia Traction Co.* 60 Fed. 212, 213; post, § 732; *Taylor* v. *Willians,* 2 Barn. & Ad. 845, 1 L. J. K. B. N. S. 17; post, 272.

[2] *Vicksburg & M. R. Co.* v. *Scanlan,* 63 Miss. 413, 417; *Mobile & M. R. Co.* v. *Ashcraft,* 48 Ala. 15, 31; *Galena & C. Union R. Co.* v. *Fay,* 16 Ill. 558, 568, 63 Am. Dec. 323.

[3] *Harris* v. *Detroit City R. Co.* 76 Mich. 227, 42 N. W. 1111; *Hagenlocher* v. *Coney Island & B. R. Co.* 99 N. Y. 136, 137, 1 N. E. 536; *West Chicago Street R. Co.* v. *Kennelly,* 170 Ill. 508, 511, 48 N. E. 996; *Beath* v. *Rapid R. Co.* 119 Mich. 512, 517, 78 N. W. 537; *Omaha Street R. Co.* v. *Emminger,* 57 Neb. 240, 243, 77 N. W. 675; Clark, Acci. Law, § 147; *Lewis* v. *Bowling Green Gaslight Co.* 135 Ky. 611, 22 L.R.A.(N.S.) 1169, 117 S. W. 278.

[4] *Macon & W. R. Co.* v. *Johnson,* 38 Ga. 409, 430.

[5] Post, § 732; Wharton, Neg. §§ 26, 69.

[1] Post, § 67; *People* v. *Van Gaasbeck,* 189 N. Y. 408, 22 L.R.A. (N.S.) 650, 82 N. E. 718, 12 A. & E. Ann. Cas. 745; *Griffin* v. *State,* 26 Tex. App. 157, 163, 8 Am. St. Rep. 460, 9 S. W. 459; *Biester* v. *State,* 65 Neb. 276, 91 N. W. 416; *United States* v. *Freeman,* 4 Mason, 505, Fed. Cas. No. 15,162; *United States* v. *Jones,* 31 Fed. 718, 724; *People* v. *Shepardson,* 49 Cal. 629,

times it is relevant to put in evidence the character of the person on whom the crime is alleged to have been committed, but where such evidence is relevant, it can only be offered in the first instance by the defendant, and then the prosecution may show the character of the deceased.[2] On the other hand, when the defendant offers evidence of threats against him by the deceased, it is relevant for the prosecution to show the good character of the deceased.[3] So, habits of drunkenness, the character of persons visiting houses of ill-fame, and that of *particeps criminis* in adultery, can be shown by evidence of general reputation.[4] Where the evidence showing fraud or moral turpitude is circumstantial, and from which guilt is to be inferred, evidence of good character is relevant to repel the inference.[5]

However, the presumption of good character always prevails, and until the defendant opens the door and offers affirmative evidence of his good character, it cannot be shown to be bad by the prosecution.[6]

630; *McQueen* v. *State,* 82 Ind. 72, 74; *Com.* v. *Webster,* 5 Cush. 295, 324, 52 Am. Dec. 711; *State* v. *Snow,* 3 Penn. (Del.) 259, 262, 51 Atl. 607; *State* v. *Carr,* 4 Penn. (Del.) 523, 57 Atl. 370; *State* v. *Deuel,* 63 Kan. 811, 818, 66 Pac. 1037; *State* v. *Pipes,* 65 Kan. 543, 546, 70 Pac. 363; *Lynch* v. *People,* 33 Colo. 128, 129, 79 Pac. 1015.

See also note in 20 L.R.A. 613.

[2] *Jimmerson* v. *State,* 133 Ala. 18, 32 So. 141; *Ben* v. *State,* 37 Ala. 103; *Pound* v. *State,* 43 Ga. 88, 128; *People* v. *Anderson,* 39 Cal. 703, 704.

See also note in 14 L.R.A.(N.S.) 708.

[3] *Rhea* v. *State,* 37 Tex. Crim. Rep. 138, 140, 38 S. W. 1012; *Sims* v. *State,* 38 Tex. Crim. Rep. 637, 642, 44 S. W. 522.

[4] Post, §§ 260, 261; *State* v. *Haley,* 52 Vt. 476, 479; Wharton, Crim. Law, 8th ed. 1452; *Com.* v. *Gray,* 129 Mass. 474, 475, 37 Am. Rep. 378.

[5] *State* v. *Beebe,* 17 Minn. 241, 251, Gil. 218; *Werts* v. *Spearman,* 22 S. C. 200; post, §§ 260, 261; Starkie, Ev. 10th ed. p. 241.

[6] *United States* v. *Carrigo,* 1 Cranch, C. C. 49, Fed. Cas. No. 14,735; *United States* v. *Kenneally,* 5 Biss. 122, Fed. Cas. No. 15,522; *State* v. *Lodge,* 9 Houst. (Del.) 542, 33 Atl. 312; *State* v. *Rainsbarger,* 71 Iowa, 746, 748, 31 N. W. 865; *State* v. *Ellwood,* 17 R. I. 763, 24

§ 58. "Character" interchangeable with "reputation." —Character, in the sense in which the term is used in jurisprudence, means the estimate attached to the individual by the community, not the real qualities of the individual, as conceived by the witness. It is not what the individual really is, but what he is reputed to be, generally, by the society and the community in which he moves and resides. So, a witness called to speak as to character cannot give the results of his own personal experience and observation, or express his own opinion, but he is confined to evidence of general reputation in the community where the defendant resides or does business.[1] Such a witness, so confined to general reputation, may be examined for the purpose of testing his opportunities of ascertaining that reputation.[2]

Atl. 782; *Carter* v. *State,* 36 Neb. 481, 489, 54 N. W. 853; *State* v. *Thompson,* 127 Iowa, 440, 103 N. W. 377; *State* v. *Richardson,* 194 Mo. 326, 342, 92 S. W. 649; *State* v. *Hinksman,* 192 N. Y. 421, 429, 85 N. E. 676; *State* v. *Cloninger,* 149 N. C. 567, 571, 63 S. E. 154. See also notes in 20 L.R.A. 609, and 14 L.R.A.(N.S.) 735.

[1] Wharton, Ev. § 564; *Reg.* v. *Rowton,* Leigh & C. C. C. 520, 10 Cox, C. C. 25, 34 L. J. Mag. Cas. N. S. 57, 11 Jur. N. S. 325, 11 L. T. N. S. 745, 13 Week. Rep. 436; *Knode* v. *Williamson,* 17 Wall. 586, 588, 21 L. ed. 670, 671; *Powers* v. *Leach,* 26 Vt. 270, 279; *Wetherbee* v. *Norris,* 103 Mass. 565, 566; *Snyder* v. *Com.* 85 Pa. 519, 522; *State* v. *Egan,* 59 Iowa, 636, 13 N. W. 730. But see *Marts* v. *State,* 26 Ohio St. 162, 168; *Haley* v. *State,* 63 Ala. 83, 86; *Sullivan* v. *State,* 66 Ala. 48, 50; *Arnold* v. *State,* 131 Ga. 494, 62 S. E. 806.

Character is the slow spreading influence of opinion arising from the deportment of a man in society, as a man's deportment, good or bad, necessarily produces one circle without another, and so extends itself till it unites in one general opinion. That general opinion is allowed to be given in evidence. Erskine, J., in *Hardy's Case,* 24 How. St. Tr. 1079.

Criticizing position of text see London Law Times Jan. 8, 1881, p. 167.

The position in the text is now so universally accepted as the correct exposition of the law of character as viewed by jurisprudence, that any criticism of the same is based on superdistinctions affording no practical rule of estimation.

[2] Post, §§ 487, 489; *DeArman* v. *State,* 71 Ala. 351, 360.

The majority of American cases make no distinction between the use of the words "character" and "reputation," using them interchangeably one for the other,[3] though a few cases maintain that the distinction between the two words should be observed.[4]

The great weight of authority now is, that character can be established by negative testimony, so that one who has never heard the reputation of the defendant assailed, but who has been in a position where he probably would have heard it if it had been a subject of comment, may testify to the good character of such person, upon the very wise and logical theory that, if a person's reputation is never a subject of discussion in the community, it is more likely to be good than where it is the subject of discussion and comment. So that the best evidence of good reputation is where the witness testifies that he has never heard it discussed, questioned, nor talked about.[5] The more unsullied and exalted the character is, the less likely it is ever to be called into question.[6]

[3] *Hussey* v. *State,* 87 Ala. 121, 129, 131, 6 So. 420; *Kimmel* v. *Kimmel,* 3 Serg. & R. 336, 337, 8 Am. Dec. 655.

[4] *State* v. *Lapage,* 57 N. H. 245, 296, 24 Am. Rep. 69, 2 Am. Crim. Rep. 506; *Leverich* v. *Frank,* 6 Or. 212, 213; *State* v. *Wilson,* 15 R. I. 180, 1 Atl. 415; *Webster's New Int. Dict.* "Character" 8; *State* v. *Dickerson,* 77 Ohio St. 34, 13 L.R.A.(N.S.) 341, 344, 122 Am. St. Rep. 479, 82 N. E. 969, 11 A. & E. Ann. Cas. 1181.

[5] 3 Enc. Ev. p. 43, note, 34; *People* v. *Adams,* 137 Cal. 580, 582, 70 Pac. 662; *Powell* v. *State,* 101 Ga. 9, 17, 65 Am. St. Rep. 277, 29 S. E. 309; *Cole* v. *State,* 59 Ark. 50, 53, 26 S. W. 377; Cockburn, Ch J., *Reg.* v. *Rowton,* Leigh & C. C. C. 536, 10 Cox, C. C. 34, 34 L. J. Mag. Cas. N. S. 57, 11 Jur. N. S. 325, 11 L. T. N. S. 745, 13 Week. Rep. 436; *Turner's Case,* 6 How. St. Tr. 630; *Gandolfo* v. *State,* 11 Ohio St. 114, 115; *State* v. *Lee,* 22 Minn. 407, 21 Am. Rep. 769, 2 Am. Crim. Rep. 61. See *Coxwell* v. *State,* 66 Ga. 309, 315.

[6] 3 Enc. Ev. pp. 43, 44, note, 34.

"There is no case in which the jury may not, in the exercise of sound judgment, give the prisoner the benefit of a previous good character. No matter how conclusive the other testimony may appear to be, the character of the accused may

§ 58a. Not a substantive defense in itself.—While it is relevant for the accused to prove that his previous character, as to the trait involved in the charge, was good, it must be remembered that character is not of itself a substantive defense, but a circumstance to be considered in connection with all the other evidence in the case. In some instances it is sufficient to create a reasonable doubt and turn the scale in defendant's favor, but its weight and value is in all cases a question for the jury.[1]

§ 59. Exceptions in certain offenses; relevancy to charge.—While character evidence is now relevant in all prosecutions that subject the accused to punishment by fine or imprisonment, or both,[1] it is not relevant in those actions that are founded on fraudulent acts imputed to the accused, or where the prosecution is not for the crime, but to enforce the pecuniary mulct.[2]

Again, the proof of good character to be relevant must be confined to the nature of the offense under charge and bear

be such as to create a doubt in the minds of the jury and lead them to believe, in view of the improbabilities, that a person of such character would not be guilty of the offense charged; that the other evidence in the case is false or the witnesses mistaken." *Remsen* v. *People,* 43 N. Y. 6.

[1] *Hall* v. *State,* 132 Ind. 317, 323, 31 N. E. 536; 3 Chitty, Crim. Law, § 99; Roscoe, Crim. Ev. 8th ed. 296; *State* v. *House,* 108 Iowa, 68, 69, 78 N. W. 859; *Wells* v. *Territory,* 14 Okla. 436, 78 Pac. 124; *Shields* v. *State,* 149 Ind. 395, 411, 49 N. E. 351. As to weight in reversal of case see, *Walsh* v. *People,* 65 Ill. 58, 64, 16 Am. Rep. 569; *Cavender* v. *State,* 126 Ind. 47, 49, 25 N. E. 875.

As to weight and effect of evidence as to character, see note in 20 L.R.A. 618.

[1] Supra, § 58, note 1; 3 Enc. Ev. p. 6, note 13.

[2] *Home Lumber Co.* v. *Hartman,* 45 Mo. App. 647, 653; *Gebhart* v. *Burkett,* 57 Ind. 378, 381, 26 Am. Rep. 61; *Alkire Grocer Co.* v. *Tagart,* 78 Mo. App. 166, 168.

So, evidence of defendant's character in suit for damages for assault and battery is not admissible. *Vance* v. *Richardson,* 110 Cal. 414, 417, 42 Pac. 909; Wharton, Ev. 47; *Atty. Gen.* v. *Bowman,* 2 Bos. & P. 532, note.

some pertinent analogy and reference to it.[2a] For instance, on charge of adultery, it is wholly irrelevant to inquire as to the accused's honesty and integrity; or on a charge of high treason, it would be absurd to elicit evidence tending to show honesty and uprightness in private business.[3]

§ 60. Purposes of admission.—While the accused can call witnesses to testify to his general reputation prior to the commission of the act charged, he cannot give evidence of particular acts, unless they tend to disprove some of the facts put in issue by the pleadings.[1]

[2a] See note in 20 L.R.A. 612.

[3] Post, § 60, and notes; *People* v. *Fair,* 43 Cal. 137; *United States* v. *Chung Sing,* 4 Ariz. 217, 219, 36 Pac. 205; *Kee* v. *State,* 28 Ark. 155, 164, 2 Am. Crim. Rep. 263; *People* v. *Cowgill,* 93 Cal. 596, 597, 29 Pac. 228; *People* v. *Fitzgerald,* 156 N. Y. 253, 267, 50 N. E. 846, 11 Am. Crim. Rep. 760; *Kauffman* v. *People,* 11 Hun, 82, 86; *Frazier* v. *Pennsylvania R. Co.* 38 Pa. 104, 110, 80 Am. Dec. 467; *State* v. *Dalton,* 27 Mo. 12. 16.

As taking a wider range, see *People* v. *Bodine,* 1 Denio, 281.

So it was not error to reject proof that defendant was a kind-hearted man, where permission was given to allow evidence as to peacefulness of character towards deceased, or any other relevant purpose. *Cathcart* v. *Com.* 37 Pa. 108.

[1] Archbold, Crim. Pl. 104; 2 Russell, Crimes, 784; *Rex* v. *Stannard,* 7 Car. & P. 673; *Com.* v. *Hardy,* 2 Mass. 317; *State* v. *Wells,* 1 N. J. L. 424, 1 Am. Dec. 211; *Com.* v. *Webster,* 5 Cush. 295, 325, 52 Am. Dec. 711; *Thomas* v. *People,* 67 N. Y. 218, 223; *Kistler* v. *State,* 54 Ind. 400, 406, 2 Am. Crim. Rep. 18; *Remsen* v. *People,* 43 N. Y. 6; *Hopps* v. *People,* 31 Ill. 385, 387, 83 Am. Dec. 231; *State* v. *Kinley,* 43 Iowa, 294, 296; *Carson* v. *State,* 50 Ala. 134, 138; *Drake* v. *State,* 51 Ala. 30, 32; *Davis* v. *State,* 10 Ga. 101, 103; *Lee* v. *State,* 2 Tex. App. 338, 340; *Com* v. *Twitchell,* 1 Brewst. (Pa.) 563.

The same reasoning applies as to the admission of independent offenses to establish system. Such offenses must be cognate; if different in type they cannot be received. So with character evidence. It is relevant, then, in murder, to show peace and quiet; in larceny, honesty; in treason, loyalty; in adultery, chastity; in rape, quiet and peaceful character (*State* v. *Lee,* 22 Minn. 407, 21 Am. Rep. 769, 2 Am. Crim. Rep. 61); in perjury, truthfulness (*Rex* v. *Hemp,* 5 Car. & P. 468). When such character evidence has been admitted, then it is error to charge

The immediate object of character evidence is to disprove guilt, but it is also admissible in murder to aid the jury in ascertaining the grade of the offense.[2] In some issues it is relevant to rebut criminal intent and to show probable mistake or falsehood on the part of the witnesses for the prosecution.[3] In some cases where the jury, in their verdict, fix the punishment, it is admissible as a circumstance to mitigate that punishment.[4]

§ 61. Particular facts not relevant in rebuttal of reputation.—When a defendant has voluntarily put his character in issue, it is not competent nor relevant to the issue, to admit in rebuttal on the part of the prosecution evidence of a series of independent facts, each forming a constituent offense.[1] Rebutting evidence of bad reputation is, however, always admissible.

that the defendant's intention can only be determined from his acts. *People* v. *Casey,* 53 Cal. 360, 361.

Wharton, Crim. Law, 8th ed. § 1327.

Evidence of good character is a substantive fact, and ought to be so regarded by both court and jury. *Hanney* v. *Com.* 116 Pa. 322, 327, 9 Atl. 339; *State* v. *Collins,* 5 Penn. (Del.) 263, 272, 62 Atl. 224; *Brazil* v. *State,* 117 Ga. 32, 38, 43 S. E. 460; *State* v. *King,* 122 Iowa, 1, 4, 96 N. W. 712.

For note as to evidence of specific instances to prove character, see 14 L.R.A.(N.S.) 689.

[2] *Carroll* v. *State,* 3 Humph. 315.

See *People* v. *Stewart,* 28 Cal. 396; *People* v. *Gleason,* 1 Nev. 173, 177.

See, differing, *Com.* v. *Twitchell,* 1 Brewst. (Pa.) 563.

[3] *Guzinski* v. *People,* 77 Ill. App. 275, 277; *Young* v. *Com.* 6 Bush, 312, 315; *People* v. *Harrison,* 93 Mich. 594, 53 N. W. 725.

Contra, *Reg.* v. *Burt,* 5 Cox, C. C. 284.

Good character may create a reasonable doubt against positive evidence, but this doubt against positive evidence is created only when, in the judgment of the jury, the character is so good as to raise a doubt of the truthfulness of the correctness of the positive evidence. In such case the prisoner must be given the benefit of the doubt. *People* v. *Hughson,* 154 N. Y. 164, 47 N. E. 1092.

[4] *Voght* v. *State,* 145 Ind. 12, 16, 43 N. E. 1049; *Walker* v. *State,* 136 Ind. 663, 669, 36 N. E. 356; *Rosenbaum* v. *State,* 33 Ala. 354, 364.

[1] *Aiken* v. *People,* 183 Ill. 215,

§ 62. No presumption against defendant to be drawn from absence of character evidence.—If the defendant offers no evidence of his good character, no legal presumption can be drawn from such omission prejudicial to the defendant, or that his character is bad,[1] and under a proper request the

218, 220, 222, 55 N. E. 695, 15 Am. Crim. Rep. 46; *Gifford* v. *People,* 87 Ill. 210, 214; 1 Phillipps, Ev. Cowen, H. & E's. notes p. 765; Roscoe, Crim. Ev. 5th Am. ed. p. 97; *Holsey* v. *State,* 24 Tex. App. 35, 42, 5 S. W. 523; *Murphy* v. *State,* 108 Ala. 10, 12, 18 So. 557; *Reddick* v. *State,* 25 Fla. 112, 113, 5 So. 704; *State* v. *Donelon,* 45 La. Ann. 744, 12 So. 922; *People* v. *White,* 14 Wend. 112, 114; *Com.* v. *Gibbons,* 3 Pa. Super. Ct. 408; *Bird* v. *United States,* 180 U. S. 356, 45 L. ed. 570, 21 Sup. Ct. Rep. 403; *Fitzpatrick* v. *United States,* 178 U. S. 304, 44 L. ed. 1078, 20 Sup. Ct. Rep. 944; *People* v. *Harris,* 95 Mich. 87, 54 N. W. 648; *Fountain* v. *Boodle,* 3 Q. B. 5, 2 Gale & D. 455; *Reg.* v. *Rowton,* Leigh & C. C. C. 520, 10 Cox, C. C. 25, 34 L. J. Mag. Cas. N. S. 57, 11 Jur. N. S. 325, 11 L. T. N. S. 745, 13 Week. Rep. 436; *State* v. *Lapage,* 57 N. H. 245, 296, 24 Am. Rep. 69, 2 Am. Crim. Rep. 506; *Com.* v. *O'Brien,* 119 Mass. 342, 345, 20 Am. Rep. 325; *Snyder* v. *Com.* 85 Pa. 519, 521; *McCarty* v. *People,* 51 Ill. 231, 99 Am. Dec. 542; *Keener* v. *State,* 18 Ga. 194, 220, 63 Am. Dec. 269; *State* v. *Laxton,* 76 N. C. 216; *Hirschman* v. *People,* 101 Ill. 568, 575; *Meyncke* v. *State,* 68 Ind. 401, 404.

Contra:

Balkum v. *State,* 115 Ala. 117, 118, 67 Am. St. Rep. 19, 22 So. 532; *State* v. *Nelson,* 98 Mo. 414, 418, 11 S. W. 997; *State* v. *Dill,* 48 S. C. 249, 256, 26 S. E. 567.

In Alabama it seems that particular acts of immorality may be elicited on cross-examination of the witness, where he has testified that defendant's character is good. *Ingram* v. *State,* 67 Ala. 67; *Thompson* v. *State,* 100 Ala. 70, 14 So. 878; *Goodwin* v. *State,* 102 Ala. 87, 15 So. 571. This seems to have been confined to cases where the particular act elicited was exactly relevant to the charge, but, as announcing the contrary doctrine and sustaining the rule, see *Moulton* v. *State,* 88 Ala. 116, 6 L.R.A. 301, 6 So. 758; *Evans* v. *State,* 109 Ala. 11, 19 So. 535.

For note as to rebutting evidence of defendant's good character, see 20 L.R.A. 616.

[1] *State* v. *Upham,* 38 Me. 261; *Ackley* v. *People,* 9 Barb. 609; *People* v. *Bodine,* 1 Denio, 281, 314; *Donoghoe* v. *People,* 6 Park. Crim. Rep. 120, 124; *State* v. *O'Neal,* 29 N. C. (7 Ired. L.) 251, 252; *Cluck* v. *State,* 40 Ind. 263, 270; *Knight* v. *State,* 70 Ind. 375, 380; *State* v. *Kabrich,* 39 Iowa, 277; *State* v. *Dockstader,* 42 Iowa, 436, 2 Am. Crim. Rep. 469; *State* v. *Sanders,* 84 N. C. 728, 731; *Olive* v. *State,* 11 Neb. 1, 27, 7 N. W. 444.

See *State* v. *McAllister,* 24 Me. 139.

court will so charge the jury. However, if he desires to put his character in issue he has a right to the benefit of his previous good character and reputation, so far as it is at variance with the crime charged, and the jury is to consider it, as a circumstance, with all the other evidence, as bearing on the probability of his guilt.[2]

§ 63. Cannot rebut by showing character subsequent to commission of offense.—The prosecution cannot rebut proof of good character on the part of the accused, by proof of bad character subsequent to the commission of the offense, or that others associated with him had bad characters;[1] nor

[2] *Westbrooks* v. *State,* 76 Miss. 710, 713, 25 So. 491; *State* v. *Blue,* 17 Utah, 175, 183, 53 Pac. 978; *State* v. *Snover,* 63 N. J. L. 382, 43 Atl. 1059, 11 Am. Crim. Rep. 655.

[1] *People* v. *Fong Ching,* 78 Cal. 169, 174, 20 Pac. 396; *People* v. *McSweeney,* — Cal. —, 38 Pac. 743; *State* v. *Johnson,* 60 N. C. (1 Winst. L.) 151; *Lea* v. *State,* 94 Tenn. 495, 29 S. W. 900; *Carter* v. *Com.* 2 Va. Cas. 169. But, see *Com.* v. *Sacket,* 22 Pick. 394.

As to proof of bad character of others the courts say: "They were not on trial, nor were they accused in the information. To permit an inquiry into their reputation was to import into the case a collateral issue. Every man is supposed to always be able to support his own general reputation, but ought not to be expected to be ready to defend the character of those with whom he associates." *State* v. *Beaty,* 62 Kan. 266, 62 Pac. 658, 14 Am. Crim. Rep. 513.

While the character of a witness may be shown for the purpose of sustaining or impairing his testimony, it does not tend to enlighten the jury upon the question of guilt or innocence to know whether a person who is neither party nor witness, but is only mentioned in the confession of one accused of crime as the receiver of stolen goods, is of good or bad reputation. *State* v. *Staton,* 114 N. C. 813, 19 S. E. 96.

So, where a defendant offered to prove that his alleged accomplice, one Belcher, was a person of good character for honesty at the time of the robbery, the offer was refused, and the reviewing court said: "On this we do not think the court erred. Belcher was not on trial, and the question then under investigation related to the guilt or innocence of the accused, and did not necessarily involve the guilt nor innocence of Belcher. He was a stranger to the record, and his character for honesty was of no more

that in particular localities his character was bad, unless he resided or did business in such localities previous to the time of the commission of the offense charged.[2]

And it seems that in homicide, where the accused gave in evidence the quarrelsome character of the deceased when he was drinking, as he was at the time of the homicide, the prosecution is not confined to that particular time, but may offer evidence as to his character in general for peace and good citizenship.

§ 63a. Bad character of deceased irrelevant; exception. —On prosecution for homicide, evidence of the bad character of the deceased is irrelevant, for, as frequently said, the law protects everyone from unlawful violence, regardless of character, and the service done the community in ridding it of a violent and dangerous man is, in the eyes of the law, no justification of the act.

To this rule, there are two exceptions, when the bad character of deceased may be offered in evidence:

First, where the issue of self-defense is raised and the character of the slaying is doubtful, evidence of the violent and dangerous character of the deceased is competent for the purpose of determining whether the deceased or the accused was the aggressor.

importance than the character of any other third person." *Walls* v. *State,* 125 Ind. 400, 25 N. E. 457.

[2] *Graham* v. *State,* 29 Tex. App. 31, 32, 13 S. W. 1013; *Holsey* v. *State,* 24 Tex. App. 35, 42, 5 S. W. 523; *Boon* v. *Weathered,* 23 Tex. 675.

So, where a party introduces testimony impeaching his own witness, he cannot afterwards complain of the court's refusal to admit testimony sustaining the witness. *Mealer* v. *State,* 32 Tex. Crim. Rep. 102, 107, 22 S. W. 142.

As to methods of proving character, see *State* v. *Feeley,* 194 Mo. 300, 3 L.R.A.(N.S.) 351, 372, 112 Am. St. Rep. 511, 92 S. W. 663; *Wroe* v. *State,* 20 Ohio St. 460; *Brown* v. *State,* 46 Ala. 175, 184; *White* v. *Com.* 80 Ky. 480, 485 (this case citing and sustaining the text); *Griffin* v. *State,* 14 Ohio St. 55, 63.

Second, where the evidence tends to prove that the accused acted in self-defense, evidence of the violent and dangerous character of the deceased, known to the defendant, is admissible as tending to characterize the acts of the deceased, as bearing on the reasonableness of defendant's apprehension of danger at the time of the homicide.[1]

§ 64. Bad character of third parties not relevant.—Nor is it relevant to prove that third parties who had an opportunity to commit the crime were of bad character, such third parties not being witnesses or charged with crime or otherwise connected with the case.[1]

§ 65. Tendency, ability, and opportunity; when irrelevant.—While particular acts may be proven to show malice, intent, *scienter,* and the like, it is inadmissible to prove in this way, or at all, that the defendant had a tendency to commit the crime charged.[1]

[1] *Com.* v. *Tircinski,* 189 Mass. 257, 2 L.R.A.(N.S.) 102, 75 N. E. 261, 4 A. & E. Ann. Cas. 337; *State* v. *Turpin,* 77 N. C 473, 477, 24 Am. Rep. 455; Horrigan & T. Self Defense, p. 695.

For note as to evidence of character and reputation of deceased on trial for homicide, see 3 L.R.A. (N.S.) 352.

[1] *Bennett* v. *State,* 52 Ala. 370, 1 Am. Crim. Rep. 188.

[1] *Shaffner* v. *Com.* 72 Pa. 60, 13 Am. Rep. 649; *State* v. *Lepage,* 57 N. H. 245, 295, 24 Am. Rep. 69, 2 Am. Crim. Rep. 506; *State* v. *Renton,* 15 N. H. 169; 1 Chitty, Crim. Law, 504; *Coleman* v. *People,* 55 N. Y. 90; *State* v. *Hopkins,* 50 Vt. 316, 3 Am. Crim. Rep. 358; *Reg.* v. *Oddy,* 5 Cox, C. C. 210, 2 Den. C. C. 264, Temple & M. 593, 20 L. J. Mag. Cas. N. S. 198, 15 Jur. 517; *Rex* v. *Cole,* 3 Russell, Crimes, 6th ed. p. 251; *Albricht* v. *State,* 6 Wis. 74; *People* v. *Jones,* 31 Cal. 565.

On the trial of one Hawkins, a clergyman, for stealing money and a ring, in September, 1668, Lord Hale admitted evidence to show that the prisoner had once stolen a pair of boots from a man named Chilton, and more than a year before he had picked the pockets of one Noble. In summing up, his Lordship said, referring to the facts as to Chilton and Noble, "This, if true, would render the prisoner now at the bar obnoxious to any jury." 6 How. St. Tr. 935.

For it would be in contravention of the common law, if a man's having been guilty of other offenses, or having a tendency to commit them, should be received as evidence to rebut the presumption of his innocence of a particular charge. Nor is it admissible to prove as part of the prosecution's case the defendant's ability to commit the offense; *e.g.,* in cases of forgery, that he was skilful in imitating writing.[2]

On the other hand, that he had by him weapons suitable to the commission of the crime charged, such as a knife or a revolver, or burglars' tools, or inflammable materials, is always a proper ingredient of the case of the prosecution. The question when evidence of aptitude is offered is one of logic. Is the aptitude sought to be charged on the defendant one that he possesses in common with a multitude of others? Then proof of such aptitude cannot be received unless, the *corpus delicti* being first proved, a defense based on the defendant's inaptitude is set up. Such proof is never to be received to show, or as tending to show independently, such *corpus delicti.* On the other hand, when the aptitude is special to himself,—*e. g.,* when the offense was committed by a person peculiarly skilled in poisons or in the mode of inflicting wounds,—then the evidence is to be received, at least in rebuttal.[3]

§ 66. Relevancy of character in all prosecutions; exception.—It has been heretofore argued by high authority that character evidence is of weight only in doubtful cases,[1]

[2] *People* v. *Corbin,* 56 N. Y. 363, 15 Am. Rep. 427.

[3] Supra, § 41. post, §§ 772, 773; *People* v. *Corbin,* 56 N. Y. 363, 15 Am. Rep. 427; *Withaup* v. *United States,* 62 C. C. A. 328, 127 Fed. 530; *State* v. *McKinney,* 31 Kan. 570, 3 Pac. 356, 5 Am. Crim. Rep. 538, 544; *State* v. *Donovan,* 128 Iowa, 44, 102 N. W. 791; *Weed* v. *People,* 56 N. Y. 628; *Moore* v. *State,* 2 Ohio St. 500; *People* v. *Place,* 157 N. Y. 584, 52 N. E. 576; *Morgan* v. *Territory,* 16 Okla. 530, 85 Pac. 718.

[1] Starkie, Ev. 10th ed. 73; 1 Phillipps, Ev. 469; *United States* v. *Smith,* 2 Bond, 323, Fed. Cas. No. 16,322; *United States* v. *Roudenbush,* Baldw. 514, Fed. Cas. No.

but that doctrine does not now pertain. Its rejection, in limiting it to doubtful cases, is evidence of a broadened and enlightened jurisprudence. Reflecting that well-considered cases are the result of the earnest thought of able minds, applied to the most serious questions of life,—the protection of life and liberty,—men hesitate to depart from the rule formulated by precedent, as each departure tends to a certain derangement of settled law. But a departure made in line with the experience of humanity gives proof that jurisprudence broadens and deepens its foundations to give greater assurance of protection. Under these conditions, the departure from the limitation of character evidence only in doubtful cases gives recognition to the fact that, in criminal jurisprudence at least, the only difference between men is the difference in character. The well-conducted citizen, leading a decent and orderly life, is the unit of strength in the nation, and the reputation that he has acquired by observance of the laws, rules, and conventions of society, rightly affords him a measure of protection in every crisis of life. On the other hand, the evasive, shifty man, observing laws only from expedience or until he feels it safe to disregard them, has no element of permanence and safety. The difference in the two is the difference in character, and this is now recognized as having a relevancy in all prosecutions, except as shown, where the action is founded on the alleged fraudulent action of the parties or for a fine or penalty.[2]

16, 198; *Com.* v. *Webster,* 5 Cush. 295, 52 Am. Dec. 711; *Lowenberg* v. *People,* 5 Park. Crim. Rep. 414; *Rollins* v. *State,* 62 Ind. 46.

[2] 2 Greenl. Ev. § 25; *Kinloch's Case,* 2 Lead Crim. Cas. (Bennett & H.) 351; *People* v. *Mead,* 50 Mich. 228, 15 N. W. 95.

See also *Com.* v. *Hardy,* 2 Mass. 317; *Felix* v. *State,* 18 Ala. 720; *Armor* v. *State,* 63 Ala. 173.

See remarks of Talfourd, J., Dickin. Quar. Ses. 6th ed. 563; *Remsen* v. *People,* 57 Barb. 324; 3 Enc. Ev. p. 8, note 19 and authorities; *McQuiggan* v. *Ladd,* 79 Vt. 90, 14 L.R.A.(N.S.) 689, 64 Atl. 503.

As to dangerous character of deceased, collating all authorities, see *State* v. *Roderick,* 77 Ohio St. 301, 14 L.R.A.(N.S.) 704, 735, 82 N. E.

It is now considered as settled law that evidence of this character, when properly presented to a jury by preliminary questions and answers, confined within the scope shown to the identical offense or its genus, is always relevant. Technically, therefore, it is always material.[3]

§ 67. Weight attached to character evidence.—The weight to be attached to evidence as to character depends as much on the quality of character sought to be established, as on the quality of the evidence produced on the opposite side and the nature of the charge. A character for honesty and integrity, such as that of Mayor Gaynor, of New York, or Ex-President Roosevelt, for instance, if offered on the part of a defendant charged with larceny or receiving stolen goods, would cast reasonable doubt on any prosecution, no matter how strong its case might be. In some instances in which guilt would otherwise be established beyond reasonable doubt, evidence of good character may justly produce an acquittal; and in some earlier cases it has been held that so strong is this inference legally, that the presumption of guilt arising from possession of stolen goods alone is completely removed by the good character of the prisoner, if shown.[1] So in all cases it is an item of proof, more or less important, and proper to be submitted to and considered by the jury.

1082; *Wallace* v. *United States,* 162 U. S. 466, 477, 40 L. ed. 1039, 1044, 16 Sup. Ct. Rep. 859.

[3] See preceding notes.

[1] *People* v. *Turrell,* 1 Wheeler, C. C. 34; *Walsh* v. *People,* 65 Ill. 58, 64, 16 Am. Rep. 569; *People* v. *Hughson,* 154 N. Y. 164, 47 N. E. 1092; *Cavender* v. *State,* 126 Ind. 47, 49, 25 N. E. 875; *State* v. *Van Kuran,* 25 Utah, 8, 69 Pac. 60; *People* v. *White,* 14 Wend. 111.

But a statute permitting proof of the character of the deceased, in connection with threats made by him, limits such proof to the general character of the deceased, as to whether he was a violent and dangerous man, and excludes the substitution of any other evidence of character in that respect. Wharton, Homicide, 3d ed. § 271, p. 442.

For note as to weight and effect of character evidence, see 20 L.R.A. 618.

§ 68. Character of party injured generally irrelevant.—When A is charged with killing B, it is no defense for A to say, "I killed him because he was a bad and dangerous man." Hence if a defendant on trial for a homicide should offer to show that the deceased was a man of ferocious character or a highway robber, such evidence by itself would be plainly irrelevant. The defendant could not constitute himself at once judge, jury, and executioner, and then convict the deceased without recourse to the law; and if he so did, such killing would be murder, if done with malice; and so it is no defense for him to say when the case is one against him for deliberate killing,—not in self-defense and not in the sudden heat of passion,—that the deceased was a bad and abandoned man.[1]

[1] *Andersen* v. *United States,* 170 U. S. 481, 509, 42 L. ed. 1116, 1126, 18 Sup. Ct. Rep. 689; *Smith* v. *United States,* 161 U. S. 85, 40 L. ed. 626, 16 Sup. Ct. Rep. 483; *State* v. *Field,* 14 Me. 248, 31 Am. Dec. 52; *Com.* v. *Mead,* 12 Gray, 168, 71 Am. Dec. 741; *Shorter* v. *People,* 2 N. Y. 197, 51 Am. Dec. 286, 4 Barb. 460; *Eggler* v. *People,* 56 N. Y. 642; *Abbott* v. *People,* 86 N. Y. 460; *Com.* v. *Ferrigan,* 44 Pa. 386; *Dock* v. *Com.* 21 Gratt. 909; *Campbell* v. *People,* 16 Ill. 17, 61 Am. Dec. 49; *State* v. *Tilly,* 25 N. C. (3 Ired. L.) 424; *State* v. *Chavis,* 80 N. C. 353; *Bowles* v. *State,* 58 Ala. 335; *Wesley* v. *State,* 37 Miss. 327, 75 Am. Dec. 62; *State* v. *Jackson,* 17 Mo. 544, 59 Am. Dec. 281; *State* v. *Jackson,* 33 La. Ann. 1087; *Wise* v. *State,* 2 Kan. 419, 85 Am. Dec. 595; *State* v. *Riddle,* 20 Kan. 711; *People* v. *Murray,* 10 Cal. 309.

Nor in advance of proof of self-defense, can the state offer testimony of the good character of the deceased. *State* v. *Potter,* 13 Kan. 414. See *People* v. *Carlton,* 57 Cal. 83, 40 Am. Rep. 112; Wharton, Homicide, 3d ed. § 257; *Evers* v. *State,* 31 Tex. Crim. Rep. 318, 18 L.R.A. 421, 37 Am. St. Rep. 811, 20 S. W. 744, *McKeone* v. *People,* 6 Colo. 346.

A careful search of all the authorities shows no exception to the rule, where element of self-defense or justification is not relied on as a defense. *Smith* v. *State,* 142 Ala. 14, 39 So. 329; *Green* v. *State,* 143 Ala. 2, 39 So. 362; *Burnett* v. *People,* 204 Ill. 208, 66 L.R.A. 304, 98 Am. St. Rep. 206, 68 N. E. 505; *Osburn* v. *State,* 164 Ind. 262, 73 N. E. 601.

But it seems where the killing took place in a riotous affray, that questions of reputation and disposition of deceased are material. *People* v. *Curtis,* 52 Mich. 616, 18 N. W. 385.

§ 69. Character of party injured relevant in assault or homicide, when self-defense first proved.—In homicide, and in other cases of violent assault, a danger which is apparently imminent is to be viewed, provided the person assailed honestly believes in its reality and imminency, as if it were actually real and imminent.[1] It makes no difference, so far as concerns the question immediately before us, whether we assume, as do some of the authorities, that the danger must have been apparent to "reasonable men," or whether we hold it must have been apparent to the defendant himself. Either way, the conclusion reached at the time of the conflict, as to the "apparency" of the danger, must be greatly affected by the assailant's character for ferocity, brutality, and vindictiveness, as well as by his special animosity to the assailed. There can be no question, in such a case, of the right to prove that the deceased was armed with gun or sword; why not that he was armed with enormous bodily strength and desperate rage?[2]

[1] Wharton, Homicide, Bowlby's 3d ed. §§ 226 et seq.; Wharton, Crim. Law, 8th ed. § 488; *Russell* v. *State,* 11 Tex. App. 288; *Thomas* v. *State,* 11 Tex. App. 315.

For note as to evidence of character and reputation of deceased in homicide case, see 3 L.R.A.(N.S.) 352.

[2] In the 9th edition of his criminal Evidence, Doctor Wharton argues with great cogency and logic that, as specific weapons could be shown in evidence, *similiter* great bodily strength and desperate rage of the deceased ought to be shown; likewise that as specific threats were relevant, so ought an individual ferocity of temper; but closes as a query, citing only the authorities above given. The difficulty, if any at all, seems to be, that as reputation is only provable generally, and not specifically, that there might be a like question as to giving evidence of specific acts of strength, or size or temper, and it is undoubtedly the correct rule that such physical characteristics and disposition can only be testified to generally, but within that limit such evidence, in a proper case, is always relevant. *Cleveland* v. *State,* 86 Ala. 1, 5 So. 426; *Thiede* v. *Utah,* 159 U. S. 510, 40 L. ed. 237, 16 Sup. Ct. Rep. 62, 11 Utah, 241, 39 Pac. 837; *State* v. *Talmage,* 107 Mo. 543, 17 S. W. 990; *Mann* v. *State,* 134 Ala. 1, 32 So. 704; *State* v. *Crea,* 10 Idaho, 88, 76 Pac. 1013; *State* v. *Cushing,* 17 Wash. 544, 50 Pac. 512; *Thornton* v. *State,* 107 Ga. 683, 33 S. E. 673; *Sneed* v. *Territory,* 16 Okla. 641, 86 Pac.

Specific threats to the defendant can be put in evidence; why not a general ferocity of temper, which vents itself on all by whom it is crossed, and which spares not life in its fury? Suppose a thug should infest a community, and that the defendant should discover such an assailant in his chamber, would it be inadmissible, on the plea of *se defendendo,* to prove that he was a thug? The great point to be made out on the plea of self-defense is that the defendant was pushed to the wall, or that he could only protect himself, his family, or his house from felony, by taking the assailant's life. And the necessity of such extreme action can only be shown by proving that the assailant was so armed, and was guided by such violent purposes, as to make other and milder means of defense inadequate. The law excuses, on this ground, a homicide of one entering a house in the nighttime, far more readily than that of one entering in the day, because, it says, "entering a house in the nighttime leads to an inference of a felonious intent." So, to prove this felonious intent, specific acts of guilt, pointing in the same direction, and prior attempts, may, under certain conditions, be proved. The general principle, then, is this,—not that it is lawful coolly to attack and kill a person of ferocious and blood-thirsty character, for it is as much murder in such a manner to kill the most desperate of men as to kill the most inoffensive; but that, whenever it is shown that a person honestly and non-negligently believed himself attacked, it is admissible for him to put in evidence whatever could show the bona fides of his belief. He may prove that the person assailing him had with him burglars' instruments; or was armed with deadly weapons; or had been lurking in the neighborhood on other plans of violence. He is entitled to reason with himself in this way: "This man comes to my

70, 8 A. & E. Ann. Cas. 354; *State* v. *Dean,* 72 S. C. 74, 51 S. E. 524.

Disproportionate strength, in homicide, see Wharton, Homicide, Bowlby's 3d ed. 278.

house masked, or with his face blacked; he is the same who has been prowling about my house, and is connected with other felonious plans; I have grounds to conclude that such is his object now." And if so, he is also entitled to say: "This man now attacking me is a notorious ruffian; he has no peaceable business with me; his character and relations forbid any other conclusion than that his present attack is felonious." And if he thus has reason to expect, and to defend himself against, a desperate conflict, of these facts he is entitled to avail himself on trial. He must first prove that he was attacked; and, this ground being laid, it is legitimate for him to put in evidence whatever would show he had reason to believe such attack to be dangerous and felonious.[3]

§ 70. English rule; character of party injured where self-defense is shown.—In England we have no authority direct to this particular point. Intimations, however, from eminent judges, would lead us to believe that evidence of the deceased's ferocity and vindictiveness would not be refused

[3] Post, § 257; *State* v. *Lull,* 48 Vt. 581; *Com.* v. *Barnacle,* 134 Mass. 216, 45 Am. Rep. 319; *Pfomer* v. *People,* 4 Park. Crim. Rep. 558; Wharton, Homicide, Bowlby's 3d ed. §§ 244, 245; *Upthegrove* v. *State,* 37 Ohio St. 662; *State* v. *Turpin,* 77 N. C. 473, 24 Am. Rep. 455; *Abernethy* v. *Com.* 101 Pa. 322; *Quesenberry* v. *State,* 3 Stew. & P. (Ala.) 315; *Eiland* v. *State,* 52 Ala. 322; *State* v. *Hicks,* 27 Mo. 588; *State* v. *Elkins,* 63 Mo. 159; *Spivey* v. *State,* 58 Miss. 858; *State* v. *Roberston,* 30 La. Ann. 340; *Payne* v. *Com.* 1 Met. (Ky.) 370; *Wright* v. *State,* 9 Yerg. 342; *DeForest* v. *State,* 21 Ind. 23; *Wise* v. *State,* 2 Kan. 419, 85 Am. Dec. 595; *Pond* v. *People,* 8 Mich. 150; *State* v. *Neeley,* 20 Iowa, 108; *State* v. *Dumphey,* 4 Minn. 438, Gil. 340; *Green* v. *State,* 38 Ark. 304; *Hudson* v. *State,* 6 Tex. App. 565, 32 Am. Rep. 593; *People* v. *Murray,* 10 Cal. 309; *People* v. *Edwards,* 41 Cal. 640; *Brunet* v. *State,* 12 Tex. App. 521; *Brownell* v. *People,* 38 Mich. 735; *Hurd* v. *People,* 25 Mich. 405; Kerr, Homicide, pp. 187, 189, 191; *Logue* v. *Com.* 38 Pa. 265, 80 Am. Dec. 481; *Bell* v. *State,* 20 Tex. App. 445; *United States* v. *Outerbridge,* 5 Sawy. 620, Fed. Cas. No. 15,978; Horrigan & T. Self-Defense, 686; *State* v. *Roderick,* 77 Ohio St. 301, 14 L.R.A.(N.S.) 704, 82 N. E. 1082.

where there is a prima facie case of self-defense laid by the defendant. Thus, in a capital case, Garrow, B., told a jury: "But here the life of the prisoner was threatened, and if he considered his life in actual danger, he was justified in shooting the deceased, as he had done; but if, not considering his own life in danger, he rashly shot this man, who was only a trespasser, he would be guilty of manslaughter.[1] And Lord Tenterden, also, in a capital case, told the jury to "take into consideration the previous habits and connections of the deceased and the prisoner, with respect to each other.[2]" Mr. Starkie lays down premises from which the same conclusion may be legitimately drawn: "On a charge of homicide, it may be for the jury to say whether the act was done with a malicious intent to destroy another, or merely to alarm and terrify him, or resulted from mere unavoidable accident, independent of any intention to injure another, or even of carelessness or negligence; and according to that determination, the offense may amount to murder, or merely to manslaughter or chance-medley. In order, however, to arrive at a just conclusion upon such questions, the jury ought to act upon those presumptions which are recognized by the law, as far as they are applicable, and their own judgment and experience, as applied to all the circumstances and evidence." [3]

§ 71. New York rule; relevancy of character of party injured, where self-defense shown.—In New York, in trials before Judge Platt [1] and Judge Van Ness,[2] evidence of the vindictive temper of the deceased was held admissible. In 1866 the question was brought before the court of appeals in

[1] *Rex* v. *Scully*, 1 Car. & P. 319, 28 Revised Rep. 780.

[2] *Rex* v. *Lynch*, 5 Car. & P. 324, see also *Reg.* v. *Fisher*, 8 Car. & P. 182.

[3] 1 Starkie, Ev. 66.

[1] *Blake's Case*, 1 N. Y. City Hall Rec. 100.

[2] *Smith's Case*, 2 N. Y. City Hall Rec. 77, 81.

a case where the point was elaborately and ably argued.[3] The result reached was that, though evidence of the defendant's ferocity and vindictiveness would be admissible when a case of self-defense was laid, it was inadmissible without such a prerequisite.[4]

In a case which came before the court of appeals in 1874,[5] the reporter tells us that "after general evidence had been given on behalf of the prisoner, tending to show that the deceased was disposed to be sullen and violent in temper when angry, and that when excited she was ungovernable and passionate," questions were then asked tending to show particular instances of exhibitions of temper. These were excluded under objection. The ruling was affirmed in the court of appeals. No reasons, however, were given. But the exclusion may be properly sustained on the ground that the evidence offered went to particular facts, and not to general character.[6]

§ 72. Rule in New Jersey.—In New Jersey, evidence of hostile and vindictive temper on part of the deceased was received in an early case,[1] Kirkpatrick, Ch. J., saying: "Inasmuch as the distinction between murder and manslaughter depends upon the impulse of the mind with which the act was committed, every circumstance which goes to show the feelings of the parties towards each other may be proper; that temper, which at one time might not be excited, might, under the excitement of other circumstances, be more easily roused, and therefore it may be received by the jury to show the state of mind of the parties."

[3] *People* v. *Lamb*, 2 Keyes, 364.
[4] *Pfomer* v. *People*, 4 Park. Crim. Rep. 558; *McKenna* v. *People*, 18 Hun, 580; *Eggler* v. *People*, 56 N. Y. 642.
[5] *Thomas* v. *People*, 67 N. Y. 218.
[6] *State* v. *Zellers*, 7 N. J. L. 230.
[1] *State* v. *Zellers*, 7 N. J. L. 230.

§ 73. Rule in Pennsylvania.—In Pennsylvania, the practice has been, in cases in which a prima facie case of self-defense is made out, to admit evidence of any facts or circumstances likely to show the condition of the defendant's mind as to the necessity of self-defense. This was done by a late able jurist, Judge King, on the trial of the Kensington and Southwark rioters in 1844-45; though he at the same time correctly ruled that, if the defendant negligently reached honest, though erroneous, conclusions as to the reality of the danger to which he was exposed, this, while it lowered the grade of the homicide, did not justify an acquittal.[1] And in an early case, evidence on part of the defense was admitted to show that the deceased was a hostile Indian.[2]

So Judge Conyngham, as distinguished for strong sense as he was for integrity and humanity, admitted in a homicide case, for the purpose of showing the honesty of the defendant's belief of impending danger, evidence of the ferocity and brutality of the deceased.[3] And that evidence of the apparent imminency of the danger is admissible whenever there is a prima facie case of self-defense is deducible from the position rightly assumed by the courts of this state, that the defendant is to be judged by his own lights.[4]

It is true that subsequently the supreme court[5] held that it was inadmissible for a defendant to prove generally the de-

[1] These cases resulted from riots between Protestants and Irish. A number of deaths ensued on each side; indictments were found against certain leaders of both factions. In all these cases, evidence was held admissible to show not only the provocations under which the particular defendants acted, but the temper and character of the assailants.

[2] *Com.* v. *Robertson,* Addison (Pa.) 246; *Com.* v. *Seibert,* Wharton, Homicide, Bowlby's 3d ed. § 286.

[3] Wharton, Homicide, Bowlby's 3d ed. § 286, note 1; *Allen* v. *United States,* 150 U. S. 551, 37 L. ed. 1179, 14 Sup. Ct. Rep. 196; *Hickory* v. *United States,* 151 U. S. 303, 38 L. ed. 170, 14 Sup. Ct. Rep. 334.

[4] *Jordan* v. *Elliott,* 12 W. N. C. 56.

[5] *Com.* v. *Ferrigan,* 44 Pa. 386;

ceased's bad character, as a defense to an indictment for murder. But in this case self-defense was not pretended. And in 1884 it was expressly ruled that evidence of the deceased's strength and ferocity was relevant in all cases in which a case of self-defense was shown.[6]

§ 74. **Rule in North Carolina.**—North Carolina was one of the first states to lead off in affirming the admissibility of this kind of proof. The question originally arose on an indictment against a white man for the murder of a slave; and it was ruled that in such an issue the defendant, setting up self-defense, could give in evidence that the deceased was turbulent and insolent to white persons.[1] Taylor, Ch. J., speaking for the supreme court, said: "It does not appear, from any direct proof in the case, what was the immediate provocation under which the homicide was committed. The evidence relative to that is altogether circumstantial and presumptive, and its weight and effect required the most careful examination and deliberation of the jury. The conclusion they might arrive at was all-important to the prisoner, since the degree of the homicide depended on it; and whether it was malicious, extenuated, or excusable must have been determined by them from such lights as they could gather from the facts actually proved, and such inferences as they might deduce from them. It cannot be doubted that the temper and disposition of the deceased, and his usual deportment towards white persons, might have an important bearing on this inquiry, and according to the aspect in which it was presented to the jury, tend to direct their judgment as to the degree of provocation received by the prisoner. If the general behaviour of the deceased was marked

State v. *Feeley*, 194 Mo. 300, 3 L.R.A.(N.S.) 351, 112 Am. St. Rep. 511, 92 S. W. 663.

[6] *Abernethy* v. *Com.* 101 Pa. 322; Wharton, Homicide, Bowlby's 3d ed. § 257 and notes.

[1] *State* v. *Tackett*, 8 N. C. (1 Hawks) 210.

with turbulence and insolence, it might, in connection with the threats, quarrels, and existing causes of resentment he had against the prisoner, increase the probability that the latter had acted under strong and legal provocation. If, on the contrary, the behavior of the deceased was usually mild and respectful towards white persons, nothing could be added by it to the force of other circumstances. They must still depend upon their own weight, and the probability be lessened that the prisoner had received a provocation sufficient in point of law to extenuate the homicide. The evidence, therefore, ought to have been received, and this will be the more apparent when the charge to the jury is considered." It is true that this ruling was, in a subsequent case, declared to be exceptional and unauthoritative;[2] but in a still later adjudication by the same court,[3] while the general rule, that it is inadmissible for the defendant to put the deceased's character in issue, is properly reiterated, the exception established in *Tackett's Case* is recognized as still in force, and as applicable to all cases of self-defense.

§ 75. Rule in South Carolina, Georgia, Alabama, Kentucky, Tennessee, and Mississippi.—In South Carolina, Georgia, Alabama, Kentucky, Tennessee, and Mississippi, we have rulings to the same effect.[1] In these states the practice is to admit evidence of the deceased's character for ferocity, in all cases in which the defendant is shown to have been acting in self-defense.

[2] *Bottoms* v. *Kent,* 48 N. C. (3 Jones, L.) 154.

[3] *State* v. *Hogue,* 51 N. C. (6 Jones, L.) 381.

[1] *State* v. *Smith,* 12 Rich. L. 430; *Monroe* v. *State,* 5 Ga. 85; *Haynes* v. *State,* 17 Ga. 465; *Quesenberry* v. *State,* 3 Stew. & P. (Ala.) 308; *Pritchett* v. *State,* 22 Ala. 39, 58 Am. Dec. 250; *Franklin* v. *State,* 29 Ala. 14; *Dupree* v. *State,* 33 Ala. 380; *Fields* v. *State,* 47 Ala. 603, 11 Am. Rep. 771; Wharton, Homicide, Bowlby's, 3d ed. § 266; *Eiland* v. *State,* 52 Ala. 325; *Roberts* v. *State,* 68 Ala. 156; *Payne* v. *Com.* 1 Met. (Ky.) 370; *Rippy* v. *State,* 2 Head, 217; *Cotton* v. *State,* 31

§ 76. **Rule in Indiana.**—In Indiana the rule is thus expressed:[1] "As a general rule, it is the character of the living, —the defendant on the trial for the commission of crime,— and not of the person on whom the crime was committed, that is in issue, and as to which, therefore, that evidence is admissible. But in a case like the present, where the question arises whether the accused acted, in the commission of a homicide, upon grounds that justified him in the deed, it would seem that the character of the deceased might be a circumstance to be taken into consideration. Especially might this be the case where the accused knew that character, and also knew, at the time, the individual by whom the attack upon him or his property was made." The court adds: "Where, as in this case, these facts may not have been known, we do not see how the evidence could be entitled to much weight."[2]

§ 77. **Rule in Michigan.**—In Michigan, in a case tried in 1872,[1] the defendant offered to prove that "the deceased was a man of high temper and quarrelsome disposition, and known by the defendant to be so at the time of the shooting." The court below refusing to admit this evidence, the ruling was reversed by the supreme court. "The evidence," said Christiancy, Ch. J., "was admissible, since the knowledge or belief of the prisoner, that the person threatening him with an immediate personal attack is a man of high temper and quarrelsome disposition, is a most important circumstance, from which he is to estimate the probability and the character of the attack, and what course of conduct he has reason to ex-

Miss. 504; *Spivey* v. *State,* 58 Miss. 858.

[1] *Dukes* v. *State,* 11 Ind. 557, 71 Am. Dec. 370.

[2] *Holler* v. *State,* 37 Ind. 57, 10 Am. Rep. 74; *Patterson* v. *State,* 66 Ind. 185.

[1] *Hurd* v. *People,* 25 Mich. 405; *People* v. *Lilly,* 38 Mich. 270; *Brownell* v. *People,* 38 Mich. 732; supra, § 69. See *People* v. *Simpson,* 48 Mich. 474, 12 N. W. 662.

pect from the assailant, as well as the means which, at the moment, he may deem necessary to guard himself from the threatened danger."

§ 78. **Rule in Minnesota.**—In Minnesota the same distinction is taken: "The character of the deceased *per se*," said Flandrau, J.,[1] "can never be material in the trial of a party for killing him, because it is as great an offense to kill a bad man as it is to kill a good man, or to kill a quarrelsome and brutal man as it is to kill a mild and inoffensive man. Therefore, if the killing is proven to have been with a felonious intent, the character of the deceased can in no manner affect the result."

§ 79. **Rule in Iowa.**—On a trial for stabbing in Iowa, in 1870,[1] the defendant offered to introduce evidence to show that McMillin, the person stabbed, was a large, powerful, and muscular man, who, when under the influence of liquor, was quarrelsome, ugly, dangerous, and vindictive; that defendant knew these facts; and, in connection with this offer, he also proposed to prove that on the same day, and shortly before the commission of the assault, McMillin had threatened to take defendant's life, of which threat he had been informed only a few minutes previous to the assault. The judge trying the case refused to admit this evidence, and this ruling was reversed by the supreme court, on the ground that the character of the assailant was one of the circumstances from which the intent and motive of the assailed, when defending himself, could be determined.[2]

§ 80. **Rule in Missouri and Texas.**—In Missouri, in 1872, the law is thus tersely presented:[1] "When the homi-

[1] *State* v. *Dumphey*, 4 Minn. 438, Gil. 340.

[1] *State* v. *Collins*, 32 Iowa, 36.

[2] Wharton, Homicide, Bowlby's 3d ed. § 265.

[1] *State* v. *Keene*, 50 Mo. 357.

cide is committed under such circumstances that it is doubtful whether the act was committed maliciously or from a well-grounded apprehension of danger, it is very proper that the jury should consider the fact that the deceased was turbulent, violent, and desperate, in determining whether the accused had reasonable cause to apprehend great personal injury to himself. If such evidence is ever legitimate, the facts in this case show that it was one calling for its introduction." And it was afterwards held that in a case of homicide, where it is doubtful whether the killing was from malice or from a well-grounded apprehension of danger, it is proper to show that the deceased had the reputation of being a violent or dangerous man.[2]

The same distinction is taken in Texas.[3]

§ 81. Rule in California and other western states.—In California, in 1858, the supreme court stated the rule as follows: "The other point made is the exclusion of evidence of the character of the deceased for turbulence, recklessness, and violence. The rule is well settled that the reputation of the deceased cannot be given in evidence, unless, at the least, the circumstances of the case raise a doubt in regard to the question whether the prisoner acted in self-defense. It is no excuse for a murder that the person murdered was a bad man; but it has been held that the reputation of the deceased may sometimes be given in proof, to show that the defendant was justified in believing himself in danger, when the circum-

[2] *State* v. *Bryant*, 55 Mo. 75. See *State* v. *Testerman*, 68 Mo. 408.

[3] *Stevens* v. *State*, 1 Tex. App. 591; *Horbach* v. *State*, 43 Tex. 254, 1 Am. Crim. Rep. 330; *Hudson* v. *State*, 6 Tex. App. 565, 32 Am. Rep. 593. But this character of the deceased must be known to the defendant. *Grissom* v. *State*, 8 Tex. App. 386; *Holmes* v. *State*, 11 Tex. App. 223; *Russell* v. *State*, 11 Tex. App. 288; *Lewallen* v. *State*, 6 Tex. App. 475.

stances of the contest are equivocal. But the record must show this state of case. This does not." [1]

In Delaware the same distinction is sustained.[2]

In Louisiana, although such testimony will be rejected when there is no case of self-defense shown, it will be admitted where due ground of self-defense is laid.[3] And the same rule has been adopted in Wisconsin,[4] Kansas,[5] Nevada,[6] Colorado,[7] and Idaho.[8]

§ 82. Inconclusive cases contra the rule.—Nor can the cases cited against this position be relied on to meet it on principle. Thus in a Maine case we find the following from Emery, J., when giving the opinion of the supreme court: "It would not be allowable to show, on the trial of an indictment, that the prisoner had a general predisposition to commit the same kind of offense as that charged against him. 1 Phillipps, Ev. 143. Although the deceased may have been a savage and quarrelsome man when intoxicated, he still was entitled to the protection of the law. He was not, from any evidence, unlawfully in the house. We look in vain, among the attending circumstances of the melancholy catastrophe, for a provocation or an excuse for the resort to the deadly weapon which the defendant used to destroy the life of his victim. And to allow the introduction of evidence of the character of the deceased, and his habits of drinking at other times, and their consequences, could have no legal efficacy in reducing the crime, of which the defendant stood charged, to justifiable or excusable homicide." [1]

[1] *People* v. *Murray*, 10 Cal. 309; *People* v. *Edwards*, 41 Cal. 640. Compare *People* v. *Butler*, 8 Cal. 435.

[2] Delaware cases cited § 68, supra.

[3] *State* v. *Vance*, 32 La. Ann. 1177; *State* v. *Jackson*, 33 La. Ann. 1087.

[4] *State* v. *Nett*, 50 Wis. 524, 7 N. W. 344.

[5] *State* v. *Scott*, 24 Kan. 68.

[6] *State* v. *Pearce*, 15 Nev. 188.

[7] *Davidson* v. *People*, 4 Colo. 145.

[8] *People* v. *Stock*, 1 Idaho, 218.

[1] *State* v. *Field*, 14 Me. 244, 31 Am. Dec. 52.

This is correct law, for A cannot be allowed to attack and kill B because B is a cut-throat. But this does not touch the question whether, when B attacks A, B's character as a cut-throat is not justly to be considered by A in determining whether he is required to take extreme measures in self-defense. The same criticism is applicable to other cases sometimes cited to this point.[2]

§ 83. Rule adopted in Massachusetts.—In Massachusetts we find decisions which it is more difficult to explain consistently with the line of authorities which have just been given. The first is a celebrated case,[1] in which, it must be remembered, there was no evidence that the defendant was acting in self-defense. Mr. Dana, for the defendant, proposed to show "that the deceased was a man of notoriously quarrelsome and fighting habits, and boasted of his powers as a fighter." In supporting this offer, Mr. Dana said that the "vital question here is whether there was provocation or mutual combat." The chief justice said: "The general rule unquestionably is that the general character of neither party can be shown in evidence on trials for homicide. The prisoner has the personal privilege of showing his good character; but unless he puts it in issue, it is not so. The government cannot prove either quarrelsome habits in the prisoner, or peaceable habits in the deceased. There is no limit if we go beyond the *res gestæ*. The only exception is rape. This is partly because the woman is a witness, and partly from policy and necessity, as the only protection of the accused. In the case from 8 Car. & P. 168 (Reg. v. Smith), we think the expression probably arose from boasts made by the deceased at the

[2] *State* v. *Thawley*, 4 Harr. (Del.) 562; *State* v. *Hogue*, 51 N. C. (6 Jones, L.) 381; *State* v. *Chandler*, 5 La. Ann. 489, 52 Am. Dec. 599; *State* v. *Chopin*, 10 La. Ann. 458.

[1] *York's Case*, 9 Met. 93, 43 Am. Dec. 373.

time, and proved as parts of the *res gestæ*. The cases from Hawks and from Stewart & Porter stand alone, and are not of such authority as to require us to leave the established course of practice."

In a subsequent case [2] the line was drawn still more rigidly.

A prima facie case of self-defense being made out by the defendant, the defendant's counsel offered to prove "that the general character and habits of the deceased were those of a quarrelsome, fighting, vindictive, and brutal man of great strength, as a circumstance tending to show the nature of the provocation under which the defendant acted, and that he had reasonable cause to fear great bodily harm." [3] The court, however, rejected the testimony.

Four years afterwards the question was revived in a case in which the evidence was that, after an altercation, the deceased seized the defendant by the throat, the deceased's brother standing by with a shovel, and that the defendant, while choking under the deceased's grip, shot the deceased. The surgeon who made the post mortem proved that the *rigor mortis* was peculiarly severe. The defense then proposed to ask the surgeon: "Was not Jeremiah A. Agin a very strong and muscular man? Did not the *rigor mortis,* being very marked, indicate that Agin was a remarkably powerful man?" But the judge excluded these questions. The defense then offered to prove that "Agin was an experienced and practised garroter." "The judge excluded this evidence; but allowed the defendant to prove how he was actually seized by the throat; and then to show by experts the anatomical structure of the parts, and the various effects of such seizure and compression on the individual's consciousness, strength, life, and

[2] *Com.* v. *Hilliard* (1854) 2 Gray, 294.

[3] For defense was cited *Quesenberry* v. *State,* 3 Stew. & P. (Ala.) 308; *State* v. *Tackett,* 8 N. C. (1 Hawks) 210; *Oliver* v. *State,* 17 Ala. 599; *Com.* v. *Seibert,* Wharton, Homicide, Bowlby's 3d ed. § 286. For the prosecution *York's Case,* 7 Law Rep. 507, 509.

system generally." This rule was sustained by the supreme court.[4]

But whatever we may think of the rulings in York's Case and Hilliard's Case, that in Mead's Case cannot be sustained. The prosecution's evidence showed that the defendant was attacked by the deceased. The defendant offered to prove that the deceased was an experienced and practised garroter, leaving it to be inferred that the deceased's grip on the throat was that which garroters apply with such deadly effect. Had this been proved, the defendant would have been excusable in killing the deceased, or, at the most, could only have been convicted of manslaughter. But the court refused to hear evidence to show that the deceased was a garroter, and consequently precluded the defendant from offering a legitimate defense. Very different was the course in Selfridge's Case, —a case in which, it will be recollected, the defendant, armed with a pistol, shot down at sight a young man of eighteen years who was armed only with a walking cane. On the trial, the defendant was allowed to call a physician to prove that "in college, defendant was feeble in muscular strength, more than any man of his size in his class;" and was permitted to show that he expected "to be attacked by some bully;" while it was argued that the deceased was a young man in the prime of youthful vigor. Did Judge Parker, who charged the jury, exclude these points from their consideration? So far from doing so, he told the jury that the defendant was excused if the danger was apparent, and what was apparent he defined in the following remarkable words: "Whether the firing of the pistol was before or after a blow struck by the deceased, there is a point of more importance for you to settle, and about which you must make up your mind from all the circumstances proved in the case; such as the rapidity and violence of the attack, the nature of the weapon with which it was

[4] *Com.* v. *Mead*, 12 Gray, 168, 71 Am. Dec. 741

made, the place where the catastrophe happened, the muscular debility or vigor of the defendant, and his power to resist or fly." The jury were also told that the defendant had a right to defend himself from the wrong "apparently intended by the deceased." But how "apparently?" The only reply is, that all those circumstances which appeared to the defendant, from which he might conclude himself in danger, constitute such apparency. And to this result the supreme court of Massachusetts returned in 1883, holding that when self-defense is set up, the defendant may put in evidence the deceased's superior strength and capacity to do harm, overruling the prior conflicting decisions.[5]

§ 84. Summary of law.—Taking the authorities as a whole, therefore, we may hold that it is admissible for the defendant, having first established that he was assailed by the deceased, and in apparent danger, to prove that the deceased was a person of ferocity, brutality, vindictiveness, and of excessive strength; such evidence being offered for the purpose of showing, either (1) that the defendant was acting in terror, and hence incapable of that specific malice necessary to constitute murder in the first degree; or (2) that he was in such apparent extremity as to make out a case of self-defense; or (3) that the deceased's purpose in encountering the defendant was deadly. It is also admissible for the defendant, in order to excuse a violent repulsion of an assault, to prove that he was so overmatched in strength that he had, when attacked, no other means of escaping from death or great bodily harm. But such evidence can never be received for

[5] *Com.* v. *Barnacle,* 134 Mass. 216, 45 Am. Rep. 319, opinion by Morton, Ch. J., *in extenso* citing *Com.* v. *Woodward,* 102 Mass. 155; *Com.* v. *O'Malley,* 131 Mass. 423; *Com.* v. *Hilliard,* 2 Gray, 294; *Com.* v. *Mead,* 12 Gray, 167, 71 Am. Dec. 741; *York's Case,* 7 Law Rep. 497, 507; *Com.* v. *Andrews,* Pamph. L. 1869

the purpose of justifying an attack by the defendant on the deceased.

And it cannot now be questioned that this is the universal rule in this country and in all prosecutions for homicide, where the defense is self-defense; proof of the dangerous character of the deceased, known to the defendant, and affording him reasonable grounds for belief that he was in imminent danger of death or great bodily harm at the hands of the deceased, only averted by the taking of life, is relevant.[1]

§ 85. "Relevant," "material," and "competent," convertible terms; use of words in reserving exceptions.— In jurisprudence, the terms "relevant evidence" and "material evidence" are convertible, and where any question of difference is raised, are construed as identical in meaning and in application,[1] In one case it is stated "that materiality, with reference to evidence, does not have the same signification as relevancy," but the court allows the matter to rest on mere assertion, pointing out no distinction, giving no illustration, and citing no authority.[2] In a Connecticut case, it seems that "competent" evidence means "relevant" evidence.[3]

[1] *State* v. *Beckner,* 194 Mo. 281, 3 L.R.A.(N.S.) 535, 91 S. W. 892; *Garner* v. *State,* 28 Fla. 113, 29 Am. St. Rep. 232, 9 So. 835; *State* v. *Christian,* 44 La. Ann. 950, 11 So. 589; *State* v. *Golden,* 113 La. 791, 37 So. 757; *Karr* v. *State,* 100 Ala. 4, 46 Am. St. Rep. 17, 14 So. 851; *State* v. *Petsch,* 43 S. C. 132, 20 S. E. 993; *Turner* v. *State,* 70 Ga. 765; *State* v. *Doris,* 51 Or. 136, 16 L.R.A.(N.S.) 660, 94 Pac. 44; *State* v. *Kenyon,* 18 R. I. 217, 26 Atl. 199; *People* v. *Adams,* 137 Cal. 580, 70 Pac. 662; *Powell* v. *State,* 101 Ga. 9, 65 Am. St. Rep. 277, 29 S. E. 309. See *Com.* v. *Paese,* 220 Pa. 371, 17 L.R.A. (N.S.) 793, 123 Am. St. Rep. 699, 69 Atl. 891, 13 A. & E. Ann. Cas. 1081

[1] *Josephi* v. *Furnish,* 27 Or. 260, 266, 41 Pac. 424; Elliott, Ev. § 1020; *David Bradley Mfg. Co.* v. *Eagle Mfg. Co.* 6 C. C. A. 661, 18 U. S. App. 349, 57 Fed. 980, 986.

[2] *Pangburn* v. *State,* — Tex. Crim. Rep. —, 56 S. W. 72, 73.

[3] *Ryan* v. *Bristol,* 63 Conn. 26, 33–35, 27 Atl. 309

In People v. Manning,[4] the California supreme court asserts that "there is a wide distinction between immaterial and incompetent evidence. It may be material and tend to prove the issue. On the other hand, it may be competent in a proper case, but immaterial to any issue before the court." This is also mere assertion, for it is to be noticed that the case on trial is the only case by which the materiality or competency of the testimony offered can be tested. If it is not material in that particular case, it cannot be competent. If it is material, then it is competent.

As applied to evidence, competency has a little wider meaning than relevancy or materiality, because competent evidence imports not only relevancy, but that quality "which the very nature of the thing to be proven requires." [5]

Many text-writers note no difference in the use of the terms,[6] the word "competency" being generally used to express the qualifications of persons as jurors or witnesses.

While no distinction is observed between the meaning of the words "relevant" and "immaterial" and "competent," yet, where the objection takes the form that the matter is irrelevant and immaterial, it does not bring up for review the question of competency.[7] This appears to be an unnecessary refinement, but this is the conclusion from the opinion in the California and New York cases cited.

[4] *People* v. *Manning,* 48 Cal. 335, 338.

[5] *King's Lake Drainage & Levee Dist.* v. *Jamison,* 176 Mo. 557, 570, 75 S. W. 679; *Chapman* v. *McAdams,* 1 Lea, 500, 504; *Porter* v. *Valentine,* 18 Misc. 213, 41 N. Y. Supp. 507, 508.

[6] 1 Greenl. Ev. 16th ed. p. 13a; Best, Ev. 1st Am. ed. § 251; Stephen, Ev. pp. 2, 246–249. But see Wigmore, Ev., § 12.

[7] The California case uses these words; "The objection that the evidence was 'immaterial' does not raise the point whether it was competent under § 2251 of the Code of Civil Procedure. There is a wide distinction between immaterial and incompetent evidence. It may be material and tend to prove the issue, but incompetent for that purpose under the rules of law. On the other hand, it may be competent

Where, however, the question of a new trial on the ground of newly discovered evidence is raised, the question of materiality is of first importance.[8]

§ 86. Materiality of evidence in perjury.—Perjury is defined to be "the taking wilfully of a false oath by any person who, being lawfully sworn and required to depose or speak the truth in any judicial proceeding or trial, swears absolutely in a matter material to the issue then pending."

The materiality of the testimony assigned in perjury is always a question of law, and not of fact; hence the judge, and not the jury, is to pass upon the materiality of the testimony; but, like many other questions of law, it may become a mixed question both of law and of fact, in which case the court should admit it, limited by proper instructions.[1]

evidence in a proper case, but immaterial to any issue before the court. A party objecting to the admission of evidence must specify the ground of his objection when the evidence is offered, and will be considered as having waived all objections not so specified." *People* v. *Manning*, 48 Cal. 335, 338.

And in the New York case: "Indeed every ground of objection not specified which is capable of being obviated by evidence is waived. *Marston* v. *Gould*, 69 N. Y. 220. Thus, an objection to admission in evidence of a copy on the ground that it is incompetent and immaterial does not raise the question that the paper was improperly admitted because it was a copy, and not the original. *Atkins* v. *Elwell*, 45 N. Y. 753. The party must stand or fall by the specific ground taken when the ruling was made. Baylies, Trial Pr." *Porter* v. *Valentine*, 18 Misc. 213, 41 N. Y. Supp. 507, 508.

[8] In *Quick* v. *Lilly*, 3 N. J. Eq. 257, the court, in laying down the rule that to entitle a party to file a bill in the nature of a bill of review upon the ground of newly discovered evidence, says that the evidence must not only be new, but material, saying: "The meaning given to the word 'material' is of the highest importance. The new matter must be such as if, unanswered in point of fact, would either clearly entitle the plaintiff to a decree, or would raise a case of so much nicety and difficulty as to be a fit subject of judgment in a cause." Citing *Norris* v. *LeNeve*, 3 Atk. 26, Ridgeway, 322; *Ord.* v. *Noel*, 6 Madd. Ch. 131, 1 Hoffman, Ch. Pr. 570, 20 Am. & Eng. Enc. Law, p. 223.

[1] *Foster* v. *State*, 32 Tex. Crim. Rep. 39, 41, 22 S. W. 21; *Washing-*

But the materiality of the alleged false testimony can not be proved by the mere opinion of witnesses. The witnesses are no more competent to prove correct conclusions in this respect than the jury trying the cause, and for this reason the opinion of witnesses as to the materiality of such testimony must always be excluded.[2]

§ 87. Materiality; perjury; instructions of court.—The materiality of the alleged matter falsely sworn to is the essence of the issue, and, on the facts offered, it is the duty of the court to instruct the jury as to what facts constitute "material testimony."[1]

Likewise, perjury may be assigned on the answers of the witness made in cross-examination, if the evidence so elicited is material and falsely sworn to.[2] Also, it is not essential that the fact sworn to should be material to the main issue in the case.[3]

§ 88. Perjury not predicated on immaterial questions.—It is a general rule, supported by an even current of all

ton v. *State,* 23 Tex. App. 336, 337, 5 S. W. 119; *Com.* v. *Allen,* 128 Mass. 46, 35 Am. Rep. 356.

[2] Bishop, Crim. Law, 7th ed. § 1039a; *Donohoe* v. *State,* 14 Tex. App. 638, 642; *Jackson* v. *State,* 15 Tex. App. 579, 580.

[1] *State* v. *Hunt,* 137 Ind. 537, 548, 37 N. E. 409, 9 Am. Crim. Rep. 426; Wharton, Crim. Law, 8th ed. § 1284; *Cothran* v. *State,* 39 Miss. 541, 547; *State* v. *Lewis,* 10 Kan. 157, 160; *People* v. *Clementshaw,* 59 Cal. 385.

[2] Wharton, Crim. Law, §§ 1277–1279; 3 Greenl. Ev. § 195; Moore, Crim. Law, 494.

See also *State* v. *Ackerman,* 22 L.R.A.(N.S.) 1192, and case note, 214 Mo. 325, 332, 113 S. W. 1087.

[3] *State* v. *Wakefield,* 73 Mo. 549, 554.

"An affidavit made at the commencement or pending a suit, to procure the exercise of some particular power from the court, constitutes perjury if the matter falsely sworn to be material to the point of inquiry at the time it is made." *Jacobs* v. *State,* 61 Ala. 448, 452, 4 Am. Crim. Rep. 465; *State* v. *Blize,* 111 Mo. 464, 467, 20 S. W. 210; *Reg.* v. *Baker,* [1895] 1 Q. B. 797; *People* v. *Turner,* 122 Cal. 679, 680,

the authorities, that to constitute perjury the statement alleged to be false must relate to a matter material to the issue, and that the same rule applies where the alleged false testimony was produced before the grand jury.[1]

A statement upon which perjury may be assigned must have the following legal characteristics: (1) It must be competent testimony; (2) it must be material and relevant to the issue; (3) it must be a declaration of fact, and not a conclusion of the witness; (4) it must be such that it would properly influence the tribunal before which it is made, in its determination of the issue under investigation; (5) it must be false; (6) its falsity must be known to the witness when made, and must be wilfully and deliberately deposed to.[2]

§ 89. Materiality on questions of new trial.—The words "material evidence" are aptly applied to the force of testimony, upon the application for a new trial after verdict, upon the ground of newly discovered evidence. Such evidence

55 Pac. 685; 3 Russell, Crimes, 9th ed. 11–23; *Wood* v. *People*, 59 N. Y. 117, 122; *State* v. *Shupe*, 16 Iowa, 36, 39, 85 Am. Dec. 485.

[1] *State* v. *Ackerman*, 214 Mo. 325, 332, 22 L.R.A.(N.S.) 1192, 113 S. W. 1087; 22 Am. & Eng. Enc. Law, 2d ed. p. 686; *Banks* v. *State*, 78 Ala. 14, 17; *Com.* v. *Parker*, 2 Cush. 212, 220; *Pankey* v. *People*, 2 Ill. 80; *State* v. *Sargood*, 80 Vt. 415, 419, 130 Am. St. Rep. 995, 68 Atl. 49, 13 A. & E. Ann. Cas. 367; *Mackin* v. *People*, 115 Ill. 312, 327, 56 Am. Rep. 167, 3 N. E. 222, 6 Am. Crim. Rep. 556; *State* v. *Turley*, 153 Ind. 345, 346, 55 N. E. 30; *State* v. *Faulkner*, 175 Mo. 546, 612, 75 S. W. 116; *State* v. *Lehman*, 175 Mo. 619, 627, 75 S. W. 139; *People* v. *Greenwell*, 5 Utah, 112, 116, 13 Pac. 89; *Barnett* v. *State*, 89 Ala. 165, 169, 7 So. 414; *Lewis* v. *State*, 78 Ark. 567, 94 S. W. 613; *Wilson* v. *State*, 115 Ga. 206, 208, 90 Am. St. Rep. 104, 41 S. E. 696, 15 Am. Crim. Rep. 597; *United States* v. *Landsberg*, 23 Fed. 585, 586, 4 Am. Crim. Rep. 474; *Salmons* v. *Tait*, 31 Ga. 676.

[2] *Butler* v. *State*, 36 Tex. Crim. Rep. 444, 445, 37 S. W. 746; *Byrnes* v. *Byrnes*, 102 N. Y. 4, 7, 5 N. E. 776; *People* v. *Dishler*, 4 N. Y. Crim. Rep. 188; Roscoe, Crim. Ev. § 822; *Morrell* v. *People*, 32 Ill. 499, 501; 8 Enc. Ev. pp. 549, 551.

must be material,[1] and it does not satisfy the condition, that it is cumulative, corroborative, or impeaching in character, only.[2]

In defining the word "material" as thus used, a statement is said to be "material" when it has a bearing directly or indirectly upon the matter in question so as to influence its determination. Any testimony in a case that tends of itself, or in connection with other testimony, to influence the result on a direct or a collateral issue, is material.[3]

[1] *State* v. *DeGraff*, 113 N. C. 688, 18 S. E. 507.

[2] Supra, § 85; *Lindley* v. *State*, 11 Tex. App. 283, 287; Graham & W. New Trials, pp. 1043, 1044; *Lilly* v. *People*, 148 Ill. 467, 478, 36 N. E. 95; *State* v. *Howell*, 117 Mo. 307, 23 S. W. 263; *Clark* v. *State*, 29 Tex. App. 437, 16 S. W. 171.

[3] Hochheimer, Crim. Law, p. 443; *Reg.* v. *Gibbons*, 9 Cox, C. C. 105, Leigh & C. C. C. 109, 31 L. J. Mag. Cas. N. S. 98, 8 Jur. N. S. 159, 5 L. T. N. S. 805, 10 Week. Rep. 350; *Com.* v. *Grant*, 116 Mass. 17, 21 1 Am. Crim. Rep. 500; *Campbell* v. *People*, 8 Wend. 636, 638; Moore, Crim. Law, p. 494; *Com.* v. *Pollard*, 12 Met. 225, 228.

CHAPTER III.

VARIANCE.

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§ 90. **Variance at common law.**—Variance at law is the difference between the essential parts of a legal proceeding that, to be effectual, must agree with each other.[1]

Such difference is characterized as a material variance or an immaterial variance.

(a) A material variance at law is such a difference between the essential parts of a legal proceeding that one of such parts is rendered ineffectual to such a degree that the proceeding fails.[2]

(b) An immaterial variance at law is a difference between the essential parts of a proceeding that does not so affect the relation between them as to destroy the legal sequence.[3]

Modern rule of material variance.—Variance in criminal law, is not now regarded as material, unless it is of such a substantive character as to mislead the accused in preparing his defense, or places him in a second jeopardy for the same offense.[4]

Statutory provisions as to variance.—Statutory provisions

[1] *Keiser* v. *Topping,* 72 Ill. 226, 229; *House* v. *Metcalf,* 27 Conn. 631, 638; *Mulligan* v. *United States,* 55 C. C. A. 50, 120 Fed. 98, 99.

[2] *People* v. *Terrill,* 132 Cal. 497, 499, 64 Pac. 894, 895.

[3] Black's, Law Dict.

[4] *Harris* v. *People,* 64 N. Y. 148, 150, 2 Am. Crim. Rep. 416. Homicide being complete when nature is overcome and death ensues from the felonious act, neither the manner, means, nor instrument by which the killing was caused is material, and in the majority of states it is not now necessary to set them forth, for the reason that the felonious killing is the only essential element in the homicide.

This, however, does not hold true as to other offenses, such as burglary, larceny, embezzlement, receiving stolen goods, perjury, forgery, and counterfeiting, because these crimes all involved manner, means, instruments, and acts, used or done in a certain way, or at a certain time and place, or under certain circumstances, and thus become constituent elements of the offense, so that an indictment is not sufficient, neither under the common law nor the statute, that does not accurately and clearly allege all the elements of which the offense is composed, so as to bring the prosecution within the intent and meaning of the offense. *People* v. *Dumar,* 106 N. Y. 502, 511, 13 N. E. 325.

exist in many states declaring what shall not constitute a material variance. Many of these statutes have apparently risen out of the emergency of some one case, so that they cover only that particular defect, while others are so comprehensive as to legislate away the constitutional rights of parties, and to that extent are unconstitutional. There is such a lack of uniformity in these statutes, and so few states are agreed upon the questions, that the former rulings at common law are still valuable, and it is therefore proposed here to treat the subject of variance as it exists at common law.

§ 91. The agency by which the wrong is inflicted.— As a general rule the means, or the manner of accomplishing the criminal intent and purpose, are matters of evidence for the jury, and not necessary to be set forth in the indictment. Where, however, it is necessary, or where the pleader elects to set forth by averments, in the indictment or information, a description of the instrument or the means by which the offense was consummated, then the evidence must correspond with the averments in general character and operation.[1]

[1] Joyce, Indictments, § 293; 13 Enc. Ev. p. 728; *Ezell* v. *State,* 54 Ala. 165; *Phillips* v. *State,* 68 Ala. 469, 481; *Turner* v. *State,* 97 Ala. 57, 58, 12 So. 54; *Gaines* v. *State,* 146 Ala. 16, 23, 41 So. 865; *People* v. *Hyndman,* 99 Cal. 1, 3, 33 Pac. 782; *State* v. *Townsend,* Houst. Crim. Rep. (Del.) 337; *State* v. *Taylor,* 1 Houst. Crim. Rep. (Del.) 436; *Johnson* v. *State,* 88 Ga. 203, 14 S. E. 208; *Guedel* v. *People,* 43 Ill. 226, 228; *Beavers* v. *State,* 58 Ind. 530, 536; *Thomas* v. *Com.* 14 Ky. L. Rep. 288, 20 S. W. 226; *State* v. *Smith,* 41 La. Ann. 791, 792, 6 So. 623; *State* v. *Ames,* 64 Me. 386, 387; *State* v. *Smith,* 32 Me. 369, 371, 54 Am. Dec. 578; *State* v. *Mayberry,* 48 Me. 218, 236; *Com.* v. *Fenno,* 125 Mass. 387; *Com.* v. *Coy,* 157 Mass. 200, 213, 32 N. E. 4; *State* v. *Falkenham,* 73 Md. 463, 468, 21 Atl. 370; *Goodwyn* v. *State,* 4 Smedes & M. (Miss.) 520, 536; *Porter* v. *State,* 57 Miss. 300, 302; *State* v. *Dame,* 11 N. H. 271, 273, 35 Am. Dec. 495; *People* v. *Bush,* 4 Hill, 133, 134; *State* v. *Preslar,* 48 N. C. (3 Jones, L.) 421, 426; *Witt* v. *State,* 6 Coldw. 5, 8; *Gallaher* v. *State,* 28 Tex. App. 247, 266, 12 S. W. 1087; *Morris* v. *State,* 35 Tex. Crim. Rep. 313, 317, 33 S. W. 539.

But in those states where, as in homicide, it is sufficient to allege in

Of this rule an illustration is found in a recent case in Indiana, where the indictment charged that the appellant "did then and there unlawfully, feloniously, and purposely, and with premeditated malice, kill and murder Nellie Starbuck and Beulah Starbuck, by then and there feloniously, purposely, and with premeditated malice, unlawfully striking and wounding and forcibly throwing the said Nellie Starbuck and Beulah May Starbuck in a well, then and there being."

The proof offered in support of this was that the appellant alone, or with others confederating with him, broke into and entered the Starbuck house burglariously, and that by reason thereof the deceased, Nellie Starbuck, was so frightened that she lost her reason, and while in such state of insanity, left her house and jumped into a well, carrying with her the infant child, Beulah May Starbuck.

The trial court held that the proof supported the averment, but the supreme court ruled otherwise, reversing the conviction, and announced as the settled law of that state, that the averment of the indictment was descriptive of the crime and that it was necessary to prove it as laid; that as to the means and manner of death, it is sufficient if the proof agrees with the allegations in substance and generic character, although the precise conformity is not required.[2]

the indictment that the defendant "did with malice and premeditation feloniously kill and murder the deceased," and the instrument or means causing death is not required to be described, any weapon or means used is sufficient to sustain the indictment. *State* v. *Hoyt,* 13 Minn. 132, 144, Gil. 125; *Olive* v. *State,* 11 Neb. 1, 31, 7 N. W. 444; *State* v. *Murph,* 60 N. C. (1 Winst. L.) 129, 136; *Harris* v. *State,* 37 Tex. Crim. Rep. 441, 447, 36 S. W. 88; *State* v. *Morgan,* 35 W. Va. 260, 271, 13 S. E. 385.

And where the indictment or information does not state the means technically correct nor accurately, this does not render it insufficient. *People* v. *Willett,* 105 Mich. 110, 114, 62 N. W. 1115.

[2] *Gipe* v. *State,* 165 Ind. 433, 1 L.R.A.(N.S.) 419, 422, 112 Am. St. Rep. 238, 75 N. E. 881; *Taylor* v. *State,* 130 Ind. 66, 67, 29 N. E. 415.

Where the prosecution sets forth

§ 92. Material variance, fatal.—"If an offense be committed in either of various modes, the party charged is entitled to have that mode stated which is proved on the trial; and when one mode is stated and proof of the commission of the offense by a different mode is offered, such evidence is incompetent by reason of variance." [1] And where a statute prescribes that a wound with a particular kind of instrument shall

that the killing was by a particular means, proof of death by an entirely different means will not support the indictment. As is said in an old case, "if a person be indicted, or appealed for one species of killing, as by poisoning, he cannot be convicted by evidence of a totally different species of death, as by showing starving or strangling." 1 East, P. C. 341.

In homicide, the means is not a constituent element of the crime, it being declared that the unlawful killing with malice aforethought constitutes murder, regardless of the means employed. Joyce, Indictments, § 293; *Gaines* v. *State,* 146 Ala. 16, 23, 41 So. 865.

But where the gist of the offense is the illegal means, it is essential that the acts constituting those means should be specifically charged and set out in the indictment. Joyce, Indictments, § 294; *State* v. *Potter,* 28 Iowa, 554, 556; *State* v. *Roberts,* 34 Me. 320, 321; *Com.* v. *Eastman,* 1 Cush. 189, 223, 48 Am. Dec. 596; *Com.* v. *Shedd,* 7 Cush. 514, 515.

Thus, in an indictment charging conspiracy to do an act not necessarily criminal, it was held fatally defective where the indictment did not specify the means by which the defendants designed to effect their purpose. *Territory* v. *Carland,* 6 Mont. 14, 16, 9 Pac. 578.

So, in an affray, the indictment must allege with certainty the essential elements of the offense. And in general, it is sufficient if it aver the facts made essential to the crime by the statute, or if it follows a form provided by statute. 1 Stand. Enc. of Proced. 495; Mackalley's Case, 9 Coke, 67a; *Rex* v. *Thompson,* 1 Moody, C. C. 139; *Reg.* v. *Warman,* 2 Car. & K. 195, 1 Den. C. C. 163; *Rex* v. *Grounsell,* 7 Car. & P. 788; *Rex* v. *Waters,* 7 Car. & P. 250; *State* v. *Dame,* 11 N. H. 271, 35 Am. Dec. 495; *Com.* v. *Macloon,* 101 Mass. 1, 100 Am. Dec. 89; *State* v. *Purify,* 86 N. C. 681; *Com.* v. *Fenno,* 125 Mass. 387; *Phillips* v. *State,* 68 Ala. 469; Wharton, Crim. Law, 8th ed. § 519; *Patterson* v. *State,* 3 Lea, 575; *State* v. *Blan,* 69 Mo. 317; *Com.* v. *Williams,* 127 Mass. 285; *Com.* v. *Kellogg,* 7 Cush. 473; *Com.* v. *O'Keefe,* 121 Mass. 59; *Com.* v. *Van Sickle.* Brightly (Pa.) 69.

[1] *Com.* v. *Richardson,* 126 Mass. 34, 30 Am. Rep. 647, 2 Am. Crim. Rep. 612. See *State* v. *Gainus,* 86 N. C. 632.

be punished in a particular way, then the kind of instrument becomes material. "A blow given with the handle of a knife would not be an assault with a knife or a sharp instrument, any more than an attempt to discharge a loaded gun the primer of which was plugged would be an offense under the English statute making it criminal to attempt to discharge a loaded gun at another."[2] It is otherwise, however, when the wound is produced by an instrument of the same class. Thus an indictment for murder charged that the death of the deceased was caused by a mortal wound on the head, inflicted with a swingle, but it was proved that the death was caused by a blow on the head by a piece of wood, and that the external skin was not broken, but that there was extravasation of blood pressing on the brain, and a collection of blood between the scalp and brain. The surgeon stated this to be a contused wound, with effusion of blood. It was held by the fifteen judges that the evidence supported the indictment.[3] But an indictment charging an exhibition of pictures of "naked" girls is not supported by girls naked above the waist.[4]

Where the instrument is unknown, it may be so stated, provided the pleader gives as accurate a description as is consistent with the nature of the case.[5] But if it is not possible to

[2] *Filkins* v. *People,* 69 N. Y. 101, 104, 25 Am. Rep. 143. See *State* v. *Townsend,* Houst. Crim. Rep. (Del.) 337; *State* v. *Taylor,* Houst. Crim. Rep. (Del.) 436; *Porter* v. *State,* 57 Miss. 300, 301.

[3] *Reg.* v. *Warman,* 2 Car. & K. 195, 1 Den. C. C. 163; *People* v. *Cavanagh,* 62 How. Pr. 187; *Morgan* v. *State,* 61 Ind. 447, 3 Am. Crim. Rep. 246.

Where an indictment charged two methods of killing, an instruction that it was immaterial from which mode death resulted was proper. *Jones* v. *State,* 65 Ga. 621, 622.

Com. v. *Wardell,* 128 Mass. 52, holding proof of indecent exposure of person, without necessity, to sustain charge of open, gross lewdness. *Flynn* v. *State,* 34 Ark. 441.

[4] *Com.* v. *Dejardin,* 126 Mass. 46, 30 Am. Rep. 652, 3 Am. Crim. Rep. 290, post, § 143.

On failure of justice arising from want of due care in pleading the fatal weapon, see *Reg.* v. *Bird,* 5 Cox, C. C. 11, 2 Den. C. C. 94.

[5] Wharton, Crim. Law, 8th ed. §

give any description at all, then the indictment or information should state the reason for such failure.[6]

520; *Com.* v. *Webster,* 5 Cush. 295, 303, 52 Am. Dec. 711; *State* v. *Williams,* 52 N. C. (7 Jones, L.) 446, 78 Am. Dec. 248; *Edmonds* v. *State,* 34 Ark. 720, 724; *Cox* v. *People,* 80 N. Y. 500, 514.

As to lost instruments, post, § 118; *King* v. *State,* 137 Ala. 47, 49, 34 So. 683; *Michael* v. *State,* 40 Fla. 265, 267, 23 So. 944; *Hicks* v. *State,* 105 Ga. 627, 628, 31 S. E. 579.

As to omitting the word "with" before the instrument named. *State* v. *Evans,* 158 Mo. 589, 602, 59 S. W. 994; *State* v. *Heinzman,* 171 Mo. 629, 632, 71 S. W. 1010; *State* v. *Gleason,* 172 Mo. 259, 268, 72 S. W. 676; *State* v. *Wilson,* 172 Mo. 420, 428, 72 S. W. 696.

Contra, *State* v. *Furgerson,* 162 Mo. 668, 675, 63 S. W. 101; *Terry* v. *State,* 118 Ala. 79, 87, 23 So. 776; *Williams* v. *State,* 144 Ala. 14, 18, 40 So. 405; *Houston* v. *State,* 50 Fla. 90, 93, 39 So. 468; *Waggoner* v. *State,* 155 Ind. 341, 80 Am. St. Rep. 237, 58 N. E. 190; *Donahue* v. *State,* 165 Ind. 148, 74 N. E. 996; *State* v. *Brown,* 168 Mo. 449, 451, 68 S. W. 568; *State* v. *Barrington,* 198 Mo. 23, 108, 95 S. W. 235, s. c. 205 U. S. 483, 51 L. ed. 890, 27 Sup. Ct. Rep. 582.

Nor need it be alleged that it was a deadly weapon. *Blankenship* v. *Com.* 23 Ky. L. Rep. 1995, 66 S. W. 994; *State* v. *Bowles,* 146 Mo. 6, 13, 69 Am. St. Rep. 598, 47 S. W. 892; *State* v. *Hottman,* 196 Mo. 110, 122, 94 S. W. 237; *State* v. *Myers,* 198 Mo. 225, 258, 94 S. W. 242; *Lee* v. *State,* 44 Tex. Crim. Rep. 460, 462, 72 S. W. 195.

[6] Joyce, Indictments, § 349, note 18, and authorities.

So, in theft where the indictment charges ownership in a person unknown, it is not necessary to allege that such unknown person was other than the defendant. *Reed* v. *State,* 32 Tex. Crim. Rep. 139, 22 S. W. 403.

But, where the indictment charged that the accused procured from the hirer "money, shoes, and clothes of the value of $13, with intent not to perform such service, to the loss and damage of the hirer in the sum of $4," was not sustained by the proof that the "hirer advanced to the accused in money, clothes, etc., $13.50, and that the accused owed the hirer $4 on account of advances." *Banks* v. *State,* 124 Ga. 15, 17, 2 L.R.A.(N.S.) 1007, 52 S. E. 75.

But no variance is shown, on an indictment for robbery of $10, by the fact that the accused secured $10 and returned $2. *Fanin* v. *State,* 51 Tex. Crim. Rep. 41, 10 L.R.A.(N.S.) 744, 123 Am. St. Rep. 874, 100 S. W. 916.

So, where the defendant was described as principal and the proof showed accessoryship, the variance was fatal. *Riggins* v. *State,* 116 Ga. 592, 603, 42 S. E. 707, 14 Am. Crim. Rep. 507.

So, where the ownership of a house was alleged in the owner of

§ 93. Variance in perjury and conspiracy.—In prosecutions for perjury, it is essential to correctly describe and accurately prove the judicial proceedings in which the perjury is alleged to have been committed. It must be accurately described in the indictment or information, and must be proved substantially as laid.[1]

In Michigan, however, it has been held that, in conspiracy, an information charging a conspiracy to defraud a certain person is sustained by proof of a conspiracy to defraud the public generally, but this opinion is subject to some serious criticism in its conclusions, and has been condemned as not

the fee, and the proof showed it was rented as a hotel and the owner merely occupied a room as a guest, the variance was fatal. *Trice* v. *State,* 116 Ga. 602, 603, 42 S. E. 1008, 14 Am. Crim. Rep. 510.

Joint ownership is not sustained by proof of separate ownership. *Hernandez* v. *State,* 43 Tex. Crim. Rep. 80, 63 S. W. 320, 14 Am. Crim. Rep. 537.

But proof of a gold-filled watch will sustain an averment of "gold watch." *State* v. *Alexander,* 66 Kan. 726, 728, 72 Pac. 227, 14 Am. Crim. Rep. 629; *Staples* v. *State,* 114 Ga. 256, 40 S. E. 264, 13 Am. Crim. Rep. 675; *Com.* v. *Coy,* 157 Mass. 200, 214, 32 N. E. 4; Joyce, Indictments, chap. 11; Hochheimer, Crim. Law, p. 178; Hughes, Crim. Law, & Proc. chap. 85; Starkie, Ev. 10th ed. §§ 624 et seq; Abbott, Trial Brief, Crim. chap. 48.

As to variance of the verdict from the indictment, see Kerr, Homicide, § 543; 13 Enc. Ev. pp. 710–740.

[1] In a trial for perjury, where the indictment charges that the defendant falsely made an affidavit for a new trial in a civil action of G. against him, an affidavit for a new trial in the case of G. et al. against him should not be admitted in evidence, over defendant's objection, on the ground of variance. The court said: "This evidence did not correspond with the allegation of the indictment as to the description of the proceedings in which the affidavit was made. A suit by Jacob Griel and others is not properly described as a suit by Jacob Griel alone. The proceedings alleged and the one proved are not identical. It cannot be affirmed that the case mentioned in the affidavit was the same as the one described in the indictment. The allegation of the indictment in this regard is material matter of description." *Walker* v. *State,* 96 Ala. 53, 55, 11 So. 401; *Jacobs* v. *State,* 61 Ala. 448, 454, 4 Am. Crim. Rep. 465; *Gandy* v. *State,* 27 Neb. 707, 745, 43 N. W. 747, 44 N. W. 108; *Wilson* v. *State,* 115 Ga. 206,

sound.[2] The rule is settled in conspiracy that, where the charge is to defraud generally, it is not necessary to set forth in the indictment or information the names of the individuals or persons intended to be defrauded, it being sufficient to charge the intent to defraud persons of a particular class or description. But if the conspiracy charged is to defraud a particular person, he must be named, and the proof must correspond to the allegation in that respect, so that in a charge of conspiracy to defraud the public generally, proof of an intent to defraud a particular person will constitute a fatal variance. However, where the charge is an intent against a large number, it is sufficient to state the names of some of them and that the names of the others are unknown.[3]

§ 93a. Name; definition; additions.—A name is that designation of a person or thing which, produced to the eye or the ear, calls before the mind the person or thing so clearly as to identify such person or thing from all others of the same class.

Thus the mere words, "John Stiles," would not be a name, as, without further description, it would not call to mind any individual. Add to it occupation and locality, John Stiles, "merchant, Washington, District of Columbia," would so identify the individual to persons in his locality that it would well implead him in a suit or sustain a writ served on him in that locality. In a limited locality the name and the person

90 Am. St. Rep. 104, 41 S. E. 696, 15 Am. Crim. Rep. 597.

[2] *People* v. *Gilman,* 121 Mich. 187, 188, 46 L.R.A. 218, 80 Am. St. Rep. 490, 80 N. W. 4, 15 Am. Crim. Rep. 88, 91.

[3] *Lowell* v. *People,* 229 Ill. 227, 234, 82 N. E. 226; 2 McClain, Crim. Law, § 982; Wharton, Crim. Law, 10th ed. § 1396; *State* v. *Roberts,* 50 W. Va. 422, 424, 40 S. E. 484, 15 Am. Crim. Rep. 1; *Broznack* v. *State,* 109 Ga. 514, 515, 35 S. E. 123, 15 Am. Crim. Rep. 238; *State* v. *Riley,* 65 N. J. L. 624, 625, 48 Atl. 536, 15 Am. Crim. Rep. 234; *Gully* v. *State,* 116 Ga. 527, 530, 42 S. E. 790, 15 Am. Crim. Rep. 294.

can never be mistaken; outside of such locality, the words of the name are a futility. Hence as early as A. D. 1413, the English Parliament enacted, in 1 Stat. Henry V. chap. v., that "in the name of the defendants in such writs original, appeals, and indictments, additions shall be made of their estate or degree or mystery, and of the towns or hamlets, or places and counties, of which they were or be, or in which they be or were, conversant." [1] This statute came into the states of the Union, as one of those in aid of the common law, and, where not repealed, is still in force. While it is true that no estate or degree or mystery is known to our law, the addition required as to towns, places, and counties is as important now as at the date of enactment, and to this extent the statute is in force in principle, if not by title.

Indeed, so important is locality and addition to assure certainty in names, that it must be looked to as accounting for the apparent confusion of decision, not only between the different states, but in the decisions of the same state.

To illustrate: John Adams is named as a defendant in the declaration; the writ issues as against John Q. Adams, but is served upon John Adams, the real defendant. The prominence of the names, and the fact that they can only be distinguished by the correct use of the middle initial, would cause the court to abate the writ for a fatal variance, so that

[1] 3 Eng. Stat. at L. p. 3, *Com.* v. *France,* 3 Brewst. (Pa.) 148.

"Mystery," in the English statute, means the defendant's trade or occupation, such as merchant, tailor school-teacher, laborer, husbandman. 2 Hawk, P. C. chap. 33, § 111, 2 Co. Inst. 669.

The defendant must also be described as of the town or hamlet, or place and county, of which he was or is, or in which he is or was, conversant. Archbold, Crim. Pr. & Pl. § 27. In most states there follows the name, "late of the said county," or, "of the county of ——," and the place may be averred as that where the crime is committed. *Com.* v. *Taylor,* 113 Mass. 1.

Again, any addition to the name tending to cast discredit on the defendant, is obnoxious to a plea in abatement. *State* v. *Bishop,* 15 Me. 122.

in the Massachusetts reports it would appear that a misuse of the middle initial "Q" was a fatal variance. Again: In New York, Theodore Roosevelt is impleaded as a defendant, but the writ issues against Theodore Roosevelt, Junior. This fact would cause the court to abate the writ for a fatal variance, so that in the New York reports it would appear that the addition of "junior" was a fatal variance, as pointing out an entirely different person than the real defendant. Hence a mere abstract reading from the case on these points would warrant the assertion that in Massachusetts and New York the rule as to variance was rigidly enforced.

As we shall presently see, there are many such well-reasoned and applied decisions, that are valuable, only, however, as parallel circumstances arise in the same or other localities.

§ 94. Names must be proved as averred.—While an error in the name of the defendant in the indictment can only be taken advantage of by a plea in abatement,[1] yet an error in the names of the prosecutor, or of third parties, where the name is material, is fatal at common law.[2] Thus, if a burglary be alleged to have been committed in the dwelling house of J. G., which is in fact the dwelling house of J. S., the accused must be acquitted for the variance;[3] and if the larceny

[1] *Harris* v. *People,* 21 Colo. 95, 99, 39 Pac. 1084; *Turns* v. *Com.* 6 Met. 224.

Requisites of the plea. *Waldron* v. *State,* 41 Fla. 265, 26 So. 701; *Stinchcomb* v. *State,* 119 Ga. 442, 46 S. E. 639; *State* v. *Allen,* 91 Me. 258, 262, 39 Atl. 994; *Territory* v. *Smith,* 12 N. M. 229, 234, 78 Pac. 42.

[2] 1 East, P. C. 514; *Rex* v. *Norton,* Russ. & R. C. C. 509; *Rex* v. *Berriman,* 5 Car. & P. 601; *Reg.* v. *Wilson,* 1 Den. C. C. 284, 2 Car. & K. 527, 17 L. J. Mag. Cas. N. S. 82, 2 Cox, C. C. 426; *State* v. *Bean,* 19 Vt. 530, 532; *Com.* v. *Gillespie,* 7 Serg. & R. 469, 10 Am. Dec. 475; *State* v. *Bell,* 65 N. C. 313, 315; *State* v. *Scurry,* 3 Rich. L. 68; *State* v. *Trapp,* 14 Rich. L. 203; Wharton, Crim. Pl. & Pr. §§ 109 et seq.

[3] *Rex* v. *White,* 1 Leach, C. L. 256, 2 East, 513, 780; *State* v. *Rushing,* 2 Nott. & M'C. 560. But see *Com.* v. *Price,* 8 Leigh, 757.

is alleged as committed in the house of J. G., and the proof shows it to be the house of J. S., the defendant must be acquitted of stealing in the dwelling house, and can only be convicted of the lesser offense embraced in the charge, namely, petit larceny.[4] Ownership of goods must be stated with the same exactness.[5] A draft signed Jos. Johnson is not admissible under a count stating it to be signed "Joseph Johnson, President."[6] Generally, a variance between the indictment and the evidence in the name of the party injured will be fatal, and the accused must be acquitted.[7] Such strictness, however, is not required where the names of third parties are only collaterally connected with the offense.[8] Statutory provisions in many states forbid that misnomers and immaterial errors shall vitiate an indictment.[9] However, in the absence of such statutes, and in those states where the procedure in criminal cases is as at common law, and in the courts of the United States, the common-law rule prevails, and such variance is fatal.[10]

§ 95. Use of popular name sufficient; middle names; modern rule.—An indictment will not be held bad which gives a popular name as distinguished from a proper name; it will be enough to sustain the averment of a particular name,

[4] Wharton, Crim. Law, 8th ed. 934; *State* v. *Ellison,* 58 N. H. 325; post, § 140, as to immateriality of averment.

[5] Joyce, Indictments, § 35.

So, where a house is material in the indictment, it should be so described as to leave no reasonable doubt of its locality. *Norris's House* v. *State,* 3 G. Greene, 513.

[6] *United States* v. *Keen,* 1 McLean, 429, Fed. Cas. No. 15,510.

[7] *United States* v. *Howard,* 3 Sumn. 12, Fed. Cas. No. 15,403; *State* v. *Owens,* 10 Rich. L. 169; *Timms* v. *State,* 4 Coldw. 138; Wharton, Crim. Pl. & Pr. § 167.

[8] *Binger* v. *People,* 21 Ill. App. 367, 369.

[9] Cal. Penal Code, § 956; McClain's Anno. Code (Iowa), § 5687; Mo. Rev. Stat. §§ 1812, 1820; Mass. Pub. Stat. chap. 213, §§ 16 et seq.

[10] *Ledbetter* v. *United States,* 170 U. S. 606, 614, 42 L. ed. 1162, 1165, 18 Sup. Ct. Rep. 774.

that the party was usually or popularly known by such name.[1] Thus where the prosecutrix's true name was Susannah, and it was laid in the indictment as Susan, that being her popular name, it was held good.[2] So, where the instrument was signed T. Tupper, and it was averred that the prisoner made it with the intention of defrauding Tristam Tupper, the evidence being that Tristam was the name by which the party was known, it was held no variance, and the count was well framed.[3] Where the indictment designated the accused as John Rufus, and the true name was John Rufus George, and the evidence showed that the accused was as well known by one name as the other, it was held no variance.[4]

So a variance between the indictment or information and the proof, as to the middle name of the party injured, or as to the middle name of the accused, is not fatal.[5]

[1] Post, § 99; *Rex* v. *Norton*, Russ. & R. C. C. 510; *Rex* v. *Berriman*, 5 Car. & P. 601; *Rex* v. ——, 6 Car. & P. 408; *United States*, v. *Miles*, 2 Utah, 19, 103 U. S. 304, 26 L. ed. 481; *State* v. *Bundy*, 64 Me. 507, 509; *State* v. *Peterson*, 70 Me. 216, 218; *Com.* v. *Trainor*, 123 Mass. 414; *Taylor* v. *Com.* 20 Gratt. 825, 828; *State* v. *Bell*, 65 N. C. 313, 314; *Jones* v. *State*, 65 Ga. 147, 150; *Rex* v. *Williams*, 7 Car. & P. 298. But see *Com.* v. *Shaw*, 7 Met. 52; *Rex* v. *Clark*, Russ. & R. C. C. 358; *Rex* v. *Turner*, 1 Leach, C. C. 536. But contra, last point, *Com.* v. *Brown*, 2 Gray, 358; supra, § 94.

[2] *State* v. *Johnson*, 67 N. C. 55, 57; *State* v. *Gardiner*, Wright (Ohio) 392; *State* v. *Bell*, 65 N. C. 313; as to "junior" and "senior," post, § 108.

[3] *State* v. *Jones*, McMull. L. 236, 36 Am. Dec. 257; *State* v. *English*, 67 Mo. 136, 137; *Scott* v. *State*, 7 Lea, 232; *State* v. *France*, 1 Overt. 434; *Reg.* v. *Toole*, 40 Eng. L. & Eq. Rep. 583. See *Hardin* v. *State*, 26 Tex. 113.

[4] *Irwin* v. *State*, 117 Ga. 722, 45 S. E. 59, 13 Am. Crim. Rep. 710; *Rufus* v. *State*, 117 Ala. 131, 133, 23 So. 144; *Black* v. *State*, 57 Ind. 109, 111; *Mitchell* v. *State*, 63 Ind. 276, 278; *McFarland* v. *State*, 154 Ind. 442, 56 N. E. 910, 13 Am. Crim. Rep. 715; *Burroughs* v. *State*, 17 Fla. 643, 655; *Mansfield* v. *State*, — Tex. Crim. Rep. —, 63 S. W. 630, 13 Am. Crim. Rep. 718; *United States* v. *Winter*, 13 Blatchf. 276, Fed. Cas. No. 16,743; *People* v. *Webber*, 138 Cal. 145, 148, 70 Pac. 1089, 13 Am. Crim. Rep. 698.

[5] *Ratchiff* v. *State*, 23 Ind. App. 64, 54 N. E. 814, 13 Am. Crim. Rep. 717; *Pace* v. *State*, 69 Ala. 231.

The modern rule is that a variance in names is not now regarded as material, unless it appears to the court that the jury was misled by it, or some substantial injury is done to the accused, such as that, by reason thereof, he was unable intelligently to make his defense, or he was exposed to the danger of a second trial on the same charge.[6]

§ 95a. Averment of corporate name; criminal proceedings.—The name of a corporation must be accurately averred.[1] Apart from its correct legal name, a corporation has no such entity as to be answerable at law or otherwise, than by its legal designation.

An averment of a corporate name cannot be amended by the change of one word for another, such as "railroad" for "railway," and the variance is fatal.[2]

But, where a corporation has independent departments, doing business as such, or branches for its own convenience designated by and recognized by a particular name, the averment of the name of such department or branch is sufficient to implead the entire corporation, where the corporation appears to defend the suit. Under such circumstances, a failure to show a misnomer at the proper time concludes it.[3]

[6] *Harris* v. *People,* 64 N. Y. 148, 154, 2 Am. Crim. Rep. 416; *Andrews* v. *State,* 123 Ala. 42, 43, 26 So. 522; *Com.* v. *Warner,* 173 Mass. 541, 545, 54 N. E. 353; *State* v. *Nelson,* 101 Mo. 477, 10 L.R.A. 39, 14 S. W. 718.

[1] *Reg.* v. *Birmingham & G. R. Co.* 3 Q. B. 223, 2 Gale & D. 236, 6 Jur. 804; *State* v. *Vermont C. R. Co.* 28 Vt. 583; *Fisher* v. *State,* 40 N. J. L. 169; *McGary* v. *People,* 45 N. Y. 153; *Lithgow* v. *Com.* 2 Va. Cas. 297; *Smith* v. *State,* 28 Ind. 321; *Wallace* v. *People,* 63 Ill. 451; *White* v. *State,* 24 Tex. App. 231, 233, 5 Am. St. Rep. 879, 5 S. W. 857; *State* v. *Jones,* 168 Mo. 398, 403, 68 S. W. 566; *Curtiss* v. *Murry,* 26 Cal. 633, 635; *Crescent Mut. Ins. Co.* v. *Payne* (La. unreported); *New Orleans Terminal Co.* v. *Teller,* 113 La. 733, 37 So. 624, 2 A. & E. Ann. Cas. 127.

[2] *Denver & R. G. R. Co.* v. *Loveland,* 16 Colo. App. 146, 149, 64 Pac. 381; *Little* v. *Virginia & G. H. Water Co.* 9 Nev. 317, 319.

[3] *Burlington & M. River R. Co.* v. *Burch,* 17 Colo. App. 491, 497,

Where an offense is committed by corporate authority, the individuals concerned in the commission of the offense must be indicted as persons, and not as a corporation.[4]

But where corporations are proceeded against, as for disobedience of a statute, or a neglect of duties imposed, it must be indicted by its corporate name, which name must be accurately averred as it existed at the date of the offense.[5]

§ 96. Names; idem sonans; practice upon issue as to same.—*Idem sonans* means of the same sound.[1] It exists when the attentive ear finds difficulty in distinguishing the names when pronounced; or, where common, long-continued usage has made them identical in pronunciation.[2] Absolute

69 Pac. 6; *Lafayette Ins. Co.* v. *French,* 18 How. 404, 15 L. ed. 451; *Solmonovich* v. *Denver Consol. Tramway Co.* 39 Colo. 282, 290, 89 Pac. 57; *State* v. *Banking Dept.* 113 La. 150, 36 So. 921.

[4] *State* v. *Great Works, Mill. & Mfg. Co.* 20 Me. 41, 37 Am. Dec. 38.

[5] *Reg.* v. *Great North of England R. Co.* 9 Q. B. 315; *Reg.* v. *Manchester,* 7 El. & Bl. 453; *Reg.* v. *Birmingham & G. R. Co.* 3 Q. B. 223, 2 Gale & D. 236, 6 Jur. 804, 9 Car. & P. 478; *State* v. *Vermont C. R. Co.* 28 Vt. 583; *Com.* v. *Phillipsburg,* 10 Mass. 78; *Com.* v. *Dedham,* 16 Mass. 142; *Com.* v. *Demuth,* 12 Serg. & R. 389. See cases under §§ 91, 92, Wharton, Crim. Law, 10th ed.; *United States* v. *Alaska Packer's Asso.* 1 Alaska, 217; *Southern R. Co.* v. *State,* 125 Ga. 287, 290, 114 Am. St. Rep. 203, 54 S. E. 160, 5 A. & E. Ann. Cas. 411; *Paris* v. *Com.* 4 Ky. L. Rep.

597; *United States* v. *John Kelso Co.* 86 Fed. 304; *State* v. *Baltimore, O. & C. R. Co.* 120 Ind. 298, 299, 22 N. E. 307; *Standard Oil Co.* v. *Com.* 107 Ky. 606, 607, 55 S. W. 8; *Louisville Tobacco Warehouse Co.* v. *Com.* 106 Ky. 165, 57 L.R.A. 33, 49 S. W. 1069; *Crall* v. *Com.* 103 Va. 855, 856, 49 S. E. 638; *State* v. *Glucose Sugar Ref. Co.* 117 Iowa, 524, 527, 91 N. W. 794; *Standard Oil Co.* v. *Com.* 110 Ky. 821, 62 S. W. 897; *Standard Oil Co.* v. *Com.* 122 Ky. 440, 91 S. W. 1128; *State* v. *Runzi,* 105 Mo. App. 319, 329, 80 S. W. 36; *State* v. *Thacker Coal & Coke Co.* 49 W. Va. 140, 142, 38 S. E. 539; *State* v. *Dry Fork R. Co.* 50 W. Va. 235, 236, 40 S. E. 447.

[1] *State* v. *Witt,* 34 Kan. 488, 8 Pac. 769.

[2] *State* v. *Griffie,* 118 Mo. 188, 197, 23 S. W. 878; *Robson* v. *Thomas,* 55 Mo. 581, 583.

accuracy in spelling is not required in legal documents or in legal proceedings, if the name, as spelled in the document or proceeding, produces to the ear the same sound. The name thus given is sufficient to designate the person referred to.[3] Hence, the rule in *idem sonans* is, that the variance is immaterial unless it is such as misleads the party to his prejudice.[4]

The phonetic value given to the letters must be that given to them in the English language.[5] Names that sound the same when pronounced, but beginning with a different letter, as Y and J, are not *idem sonans*.[6]

The decisions on the question of *idem sonans* exceed two thousand in number.[7] Locality and habitation have such a marked bearing on the cases, that the mere fact that a name in one state was held to be *idem sonans* with another would hardly be persuasive in another state, and certainly not controlling. The principles in their application vary with each case.[8]

The issue as to *idem sonans* arises in two ways: First, on demurrer to a plea in abatement, when it is presented as an issue at law to be decided by the judge;[9] second, when it appears from the evidence or other proceedings on the trial,

[3] *Hubner* v. *Reickhoff*, 103 Iowa, 368, 371, 64 Am. St. Rep. 191, 72 N. W. 540.

[4] *State* v. *White*, 34 S. C. 59, 61, 27 Am. St. Rep. 783, 12 S. E. 661.

[5] *Rooks* v. *State*, 83 Ala. 79, 80, 3 So. 720.

[6] *Heil's Appeal*, 40 Pa. 453.

[7] See 21 Am. & Eng. Enc. Law, pp. 313–317, where the decisions collected in alphabetical order.

[8] *Rooks* v. *State*, 83 Ala. 79, 3 So. 720; *Moore* v. *Allen*, 26 Colo. 197, 202, 77 Am. St. Rep. 277, 57 Pac. 698; *Henry* v. *State*, 7 Tex. App. 388, 392; *Miltonvale State Bank* v. *Kuhnle*, 50 Kan. 422, 34 Am. St. Rep. 129, 31 Pac. 1057; *Ogden* v. *Bosse*, 86 Tex. 336, 343, 24 S. W. 798; *Ewert* v. *State*, 48 Fla. 36, 39, 37 So. 334; *Johnson* v. *State*, 51 Fla. 44, 49, 40 So. 678; *Roland* v. *State*, 127 Ga. 402, 56 S. E. 412; *Boyd* v. *Boyd*, 128 Iowa, 699, 702, 111 Am. St. Rep. 215, 104 N. W. 798.

[9] *State* v. *Havely*, 21 Mo. 498, 503; *Veal* v. *State*, 116 Ga. 589, 590, 42 S. E. 705.

when it becomes a question of fact for the jury, submitted under proper instructions by the court.[10]

So a question of *idem sonans,* or as to the name in the indictment, is a question for the jury[11] under proper instructions of the court.

§ 97. Variance between known and unknown; when fatal.—When a third person is described as "a person to the grand jurors unknown," and it is shown that he was known to the grand jurors, the variance is fatal.[1] But the variance is not fatal where the name does not become known until after the indictment has been found.[2] The burden is on the accused to show that the grand jury, at the time of finding

[10] *Com.* v. *Donovan,* 13 Allen, 571; *Noble* v. *State,* 139 Ala. 90, 92, 36 So. 19; *State* v. *Perkins,* 70 N. H. 330, 47 Atl. 268.

[11] *Turpin* v. *State,* 19 Ohio St. 540; *People* v. *Cooke,* 6 Park. Crim. Rep. 31; *Weitzel* v. *State,* 28 Tex. App. 523, 524, 19 Am. St. Rep. 855, 13 S. W. 864.

Indictment as evidence. *State* v. *Homer,* 40 Me. 438, 441.

[1] 2 East, P. C. 561, 787; *Rex* v. *Walker,* 3 Campb. 265, note; 2 Hawk. P. C. chap. 25, § 71; *Rex* v. *Baxter,* 2 Leach, C. L. 578; *Rex* v. *Robinson,* Holt, N. P. 595; *Reg.* v. *Stroud,* 2 Moody, C. C. 270, 1 Car. & K. 187; *Reg.* v. *Bliss,* 8 Car. & P. 773; *Com.* v. *Tompson,* 2 Cush. 551; *Com.* v. *Hill,* 11 Cush. 137; *State* v. *Wilson,* 30 Conn. 500; *White* v. *People,* 32 N. Y. 465; *Blodget* v. *State,* 3 Ind. 403; *Moore* v. *State,* 65 Ind. 213; *State* v. *McIntire,* 59 Iowa, 264, 13 N. W. 287; *Barkman* v. *State,* 13 Ark. 703; *Reed* v. *State,* 16 Ark. 499; *Jorasco* v. *State,* 6 Tex. App. 238. See *Rothschild* v. *State,* 7 Tex. App. 519; *Sault* v. *People,* 3 Colo. App. 502, 504, 34 Pac. 263; *Presley* v. *State,* 24 Tex. App. 494, 495, 6 S. W. 540, 7 Am. Crim. Rep. 243. But see *Guthrie* v. *State,* 16 Neb. 667, 670, 21 N. W. 455, 4 Am. Crim. Rep. 78.

[2] *Reg.* v. *Campbell,* 1 Car. & K. 82; *Rex* v. *Smith,* 1 Moody, C. C. 402; *Com.* v. *Hendrie,* 2 Gray, 503; *Com.* v. *Hill,* 11 Cush. 137; *State* v. *Haddock,* 3 N. C. (2 Hayw.) 162; *Cheek* v. *State,* 38 Ala. 227; *Hays* v. *State,* 13 Mo. 246; *State* v. *Bryant,* 14 Mo. 340; *Reg.* v. *Stroud,* 1 Car. & K. 187, 2 Moody, C. C. 270; *Rex* v. *Robinson,* Holt, N. P. 595; *Com.* v. *Sherman,* 13 Allen, 249; *Com.* v. *Glover,* 111 Mass. 401; *Atkinson* v. *State,* 19 Tex. App. 462, 466; *Moore* v. *State,* 65 Ind. 213.

the indictment, knew his name or could have ascertained it by reasonable diligence.[3]

A person unknown must be averred as a specific person, even where the name is not ascertained.[4]

So, where a principal and an accessory were indicted, the principal being alleged as unknown, and the proof showed that he was known, the variance is fatal.[5]

But where the indictment contained two counts, one charging the principal as known and the other charging him as unknown, a fatal variance is avoided by proof of either count.[6]

[3] *Rex* v. *Bush,* Russ. & R. C. C. 372; *Com.* v. *Tompson,* 2 Cush. 551; *Com.* v. *Hill,* 11 Cush. 137; *Com.* v. *Gallagher,* 126 Mass. 54; *Blodget* v. *State,* 3 Ind. 403. But see *Com.* v. *Stoddard,* 9 Allen, 280; and *Duvall* v. *State,* 63 Ala. 12.

It is sufficient as to third persons if it appear that such third person was unknown at the time of the indictment, though he afterwards was known. See *Com.* v. *Hendrie,* 2 Gray, 503; *White* v. *People,* 32 N. Y. 465; *Cheek* v. *State,* 38 Ala. 227; *Com.* v. *Blood,* 4 Gray, 31.

In unlawfully selling liquor to a person unknown, the complaint is not supported by proof of a sale to a different person. *Zellers* v. *State,* 7 Ind. 659.

Where the charge was laid as unknown, and the bill found on the testimony of one Charles Iles, who confessed that he had stolen the goods, being incited thereto by the defendant, the judge directed an acquittal, saying that the indictment was wrong, as the name was known and was written on the back of the bill as a witness. *Rex* v. *Walker,* 3 Campb. 264; *Rex* v. *Blick,* 4 Car. & P. 377; *Sault* v. *People,* 3 Colo. App. 502, 504, 34 Pac. 263. See *Rex* v. *Bush,* Russ. & R. C. C. 372; *Reg.* v. *Caspar,* 2 Moody, C. C. 101, 9 Car. & P. 289.

[4] *State* v. *Trice,* 88 N. C. 627. See *Moore* v. *State,* 65 Ind. 213; *Vance* v. *State,* 65 Ind. 460.

[5] *Rex* v. *Walker,* 3 Campb. 264; *Rex* v. *Blick,* 4 Car. & P. 377; *Presley* v. *State,* 24 Tex. App. 494, 495, 6 S. W. 540, 7 Am. Crim. Rep. 243; *Reese* v. *State,* 90 Ala. 626, 8 So. 818; 3 Greenl. Ev. § 22; *Morgenstern* v. *Com.* 27 Gratt. 1018, 2 Am. Crim. Rep. 476; *Merwin* v. *People,* 26 Mich. 298, 12 Am. Rep. 314.

[6] *Walker* v. *State,* 146 Ala. 45, 50, 41 So. 878; *Spies* v. *People,* 122 Ill. 1, 3 Am. St. Rep. 320, 12 N. E. 865, 17 N. E. 898, 6 Am. Crim. Rep. 570; *Brennan* v. *People,* 15 Ill. 516; *Pilger* v. *Com.* 112 Pa. 220, 5 Atl. 309; *Green* v. *State,* 13 Mo. 382; *State* v. *Stewart,* 26 S. C. 125, 128, 1 S. E. 468; *Reg.* v. *Tyler,* 8 Car. & P. 616.

§ 98. Names; alias.—Where the name of the accused, or even of a third party, is laid with an alias, proof of either name is sufficient.[1]

But names, even under an *alias dictus,* must be names of identification, and the alias is not sufficient where two fictitious names are connected, or a fictitious name and an unknown name are thus connected.[2]

§ 99. Names; middle names; initials.—The law recognizes but one Christian or baptismal name, hence the insertion of a middle name, or a middle initial, is immaterial.[1] However, for many years Massachusetts held the middle name as

[1] *State* v. *Graham,* 15 Rich. L. 310. See *Rex* v. *Newman,* 1 Ld. Raym. 562; *Evans* v. *King,* Willes Rep. 554; *State* v. *Peterson,* 70 Me. 216; *Kennedy* v. *People,* 39 N. Y. 245; *State* v. *Gardiner,* Wright (Ohio) 392; *Evans* v. *State,* 62 Ala. 6; *Haley* v. *State,* 63 Ala. 89, 91; *Owen* v. *State,* 7 Tex. App. 329; *United States* v. *Bowen,* 3 MacArth, 64; *Miles* v. *United States,* 103 U. S. 304, 314, 26 L. ed. 481, 484; *Lee* v. *State,* 55 Ala. 259; *Noblin* v. *State,* 100 Ala. 13, 14 So. 767; *People* v. *Maroney,* 109 Cal. 277, 280, 41 Pac. 1097; *Barnesciotta* v. *People,* 10 Hun, 137; *Brown* v. *State,* 152 Ala. 668, 47 So. 1024; *Jenkins* v. *State,* 4 Ga. App. 859, 62 S. E. 574; *Ferguson* v. *State,* 134 Ala. 63, 92 Am. St. Rep. 17, 32 So. 760; *Vibery* v. *State,* 138 Ala. 100, 100 Am. St. Rep. 22, 35 So. 53; *Leslie* v. *State,* — Tex. Crim. Rep. —, 47 S. W. 367; *Moore* v. *State,* 47 Tex. Crim. Rep. 410, 415, 83 S. W. 1117; *Scott* v. *Soans,* 3 East, 111

[2] *United States* v. *Doe,* 127 Fed. 982.

[1] *Keene* v. *Meade,* 3 Pet. 1, 7 L. ed. 581.

And *sequitur,* in all the states except Massachusetts, in the earlier cases. In *Crouse* v. *Murphy,* 140 Pa. 335, 12 L.R.A. 58, 23 Am. St. Rep. 232, 21 Atl. 358; *Dutton* v. *Simmons,* 65 Me. 583, 20 Am. Rep. 729; and *Ming* v. *Gwatkin,* 6 Rand. (Va.) 551; it is to be noted that the rule is different, but these are civil cases. The presumption of identity of person from identity of name fails in matters of titles, judgments, and other civil proceedings, so that the cases cited are followed in later decisions. See *Bennett* v. *Libhart,* 27 Mich. 489; *People ex rel. Haines* v. *Smith,* 45 N. Y. 772; *Ambs* v. *Chicago, St. P. M. & O. R. Co.* 44 Minn. 266, 46 N. W. 321; *Veal* v. *State,* 116 Ga. 589, 590, 42 S. E. 705; *Eddison* v. *State,* — Tex. Crim. Rep. —, 73 S. W. 397.

an essential part of the name, and its omission a misnomer,[2] but later decisions in that state now hold the middle name as immaterial.[3] Where a man is popularly known by his middle name, he should be described by that name in the indictment.[4] Where a middle name is averred it must be proved as laid.[5] Where a man designates himself by his initials, conducts his affairs of life by that designation, he should always be so described.[6]

Recognizing the vast numbers of individuals of the same family name, the universal duplication of baptismal names and initials, it is evident that the business of life cannot be conducted without great confusion and mistake, unless such names are accurately given in each instance. Under such circumstances, the loose *dictum*, that identity of names presumes identity of person, must fail and the importance of the correct order of the name and of the initials becomes essential.[7]

Where correctly laid, the identity of person or thing is well established. The identity of J. C. Stiles is no more correctly established where he is charged as C. J. Stiles, than averring that 38 Broadway is identical with 83 Broadway, both names and numbers in modern business indicating persons so different that no identity could be conceived.

[2] *Com.* v. *Perkins* (1823) 1 Peck. 388, et seq.; *Langmaid* v. *Puffer*, 7 Gray, 381.

[3] *Com.* v. *Robinson*, 165 Mass. 426, 43 N. E. 121.

[4] *Com.* v. *Perkins*, 1 Pick. 388; *Com.* v. *Blood*, 4 Gray, 31.

[5] *Price* v. *State*, 19 Ohio, 423; *State* v. *Hughes*, 1 Swan, 261; *State* v. *English*, 67 Mo. 136. But see *Delphino* v. *State*, 11 Tex. App. 30, 31.

[6] *United States* v. *Upham*, 43 Fed. 68; *Gerrish* v. *State*, 53 Ala. 476, 480; *Charleston* v. *King*, 4 M'Cord, L. 487; *Hewlett* v. *State*, 135 Ala. 59, 33 So. 662.

[7] *Ambs* v. *Chicago, St. P. M. & O. R. Co.* 44 Minn. 266, 46 N. W. 321.

At common law it is true a legal name consisted of one given name and one surname, or family name, and mistakes in a middle initial or a middle name were not regarded as of consequence. But since the use of initials, instead of a given name, before a surname, has become a common practice, the necessity that these initials be all

§ 100. Names; prefixes and suffixes.—Prefixes to names in the United States are unknown, except in the instances of army and navy officers, who are charged by their proper title and rank. The instance of a suffix is nearly always confined to junior or senior, or in some instances, the younger. Such a suffix is no part of the name, and is merely descriptive.[1] Both in England [2] and in America [3] where there are father and son of the same name in the same community who distinguish themselves by such suffix, in its absence it will be presumed the name refers to the elder.

In New York it has been held that if a person be known by the addition of junior, an indictment without that addition is not conclusive against him.[4] The question is entirely one of usage in criminal matters.

given and correctly given in court proceedings has become of importance in every case, and in many absolutely essential to a correct designation of the person intended. *Carney* v. *Bigham,* 51 Wash. 452, 456, 19 L.R.A.(N.S.) 905, 99 Pac. 21.

[1] *Rex* v. *Peace,* 3 Barn. & Ald. 579; *Hodgson's Case,* 1 Lewin C. C. 236; *Hayes* v. *State,* 58 Ga. 35, 49; *Allen* v. *State,* 52 Ind. 486, 488; *State* v. *Grant,* 22 Me. 171, 173; *Teague* v. *State,* 144 Ala. 42, 47, 40 So. 312; *State* v. *Cafiero,* 112 La. 453, 455, 36 So. 492; *Com.* v. *Parmenter,* 101 Mass. 211, 213; *State* v. *Weare,* 38 N. H. 314, 317; *State* v. *Best,* 108 N. C. 747, 749, 12 S. E. 907; *San Francisco* v. *Randall,* 54 Cal. 408, 410; *Geraghty* v. *State,* 110 Ind. 103, 104, 11 N. E. 1; *Kincaid* v. *Howe,* 10 Mass. 203, 205; *Allen* v. *Taylor,* 26 Vt. 599; *McKay* v. *Speak,* 8 Tex. 376. But see *Zuill* v. *Bradley,* Quincy (Mass.) 6; *Boyden* v. *Hastings,* 17 Pick. 200. The prefix "Mrs." is no part of a name. *Schmidt* v. *Thomas,* 33 Ill. App. 109, 112; *State, Elberson, Prosecutrix,* v. *Richards,* 42 N. J. L. 69.

[2] *Hodgson's Case,* 1 Lewin, C. C. 236; *Rex* v. *Peace,* 3 Barn. & Ald. 579; *Geraghty* v. *State,* 110 Ind. 103, 11 N. E. 1.

[3] *State* v. *Vittum,* 9 N. H. 519, 522.

[4] *Jackson ex dem. Pell* v. *Provost,* 2 Caines, 165. Also *State* v. *Vittum,* 9 N. H. 519, 522; *Singleton* v. *Johnson,* 9 Mees. & W. 67, 1 Dowl. N. S. 356, 11 L. J. Exch. N. S. 88, 5 Jur. 114.

Distinction as to sex. *LaMotte* v. *Archer,* 4 E. D. Smith, 46, 48; *Taylor* v. *Com.* 20 Gratt. 825, 827; *Supernant* v. *People,* 100 Ill. App. 121, 122.

§ 101. Description of person; variance.—A false description of a person, where such description is essential, constitutes a fatal variance.[1] Thus, where a woman (the wife of an alleged bigamous party) was averred to be a "widow" when the proof showed that she was a single woman, the indictment could not be sustained.[2] The sex of a child on whom an offense is committed must be proved as laid.[3]

§ 102. Variance; principal and agent.—Where the legal effect of an agent's act is the same as though the principal had acted in person, evidence that the act was done by the agent acting for the principal will sustain an averment in the indictment directly charging the act to have been committed by the principal.[1]

Misdemeanors committed by the agent acting for the principal may be laid in the name of the principal, and proof of the agent's acts for the principal will sustain the averment.[2] An indictment averring a homicide to have been committed by A is sustained by proof of a killing by B done under A's immediate direction and control.[3] In false pretenses, an in-

[1] *Burns* v. *People,* 28 Colo. 84, 85, 62 Pac. 840; *State* v. *Leonard,* 7 Mo. App. 571; *People* v. *Hughes,* 41 Cal. 234, 236; *Moynahan* v. *People,* 3 Colo. 367, 369.

False description as to race. *Reed* v. *State,* 16 Ark. 499, 500; *Dick* v. *State,* 30 Miss. 631, 633.

[2] *Rex* v. *Deeley,* 1 Moody, C. C. 303, 4 Car. & P. 579. But see *United States* v. *Howard,* 3 Sumn. 12, Fed. Cas. No. 15,403.

[3] *Wallace* v. *State,* 10 Tex. App. 255, 257.

[1] Post, § 112; *Rex* v. *Gutch,* Moody & M. 437; *State* v. *Neal,* 27 N. H. 131, 132; *Com.* v. *Nichols,* 10 Met. 259, 264, 43 Am. Dec. 432; *Com.* v. *Bagley,* 7 Pick. 279, 281; *Com.* v. *Call,* 21 Pick. 515, 521, 32 Am. Dec. 284; *Com.* v. *Park,* 1 Gray, 553, 555; *Com.* v. *Chapman,* 11 Cush. 422, 428; *Com.* v. *Gillespie,* 7 Serg. & R. 469, 476, 10 Am. Dec. 475; *Stoughton* v. *State,* 2 Ohio St. 562, 565; *Brister* v. *State,* 26 Ala. 107, 131; *Britain* v. *State,* 3 Humph. 203, 204; post, § 695.

[2] *Com.* v. *Nichols,* 10 Met. 259, 264, 43 Am. Dec. 432; *Com.* v. *Park,* 1 Gray, 553, 555; *Com.* v. *Gillespie,* 7 Serg. & R. 469, 476, 10 Am. Dec. 475; *Loeb* v. *State,* 6 Ga. App. 23, 64 S. E. 338.

[3] *Com* v. *Chapman,* 11 Cush. 422, 428; *Brister* v. *State,* 26 Ala. 107,

dictment averring the representations to have been made or the money obtained from the principal is sustained by evidence that the representations were made to, or the money obtained from, the agent.[4] Where an indictment charges A as principal and B as abetting, there is no variance where the evidence shows B as principal and A as abetting.[5] An averment of an intent to defraud A B is sustained by proof of an intent to defraud the firm of which A B is a member.[6]

§ 102a. Names; accurate averment; rules at common law.—As it is only through the use of his correct name that a man can enforce his legal rights, or be compelled to answer to his legal obligations, so in the more important matters involving his life or personal liberty, he has the right to insist that he be charged by that name. In all preliminary proceedings this is essential, and in so grave an instrument as an indictment or a criminal information, by which he is charged as a violator of the laws, it is his right to be correctly designated.[1]

But, when he has joined issue in a criminal proceeding, inasmuch as no action that can conclude him in his life or liberty can be taken unless he is personally present before the trial court, it is within his power to plead any error in the charge. If he waives the point and answers, he cannot thereafter complain of an error which, at that point, ceases to be substantive in its character.

131; *Mackalley's Case,* 9 Coke, 67a, *Re Crown Matters happening at Salop,* 1 Plowd. 98a; *Rex* v. *Culkin,* 5 Car. & P. 121; *State* v. *Jenkins,* 14 Rich. L. 215, 228, 94 Am. Dec. 132.

[4] *Com.* v. *Call,* 21 Pick. 515, 521, 32 Am. Dec. 284.

[5] Fost. C. L. 369; 1 East, P. C. 350; *Rex* v. *Culkin,* 5 Car. & P. 121; *State* v. *Mairs,* 1 N. J. L. 335; *State* v. *Fley,* 2 Rice's Dig. 100; *State* v. *Jenkins,* 14 Rich. L. 215, 228, 94 Am. Dec. 132.

[6] *State* v. *Hastings,* 53 N. H. 452, 457; *People* v. *Curling,* 1 Johns 320; *Stoughton* v. *State,* 2 Ohio St. 562, 565; *Rex* v. *Lovell,* 1 Leach, C. L. 248, 2 East, P. C. 990.

[1] *Gerrish* v. *State,* 53 Ala. 476,

Hence, in preliminary proceedings the following rules prevail where the procedure in criminal matters is as at common law, and in all those jurisdictions where the rules are not abrogated by a specific statute.

The name of the defendant must be specifically averred.[2] The omission of the surname is fatal.[3] Misnomer must be met by plea in abatement.[4] Middle names are to be given when essential.[5] Initials are requisite when used by the party.[6] An unknown party may be approximately described.[7] At common law addition is necessary.[8] A wrong addition is to be met by plea in abatement.[9] "Junior" is to be added when the party is so known.[10] Third parties need no addition.[11] Corporate titles must be accurately averred.[12] Immaterial

480; *United States* v. *Upham,* 43 Fed. 68.

[2] *Enwright* v. *State,* 58 Ind. 567, 569; Chitty, Crim. Law. 167; 22 Cent. L. J. 220.

[3] *State* v. *Hand,* 6 Ark. 165.

[4] *Rex* v. *Shakespeare,* 10 East, 83; 2 Hale, P. C. 176, 237, 238; *Washington* v. *State,* 68 Ala. 85; *Harris* v. *People,* 21 Colo. 95, 99, 39 Pac. 1084; *Uterburgh* v. *State,* 8 Blackf. 202; *People* v. *Kelly,* 6 Cal. 210, 213; *State* v. *M'Gregor,* 41 N. H. 407, 411.

[5] *Price* v. *State,* 19 Ohio, 423, 424; *State* v. *Hughes,* 1 Swan, 261.

[6] *Carney* v. *Bigham,* 51 Wash. 452, 456, 19 L.R.A.(N.S.) 905, 99 Pac. 21.

[7] *State* v. *Angel,* 29 N. C. (7 Ired. L.) 27, 29; *Rex* v. ———, Russ. & R. C. C. 489.

But under statute, see *Geiger* v. *State,* 5 Iowa, 484, 485.

[8] *Com.* v. *France,* 3 Brewst. (Pa.) 148, 150; *State* v. *Bishop,* 15 Me. 122, 123; *State* v. *Moore,* 14 N. H. 451, 454; *Com.* v. *Rucker,* 14 B. Mon. 228; *State* v. *Daly,* 14 R. I. 510; *State* v. *Nelson,* 29 Me. 329, 330. But see *Lanckton* v. *United States,* 18 App. D. C. 348; *United States* v. *McCormick,* 1 Cranch, C. C. 593, Fed. Cas. No. 15,663.

[9] *State* v. *Nelson,* 29 Me. 329, 330; *Smith* v. *Bowker,* 1 Mass. 76; *State* v. *White,* 32 Iowa, 17, 18.

[10] *Jackson ex dem. Peil* v. *Provost,* 2 Caines, 165.

[11] *Rex* v. *Sulls,* 2 Leach, C. L. 861; *Rex* v. *Graham,* 2 Leach, C. L. 547; *Rex* v. *Ogilvie,* 2 Car. & P. 230; *Com.* v. *Varney,* 10 Cush. 402, 403.

[12] *Reg.* v. *Birmingham & G. R.* Co. 3 Q. B. 223, 2 Gale & D. 236, 6 Jur. 804; *State* v. *Vermont C. R. Co.* 28 Vt. 583; *Fisher* v. *State,* 40 N. J. L. 169; *McGary* v. *People,* 45 N. Y. 153, 157; *Lithgow* v. *Com.* 2 Va. Cas. 297; *Smith* v. *State,* 28 Ind. 321; *Wallace* v. *People,* 63 Ill 451; *White* v. *State,* 24 Tex. App.

misnomer may be rejected as surplusage.[13] It is sufficient where the description is substantially correct.[14] Names be averred by initials.[15] Material variance is fatal.[16]

§ 103. Time and place of the offense.—Within the limitations, first, that the offense must be proved to have been committed prior to the finding of the indictment;[1] second, within the statute of limitations;[2] third, where a special day is essential;[3] where time is the essence of the offense,[4] the time of the commission of the offense as averred in the indictment

231, 233, 5 Am. St. Rep. 879, 5 S. W. 857; *State* v. *Jones,* 168 Mo. 398, 68 S. W. 566.

[13] *Com.* v. *Hunt,* 4 Pick. 252; *United States* v. *Howard,* 3 Sumn. 12, Fed. Cas. No. 15,403; *Farrow* v. *State,* 48 Ga. 30, 36.

[14] *Eaves* v. *State,* 113 Ga. 749, 755, 39 S. E. 318; *Wilson* v. *State,* 69 Ga. 224; *State* v. *Brecht,* 41 Minn. 50, 54, 42 N. W. 602; *United States* v. *Winter,* 13 Blatchf. 276, 277, Fed. Cas. No. 16,743.

[15] *Wiggins* v. *State,* 80 Ga. 468, 469, 5 S. E. 503; *Mead* v. *State,* 26 Ohio St. 505; *State* v. *Bell,* 65 N. C. 313, 314; *State* v. *Brite,* 73 N. C. 26, 29; *Thompson* v. *State,* 48 Ala. 165, 167; *State* v. *Seely,* 30 Ark. 162, 165; *State* v. *Anderson,* 3 Rich. L. 172, 175; *State* v. *Black,* 31 Tex. 560; *Vandermark* v. *People,* 47 Ill. 122

[16] 1 East, P. C. 514, 651, 781; *Rex* v. *Jenks,* 2 Leach, C. L. 774, 2 East, P. C. 514; *State* v. *Sherrill,* 81 N. C. 550, 551; *Graham* v. *State,* 40 Ala. 659, 670; *Haworth* v. *State,* Peck (Tenn.) 89, 90; *Osborne* v. *State,* 14 Tex. App. 225, 226; *Gerrish* v. *State,* 53 Ala. 476, 480.

[1] *Armistead* v. *State,* 43 Ala. 340, 342; *Turner* v. *State,* 89 Ga. 424, 15 S. E. 488; *Dovalina* v. *State,* 14 Tex. App. 324, 325; *Hardy* v. *State,* — Tex. Crim. Rep. —, 44 S. W. 173; *Ledbetter* v. *United States,* 170 U. S. 606, 42 L. ed. 1162, 18 Sup. Ct. Rep. 774; *Hume* v. *United States,* 55 C. C. A. 407, 118 Fed. 689, 696; *Hardy* v. *United States,* 186 U. S. 224, 225, 46 L. ed. 1137, 1138, 22 Sup. Ct. Rep. 889; *State* v. *Hughes,* 82 Mo. 86; *Terrell* v. *State,* 165 Ind. 443, 447, 2 L.R.A. (N.S.) 251, 112 Am. St. Rep. 244, 75 N. E. 884, 6 A. & E. Ann. Cas. 851.

[2] *Rex* v. *Phillips,* Russ. & R. C. C. 369; *World* v. *State,* 50 Md. 49, 51; *Nelson* v. *State,* 17 Fla. 195, 197; *Warrace* v. *State,* 27 Fla. 362, 365, 8 So. 748; *Manning* v. *State,* 35 Tex. 723; *State* v. *Moore,* 67 Mo. App. 338, 339; *State* v. *Knolle,* 90 Mo. App. 238, 240; *People* v. *Miller,* 12 Cal. 291, 294.

[3] *State* v. *Bunker,* 46 Conn. 327, 328; *State* v. *Bryson,* 90 N. C. 747, 748; *State* v. *Land,* 42 Ind. 311.

[4] *Com.* v. *Monahan,* 9 Gray, 119, 120; *Roberts* v. *People,* 99 Ill. 275,

is not material and the proof is not confined to the time charged.[5]

But even under statutes dispensing with averments as to time, a time certain must be stated even though it is not the precise time proved.[6]

§ 103a. Time; materiality of, in records and writings.—Where written documents or records are set forth, the date, if alleged, is material and must correspond with the evidence.[1] Thus, the date of the publication of a libel is immaterial, but the date of the newspaper or writing containing the libel is material and must be proved as averred.[2]

Where the time laid in an indictment is to be proved by a record, a variance between the averment and the proof is fatal.[3]

276; *Dill* v. *People*, 19 Colo. 469, 472, 41 Am. St. Rep. 254, 36 Pac. 229; *State* v. *Land*, 42 Ind. 311.

[5] *Shelton* v. *State*, 1 Stew. & P. (Ala.) 208; *Marquardt* v. *State*, 52 Ark. 269, 270, 12 S. W. 562; *People* v. *Miller*, 12 Cal. 291, 294; *Fleming* v. *State*, 136 Ind. 149, 150, 36 N. E. 154; *United States* v. *Bman*, 2 Wash. C. C. 328, Fed. Cas. No. 14,631; *State* v. *Williams*, 76 Me. 480, 481; *State* v. *Havey*, 58 N. H. 377, 380; *State* v. *Ingalls*, 59 N. H. 88, 89; *Com.* v. *Dillane*, 1 Gray, 483, 485; *Com.* v. *Sego*, 125 Mass. 210, 214; *Turner* v. *People*, 33 Mich. 363, 364; *State* v. *Swaim*, 97 N. C. 421, 462, 2 S. E. 68; *McCarty* v. *State*, 37 Miss. 411; *State* v. *Barr*, 30 Mo. App. 498; *People* v. *Jackson*, 111 N. Y. 362, 369, 19 N. E. 54; *Kenney* v. *State*, 5 R. I. 385, 386; *Arrington* v. *Com.* 87 Va. 96, 99, 10 L.R.A. 242, 12 S. E. 224; *State* v. *Gottfreedson*, 24 Wash. 398, 399, 64 Pac. 523; *United States* v. *Conrad*, 59 Fed. 458; *Cecil* v. *Territory*, 16 Okla. 197, 199, 82 Pac. 654, 8 A. & E. Ann. Cas. 457.

But see *United States* v. *Law*, 50 Fed. 915, 916; 2 Russell, Crimes, 7th Eng. ed. p. 1939.

[6] *Hampton* v. *State*, 8 Ind. 336, 337; *Terrell* v. *State*, 165 Ind. 443, 2 L.R.A.(N.S.) 251, 112 Am. St. Rep. 244, 75 N. E. 884, 6 A. & E. Ann. Cas. 851; *State* v. *Bruce*, 26 W. Va. 153, 157.

[1] *Com.* v. *Harrington*, 3 Pick. 26, 28.

So, in perjury.

[2] *Dill* v. *People*, 19 Colo. 469, 41 Am. St. Rep. 254, 36 Pac. 229.

[3] *United States* v. *McNeal*, 1 Gall. 387, Fed. Cas. No. 15,700; *United States* v. *Bowman*, 2 Wash. C. C. 328, 329, Fed. Cas. No. 14,631; *Com.* v. *Monahan*, 9 Gray, 119;

§ 103b. Time; materiality in continuous offenses; other offenses.—In averring continuing offenses, it is usual to lay them with a *continuando,* that is, the offense charged was committed on a certain day and divers other days, between such day and another day specified; and under such *continuando,* averments of time are material.[1] Under such *continuando,* the indictment is sustained by proof of the act on the day certain, though it may be ineffectual as to the acts alleged on the other days.[2]

And it seems that under a *continuando* not only the acts averred may be shown, but prior and subsequent acts, when such acts explain or corroborate the act charged under the *continuando.*[3]

§ 104. Time; materiality of, in specific offense.—Where a specific offense is charged, the indictment cannot be sustained by proof of a second offense even on the same day. This results from the general principle that evidences of col-

Pope v. *Foster,* 4 T. R. 590; *Woodford* v. *Ashley,* 11 East, 508; *State* v. *Tappan,* 21 N. H. 56, 59; *Jacobs* v. *State,* 61 Ala. 448, 4 Am. Crim. Rep. 465; *Dill* v. *People,* 19 Colo. 469, 473, 41 Am. St. Rep. 254, 36 Pac. 229.

[1] We take the rule to be well settled in criminal cases, that when a continuing offense is alleged to have been on a certain day, and on divers days and times between that and another day specified, the proof must be confined to acts done within the time. *Com.* v. *Briggs,* 11 Met. 574; *Com.* v. *Adams,* 4 Gray, 27, 28; *Com.* v. *Troverse,* 11 Allen, 260; *Cowley* v. *People,* 83 N. Y. 464, 472, 38 Am. Rep. 464; *State* v. *Bosworth,* 54 Conn. 1, 4 Atl. 248; *Com.* v. *Fuller,* 163 Mass. 499, 500, 40 N. E. 764; *State* v. *Dennison,* 60 Neb. 192, 82 N. W. 628; *Reg.* v. *Firth,* 11 Cox, C. C. 234, 38 L. J. Mag. Cas. N. S. 54, L. R. 1 C. C. 172, 19 L. T. N. S. 746, 17 Week. Rep. 327; *State* v. *Ah Sam,* 14 Or. 347, 348, 13 Pac. 303.

[2] *Wells* v. *Com.* 12 Gray, 326, 328; *State* v. *Brown,* 14 N. D. 529, 531, 104 N. W. 1112.

[3] *Toll* v. *State,* 40 Fla. 169, 173, 23 So. 942; *Townsend* v. *State,* 147 Ind. 624, 638, 37 L.R.A. 294, 62 Am. St. Rep. 477, 47 N. E. 19; *State* v. *Behan,* 113 La. 754, 759, 37 So. 714; *State* v. *Coffee,* 75 Mo. App. 88, 91. As to the force of a *continuando,* see *People* v. *Sullivan,* 9 Utah, 195, 33 Pac. 702.

lateral offenses cannot be received to prove the offense under trial.[1]

§ 105. Time; statute of limitations.—While an indictment must always show that the offense charged is within the period of the statute of limitations,[1] an offense cannot be put in evidence which is sheltered from prosecution by the statute, even though the indictment avers the offense to be within the period allowed by law.[2]

§ 106. Time; proof of, when essence of the offense.—When it is the essence of an offense that it should have been committed at a particular time, or a particular hour of the day, the allegation of that fact must be proved as laid in the indictment. In those states that still retain the limitation that a breaking, to be burglary, must be within the nighttime, it

[1] *Com.* v. *Dean,* 109 Mass. 349, 354.

See *Com.* v. *Briggs,* 11 Met. 573, 574; *Com.* v. *Elwell,* 1 Gray, 463; *Com.* v. *Adams,* 4 Gray, 27, 29; supra, § 31.

[1] *United States* v. *Winslow,* 3 Sawy. 337, 342, Fed. Cas. No. 16,742; *State* v. *Ingalls,* 59 N. H. 88, 89; *State* v. *Rust,* 8 Blackf. 195; *Lamkin* v. *People,* 94 Ill. 501, 503; *People* v. *Gregory,* 30 Mich. 371, 372; *People* v. *Miller,* 12 Cal. 291, 293; *McLane* v. *State,* 4 Ga. 335, 340; *Gill* v. *State,* 38 Ark. 524, 527; *Anderson* v. *State,* 20 Fla. 381, 383; *Shoefercator* v. *State,* 5 Tex. App. 207, 211; *Tipton* v. *State,* 119 Ga. 304, 305, 46 S. E. 436, 15 Am. Crim. Rep. 209; *Hutchinson* v. *State,* 62 Ind. 556, 557; *Com.* v. *T. J. Megibben Co.* 101 Ky. 195, 198, 40 S. W. 694, 1093; *Stamper* v. *Com.* 102 Ky. 33, 36, 42 S. W. 915; *Com.* v. *Nailor,* 29 Pa. Super. Ct. 271; *State* v. *Shaw,* 113 Tenn. 536, 538, 82 S. W. 480; *Harwell* v. *State,* — Tex. Crim. Rep. —, 65 S. W. 520; *State* v. *Ball,* 30 W. Va. 382, 385, 4 S. E. 645.

See *State* v. *J. P.* 1 Tyler (Vt.) 283.

[2] *Rex* v. *Phillips,* Russ. & R. C. C. 369; *Rex* v. *Brown,* Moody & M. 163; *United States* v. *Watkins,* 3 Cranch, C. C. 441, Fed. Cas. No. 16,649; *United States* v. *White,* 5 Cranch, C. C. 73, Fed. Cas. No. 16,676; *State* v. *Hobbs,* 39 Me. 212, 213; *State* v. *Robinson,* 29 N. H. 274, 277; *State* v. *J. P.* 1 Tyler (Vt.) 283; *Com.* v. *Ruffner,* 28 Pa. 259, 261; *Hatwood* v. *State,* 18 Ind. 492, 493; *State* v. *Magrath,* 19 Mo. 678, 680.

must be proved that the breaking took place in the nighttime, though it is not a material variance if the time proved be not the day averred, so that the averment of the time of day sustains the indictment.[1]

So, where the gist of the offense is that the act is committed on Sunday, it must be proved to have been committed on Sunday, but proof of any Sunday, prior to the indictment and within the statute, is sufficient.[2] Time, also, becomes of the gist of the offense when the prosecution is for selling liquor between certain hours or on forbidden days.[3]

Time is always essential in murder where the death must be proved to have taken place within a year and a day from the time at which the mortal lesion is proved to have been inflicted.[4]

[1] *People* v. *Burgess,* 35 Cal. 115, 117; *Jones* v. *State,* 63 Ga. 141, 143 (under statute); *Lassiter* v. *State,* 67 Ga. 739, 741; *State* v. *Hutchinson,* 111 Mo. 257, 259, 20 S. W. 34; *State* v. *Ruby,* 61 Iowa, 86, 87; *Lewis* v. *State,* 16 Conn. 32, 33.

As to what constitutes "nighttime," see *State* v. *Bancroft,* 10 N. H. 105, 106; *Lewis* v. *State,* 16 Conn. 32, 34; *People* v. *Griffin,* 19 Cal. 578; *Thomas* v. *State,* 5 How. (Miss.) 20, 31; *State* v. *Morris,* 47 Conn. 179, 182.

[2] *Rex* v. *Treharne,* 1 Moody, C. C. 298; *Com.* v. *Harrison,* 11 Gray, 308; *State* v. *Brunker,* 46 Conn. 327, 328; *People* v. *Ball,* 42 Barb. 324, 325; *State* v. *Drake,* 64 N. C. 589, 591; *Megowan* v. *Com.* 2 Met. (Ky.) 3; *State* v. *Eskridge,* 1 Swan, 413, 416; *State* v. *Bryson,* 90 N. C. 747, 748; *State* v. *Wool,* 86 N. C. 708.

But see *Werner* v. *State,* 51 Ga. 426, 427; *Frasier* v. *State,* 5 Mo. 536; *State* v. *Land,* 42 Ind. 311; *Robinson* v. *State,* 38 Ark. 548, 549, 4 Am. Crim. Rep. 570; *Hoover* v. *State,* 56 Md. 584; *Com.* v. *Dacey,* 107 Mass. 206.

[3] *Com.* v. *Purdy,* 146 Mass. 138, 139, 15 N. E. 364.

[4] *State* v. *Orrell,* 12 N. C. (1 Dev. L.) 139, 141, 17 Am. Dec. 563; *People* v. *Aro,* 6 Cal. 207, 209, 65 Am. Dec. 503; *People* v. *Kelly,* 6 Cal. 210, 212; *Edmondson* v. *State,* 41 Tex. 496, 498; *Hardin* v. *State,* 4 Tex. App. 355, 370; *Brassfield* v. *State,* 55 Ark. 556, 559, 18 S. W. 1040; *State* v. *Mayfield,* 66 Mo. 125; 3 Co. Inst. 53; *Com.* v. *Parker,* 2 Pick. 557; *Chapman* v. *People,* 39 Mich. 357, 360; *State* v. *Sides,* 64 Mo. 383, 385; *State* v. *Huff,* 11 Nev. 17, 21.

Compare: *Debney* v. *State,* 45 Neb. 856, 863, 34 L.R.A. 851, 64

Where dates are essential they must not be inconsistent with nor repugnant to each other, as it vitiates the indictment.[5]

But time may be shown inferentially or by circumstantial evidence,[6] and whether the allegation as to the time of the day or the date is sustained, is a question of fact for the jury under proper instructions of the court.[7]

§ 106a. Venue or place of crime an essential averment.—Under the English common law, all crimes are, primarily, local, that is, they depend upon the place where committed, and the offense is punished according to the law of that place. This principle has been declared in the Federal [1] and all of the state Constitutions, so that all offenders, without regard to citizenship or nationality, are amenable to the law of the place or locus of the crime.[2]

N. W. 446; *Borrego* v. *Territory*, 8 N. M. 446, 467, 46 Pac. 349, affirmed in 164 U. S. 612, 41 L. ed. 572, 17 Sup. Ct. Rep. 182; *Roberson* v. *State*, 42 Fla. 212, 218, 28 So. 427; *Com.* v. *Snell*, 189 Mass. 12, 18, 3 L.R.A.(N.S.) 1019, 75 N. E. 75.

[5] *Jeffries* v. *Com.* 12 Allen, 145, 152; *Hutchinson* v. *State*, 62 Ind. 556; *Serpentine* v. *State*, 1 How. (Miss.) 260; *McMath* v. *State*, 55 Ga. 303; *Com.* v. *Griffin*, 3 Cush. 523; *State* v. *Hendricks*, 1 N. C. pt. 2, p. 445 (Conference, 369); *People* v. *Mather*, 4 Wend. 229, 21 Am. Dec. 122; *Markley* v. *State*, 10 Mo. 291, 295; *Collins* v. *State*, 5 Tex. App. 37, 38; *Brewer* v. *State*, 5 Tex. App. 248, 251; *State* v. *Munger*, 15 Vt. 291, 295; *State* v. *Litch*, 33 Vt. 67, 68; *Com.* v. *Doyle*, 110 Mass. 103; *Jacobs* v. *Com.* 5 Serg. & R. 316; *State* v. *Noland*, 29 Ind. 212, 214; *State* v. *Davidson*, 36 Tex. 325, 327; *Clark* v. *State*, 34 Ind. 436, 437.

[6] *Greenwood* v. *State*, 64 Ind. 250, 3 Am. Crim. Rep. 154; *Tipton* v. *State*, 119 Ga. 304, 46 S. E. 436, 15 Am. Crim. Rep. 209.

[7] *State* v. *Leaden*, 35 Conn. 515; *Waters* v. *State*, 53 Ga. 567, 1 Am. Crim. Rep. 367; *People* v. *Burgess*, 35 Cal. 115, 117.

[1] U. S. Const. 6th Amend.

[2] *Rex* v. *Weston*, 4 Burr. 2507, 2511.

The principle prevailing in England, that the accused could only be tried by a jury summoned from the judicial district in which the crime or some essential part of it was committed, and in the United States, in the county or district in which it was averred to have been committed, naturally created some difficulties in the trial of those cases

As the crime is local, and not personal, venue becomes one of the essential elements, and to properly aver and sustain the averment of venue is always one of the burdens devolving upon the prosecution in its main case.[3]

§ 106b. Pleading venue.—Venue is no exception to the rule that every fact material to be proved to sustain a conviction must be established by proof beyond a reasonable doubt, and no presumptions will be indulged by the court that the venue is as laid.[1]

Even in those states where it is not essential to aver venue under the statute, but it is sufficient to show that the offense was committed where the grand jury met or the information was filed, proof must be made of those facts as fully as though they had been plead at common law.[2]

where the acts were not all committed in the same judicial area or jurisdiction. In regard to larceny it is considered as committed in any county or judicial jurisdiction into which the thief carries the goods. Post, § 109 f.

In homicide where the wound was given in one county and the death occurred in another county, the statute of 2 & 3 Edw. VI. chap. 24, § 2, permitted the trial to be in the county where the death occurred. (See Pultan's Stat. of Eng. Manby's ed. 1670, 5 Stat. at L.) post, § 110.

[3] *Odom* v. *State,* 147 Ala. 690, 40 So. 824; *Walker* v. *State,* 147 Ala. 699, 41 So. 176; *Mill* v. *State,* 1 Ga. App. 134, 57 S. E. 969; *Rex* v. *Halloway,* 1 Car. & P. 127; *R.* v. *McAleece,* 1 Cr. & D. 154; *Rex* v. *Smith,* Ryan & M. 295; *Deck* v. *State,* 47 Ind. 245; *State* v. *Dorr,* 82 Me. 212, 213, 19 Atl. 171; *Arcia* v. *State,* 28 Tex. App. 198, 200, 12 S. W. 599; *Leslie* v. *State,* 35 Fla. 184, 186, 17 So. 559; *Moore* v. *State,* 130 Ga. 322, 332, 60 S. E. 544; *Harlan* v. *State,* 134 Ind. 339, 33 N. E. 1102; *State* v. *Hobbs,* 37 W. Va. 812, 17 S. E. 380; *Vernon* v. *United States,* 76 C. C. A. 547, 146 Fed. 121; *United States* v. *Richards,* 149 Fed. 443.

[1] *Dobson* v. *State,* — Ark. —, 17 S. W. 3; *Randolph* v. *State,* 100 Ala. 139, 140, 14 So. 792; *Bain* v. *State,* 61 Ala. 75, 77; *Cawthorn* v. *State,* 63 Ala. 157, 158; *Thornell* v. *People,* 11 Colo. 305, 17 Pac. 904; *Williams* v. *State,* 105 Ga. 743, 745, 31 S. E. 749; *Moore* v. *People,* 150 Ill. 405, 406, 37 N. E. 909; *Dougherty* v. *People,* 118 Ill. 160, 163, 8 N. E. 673.

[2] *Noles* v. *State,* 24 Ala. 672; *Brassfield* v. *State,* 55 Ark. 556, 558,

It is sufficient though, to lay the venue within the jurisdiction of the court.[3]

Also, when the legal effect of an agent's act is as though the principal had acted in person, the venue against the principal is to be laid at the place where the agent committed the act.[4]

Where a jurisdiction is divided, as where one county is divided into two or more counties, the venue is to be averred in that place where the offense was actually committed, even though it is designated by another county name,[5] and where a county has several jurisdictions the *locus delicti* must be specified.[6]

The omission to prove the substituted or constructive venue allowed in some Codes is a fatal variance,[7] and at common law the omission of the venue is fatal.[8]

18 S. W. 1040; *Thetstone* v. *State,* 32 Ark. 179, 180; *Wickham* v. *State,* 7 Coldw. 525; *Toole* v. *State,* 89 Ala. 131, 8 So. 95.

[3] *Reg.* v. *Stanbury,* Leigh & C. C. C. 128, 31 L. J. Mag. Cas. N. S. 88, 8 Jur. N. S. 84, 5 L. T. N. S. 686, 10 Week. Rep. 236, 9 Cox, C. C. 94; *People* v. *Barrett,* 1 Johns. 66; *State* v. *G. S.* 1 Tyler (Vt.) 295, 4 Am. Dec. 724; *State* v. *Jones,* 9 N. J. L. 357, 17 Am. Dec. 483; *Cook* v. *State,* 20 Fla. 802, 803; *State* v. *Hinkle,* 27 Kan. 308, 311; *Territory* v. *Do,* 1 Ariz. 507, 25 Pac. 472.

[4] *Stillman* v. *White Rock Mfg. Co.* 3 Woodb. & M. 539, Fed. Cas. No. 13,446; *State* v. *Smith,* 82 Iowa, 423, 426, 48 N. W. 727; *Rex* v. *Burdett,* 4 Barn. & Ald. 95, 175, 176, 22 Revised Rep. 539; *United States* v. *Worrall,* 2 Dall. 384, 1 L. ed. 426, Fed. Cas. No. 16,766; *Perkin's Case,* 2 Lewin, C. C. 150; 2 East, P. C. 1120; *Reg.* v. *Jones,* 4 Cox, C. C. 198; *Johns* v. *State,* 19 Ind. 421, 81 Am. Dec. 408; *Green* v. *State,* 66 Ala. 40, 43, 41 Am. Rep. 744.

[5] *State* v. *Jones,* 9 N. J. L. 357, 365, 17 Am. Dec. 483; *Searcy* v. *State,* 4 Tex. 450; *United States* v. *Dawson,* 15 How. 467, 14 L. ed. 775, Fed. Cas. No. 14,933; *State* v. *Jackson,* 39 Me. 291, 293; *State* v. *Fish,* 26 N. C. (4 Ired. L.) 219.

But see *McElroy* v. *State,* 13 Ark. 708, 710.

[6] *Jordan* v. *State,* 22 Ga. 545, 554; *Taylor* v. *Com.* 2 Va. Cas. 94; *McBride* v. *State,* 10 Humph. 615; *Com.* v. *Springfield,* 7 Mass. 9, 10; *State* v. *McCracken,* 20 Mo. 411, 412.

[7] *Toole* v. *State,* 89 Ala. 131, 132, 8 So. 95.

[8] *State* v. *Hartnett,* 75 Mo. 251,

§ 107. Place of offense; must be within jurisdiction of the court.—Under the Federal Constitution the accused must be tried by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law [1] and by the Bill of Rights of nearly all of the states, such trial shall take place by an impartial jury of the county or district in which the offense is alleged to have been committed.[2] Hence, the place of the commission of the offense must always be shown, and if this is not done, the accused must be acquitted.[3] It is

4 Am. Crim. Rep. 572; *Thompson* v. *State,* 51 Miss. 353, 354; *Searcy* v. *State,* 4 Tex. 450, 451; *Morgan* v. *State,* 13 Fla. 671, 672; *People* v. *Craig,* 59 Cal. 370.

[1] U. S. Const. 6th Amend. *United States* v. *Maxon,* 5 Blatchf. 300, Fed. Cas. No. 15,748.

[2] See Bill of Rights various state Constitutions; *Rutzell* v. *State,* 15 Ark. 67, 68; *O'Berry* v. *State,* 47 Fla. 75, 80, 36 S. E. 440; *State* v. *Montgomery,* 115 La. 155, 38 So. 949; *State* v. *Gorman,* 191 Mo. 150, 90 S. W. 100.

But see, *Mischer* v. *State,* 41 Tex. Crim. Rep. 212, 96 Am. St. Rep. 780, 53 S. W. 627; *State* v. *McDonald,* 109 Wis. 506, 509, 85 N. W. 502.

[3] *People* v. *Barrett,* 1 Johns. 66; *Larkin* v. *People,* 61 Barb. 226; *State* v. *Jones,* 9 N. J. L. 357, 17 Am. Dec. 483; *Stazey* v. *State,* 58 Ind. 514; *State* v. *Hartnett,* 75 Mo. 251, 4 Am. Crim. Rep. 572; *State* v. *Burgess,* 75 Mo. 541; *People* v. *Bevans,* 52 Cal. 470; *McCombs* v. *State,* 66 Ga. 581; *Tidwell* v. *State,* 70 Ala. 33, 42; *State* v. *Burns,* 48 Mo. 438; *Williamson* v. *State,* 13 Tex. App. 514, 518; *Harsdorf* v. *State,* — Tex. App. —, 18 S. W. 415; *Moye* v. *State,* 65 Ga. 754, 755; *Throckmorton* v. *Com.* 16 Ky. L. Rep. 530, 29 S. W. 16; *People* v. *Griffith,* 122 Cal. 212, 54 Pac. 725; *Tarver* v. *State,* 123 Ga. 494, 51 S. E. 501; *State* v. *Schuerman,* 70 Mo. App. 518, 523; *Fitch* v. *Com.* 92 Va. 824, 827, 24 S. E. 272; *Anderson* v. *Com.* 100 Va. 860, 42 S. E. 865; *Com.* v. *Hardiman,* 9 Gray, 136; *Com.* v. *Webster,* 5 Cush. 295, 316, 52 Am. Dec. 711; *State* v. *McGinniss,* 74 Mo. 245, 247; *Dyer* v. *State,* 74 Ind. 594, 595; *Harlan* v. *State,* 134 Ind. 339, 341, 33 N. E. 1102; *State* v. *Mills,* 33 W. Va. 455, 457, 10 S. E. 808; *State* v. *Hobbs,* 37 W. Va. 812, 814, 17 S. E. 380; *Randolph* v. *State,* 100 Ala. 139, 141, 14 So. 792; *Jones* v. *State,* 58 Ark. 390, 396, 24 S. W. 1073; *Berry* v. *State,* 92 Ga. 47, 48, 17 S. E. 1006; *Williams* v. *State,* 21 Tex. App. 256, 257, 17 S. W. 624; *Ryan* v. *State,* 22 Tex. App. 699, 703, 3 S. W. 547.

sufficient, however, to show that the offense occurred within the county or other limit of the trial court's jurisdiction.[4]

§ 107a. Venue; degree of proof; reasonable doubt.—As we have shown, an indictment is fatally defective where no venue or place of crime is laid.[1] Venue, then, is one of the essential averments to be established by the state in all prosecutions of criminal offenses. Where there is no locus for the crime and no jurisdiction in the court, the prosecution is a nullity.

The degree of proof as applied to the evidence in all criminal prosecutions is that all essential elements must be proved beyond a reasonable doubt. Hence, in such prosecutions, venue, being an essential element, must be proved beyond a reasonable doubt.[2]

It is true that a number of cases state in terms that venue need not be proved beyond a reasonable doubt,[3] but those decisions also add that, if the only rational conclusion from the facts in evidence is that the crime was committed in the venue

[4] 2 Russell, Crimes, 7th Eng. ed. p. 19; *Padgett* v. *State,* 68 Ind. 46; *Franklin* v. *State,* 5 Baxt. 613; *Luck* v. *State,* 96 Ind. 16, 20; *Leslie* v. *State,* 35 Fla. 184, 17 So. 559; *People* v. *Breese,* 7 Cow. 429; *Pickerel* v. *Com.* 17 Ky. L. Rep. 120, 30 S. W. 617; *People* v. *Etting,* 99 Cal. 577, 34 Pac. 237; *Lewis* v. *State,* — Tex. Crim. Rep. —, 24 S. W. 903; *People* v. *Curley,* 99 Mich. 238, 58 N. W. 68; *State* v. *Farley,* 87 Iowa, 22, 23, 53 N. W. 1089; *Sullivan* v. *People,* 114 Ill. 24, 26, 28 N. E. 381; *State* v. *Burns,* 48 Mo. 438; *People* v. *Waller,* 70 Mich. 237, 239, 38 N. W. 261.

The defendant may introduce evidence, which, if it shows the venue, may cure an omission to prove venue on part of the state. *Scott* v. *State,* 42 Ark. 73, 75.

[1] Supra, § 107; *Thornell* v. *People,* 11 Colo. 305, 307, 17 Pac. 904.

[2] *Gosha* v. *State,* 56 Ga. 36, 2 Am. Crim. Rep. 589; *Wimbish* v. *State,* 70 Ga. 718; *Murphy* v. *State,* 121 Ga. 142, 48 S. E. 909.

[3] *Wilson* v. *State,* 62 Ark. 497, 54 Am. St. Rep. 303, 36 S. W. 842; *Cox* v. *State,* 28 Tex. App. 92, 94, 12 S. W. 493; *McKinnie* v. *State,* 44 Fla. 143, 144, 32 So. 786; *State* v. *Burns,* 48 Mo. 438, 440; *State* v. *Benson,* 22 Kan. 471.

laid, the proof is sufficient.[4] A rational conclusion is a conclusion that leaves no reasonable doubt, so that the difference seems to be merely in the form of expression, and not in the degree of proof. No principle is more firmly settled than that venue must not be left to inference. Hence, as an averment essential to a valid indictment, and one of the essential elements to be proved, the weight of authority is that venue must be proved beyond a reasonable doubt.[5]

[4] *Bryan* v. *State,* 19 Fla. 864; *State* v. *Horner,* 48 Mo. 520; *Richardson* v. *Com.* 80 Va. 124; *People* v. *Manning,* 48 Cal. 335, 338; *Warrace* v. *State,* 27 Fla. 362, 8 So. 748; *Smith* v. *State,* 29 Fla. 408, 10 So. 894; *Keeler* v. *State,* 73 Neb. 441, 446, 103 N. W. 64; *State* v. *Sanders,* 106 Mo. 188, 190, 17 S. W. 223; *Weinecke* v. *State,* 34 Neb. 14, 24, 51 N. W. 307; *Abrigo* v. *State,* 29 Tex. App. 143, 150, 15 S. W. 408; *Weinberg* v. *People,* 208 Ill. 15, 19, 69 N. E. 936; *McCune* v. *State,* 42 Fla. 192, 89 Am. St. Rep. 225, 27 So. 867; *Florence* v. *Berry,* 61 S. C. 237, 39 S. E. 389; *Harvey* v. *Territory,* 11 Okla. 156, 158, 65 Pac. 837; *Tipton* v. *State,* 119 Ga. 304, 306, 46 S. E. 436, 15 Am. Crim. Rep. 209.

[5] *Walker* v. *State,* 153 Ala. 31, 45 So. 640; *Franklin* v. *State,* 5 Baxt. 613; *Sedberry* v. *State,* 14 Tex. App. 233, 234.

The position taken in the text is supported by the better authorities. The fact that the venue may be established by circumstantial evidence has led to some loose expressions as to the degree of proof required. The fact that the evidence of any essential averment is circumstantial does not lessen the degree of proof required to establish it. A close analysis of all evidence shows that, no matter how direct it may be, we infer certain results from that evidence, and that inference may be as conclusive as our own existence. But the fact that we infer certain results does not warrant the assertion that the results are mere matters of inference and may be established as matters of inference.

In Texas, where the cases assert in terms that venue need not be established beyond a reasonable doubt, the court says: "One (error) in the record is fatal, and that is that the venue of the offense is nowhere established by the evidence shown in the record. . . . We might infer, . . . but inferences alone cannot be indulged to establish the venue of an offense." *Sedberry* v. *State,* 14 Tex. App. 233.

There is no necessity that any witness testify in so many words to the place of offense, but it is sufficient if the evidence as a whole leaves no reasonable doubt that the acts charged were committed within the place laid. *People* v. *Manning,* 48 Cal. 335; *State* v. *Dickerson,* 77

§ 108. Venue; circumstantial evidence.—To prove venue, it is not necessary that the witnesses should testify in terms that the offense was committed in the place charged. As in all other essential matters, the proof is not required to be direct, nor in express terms,[1] but all reasonable inferences of which the testimony will admit may be drawn by the jury, under the instructions of the court, as to where the crime charged occurred.[2]

Thus the finding of a body, with marks of injuries upon it sufficient to cause death, in a river in the heart of a county, in such situation and condition as to lead to the reasonable inference that it was thrown there by the hand of man, and not there merely by the force of the current, is enough to war-

Ohio St. 34, 13 L.R.A.(N.S.) 341, 345, 122 Am. St. Rep. 479, 82 N. E. 969, 11 A. & E. Ann. Cas. 1181.

[1] *People* v. *Manning,* 48 Cal. 335, 338; *Com.* v. *Costley,* 118 Mass. 3; *State* v. *Calvin,* R. M. Charlt. (Ga.) 142; *Moody* v. *State,* 7 Blackf. 424; *Cluck* v. *State,* 40 Ind. 263; *State* v. *Dent,* 6 S. C. 383, 3 Am. Crim. Rep. 421; *State* v. *McGinniss,* 74 Mo. 245.

But see *Bell* v. *State,* 1 Tex. App. 81; *Dumas* v. *State,* 62 Ga. 58; *State* v. *West,* 69 Mo. 401, 404, 33 Am. Rep. 506; *Harlan* v. *State,* 134 Ind. 339, 341, 33 N. E. 1102; *State* v. *Sanders,* 106 Mo. 188, 194, 17 S. W. 223, *State* v. *Snyder,* 44 Mo. App. 429, 430; *Abrigo* v. *State,* 29 Tex. App. 143, 150, 15 S. W. 408; *Tinney* v. *State,* 111 Ala. 74, 20 So. 597; *Burst* v. *State,* 89 Ind. 133, 134; *Weinecke* v. *State,* 34 Neb. 14, 24, 54 N. W. 307; *Brooke* v. *People,* 23 Colo. 375, 378, 48 Pac. 502; *State* v. *Thomas,* 58 Kan. 805, 808, 51 Pac. 228; *Harvey* v. *Territory,* 11 Okla. 156, 162, 65 Pac. 837; *Bloom* v. *State,* 68 Ark. 336, 58 S. W. 41; *State* v. *Dent,* 170 Mo. 398, 70 S. W. 881; *State* v. *Bailey,* 73 Mo. App. 576, 579; *People* v. *Kamaunu,* 110 Cal. 609, 613, 42 Pac. 1090; *McCune* v. *State,* 42 Fla. 192, 89 Am. St. Rep. 225, 27 So. 867; *Bland* v. *People,* 4 Ill. 364; *State* v. *Morgan,* 35 La. Ann. 293; *Com.* v. *Salyards,* 158 Pa. 501, 27 Atl. 993.

[2] *Malone* v. *State,* 116 Ga. 272, 42 S. E. 468; *Little* v. *State,* 3 Ga. App. 441, 60 S. E. 113; *McCoy* v. *State,* 123 Ga. 143, 51 S. E. 279; *State* v. *Meyer,* 135 Iowa, 507, 511, 124 Am. St. Rep. 291, 113 N. W. 322, 14 A. & E. Ann. Cas. 1; *Davis* v. *State,* 134 Wis. 632, 642, 115 N. W. 150; *Carroll* v. *State,* 121 Ga. 197, 48 S. E. 909.

rant the jury in finding that a homicide was committed in that county.[3]

So, in forgery, where an instrument purporting to have been made in Charleston, South Carolina, is proved to have been in the possession of the accused at its date, at that city, it is sufficient to warrant the inference that it was made there.[4]

Where the evidence showed that the offense was committed on a certain street in Peoria, Illinois, it was sufficient proof of the commission of the offense in Peoria county.[5] Proof that a crime was committed in Chicago was sufficient proof of the venue in Cook county.[6]

So, where the witnesses used the words "here" or "here in this city," and the court was sitting in Minneapolis, in Hennepin county, while indirect, the proof of the venue in Hennepin county was sufficient.[7]

So the venue in murder is sufficiently established by testimony which shows that the wound was inflicted while the deceased was between two points on a road, both points in the same county.[8]

The venue of the county being proved, that of the state follows, because the jury is presumed to know in what state they reside.[9]

But, where a forged bill of exchange was found upon J. S., who resided in Wiltshire and had so resided for about one year though under an assumed name, but the bill bore a date more than two years prior to the finding on him, and at a time when he lived in Somersetshire, on the trial of an indict-

[3] *Com.* v. *Costley,* 118 Mass. 2; *Carter* v. *State,* 40 Tex. Crim. Rep. 225, 232, 47 S. W. 979, 49 S. W. 74, 619.

[4] *State* v. *Jones,* 1 McMull. L. 236, 36 Am. Dec. 257.

[5] *Sullivan* v. *People,* 114 Ill. 26, 29, 28 N. E. 381; *Moore* v. *People,* 150 Ill. 407, 408, 37 N. E. 909.

[6] *Sullivan* v. *People,* 122 Ill. 387, 13 N. E. 248.

[7] *State* v. *Cantieny,* 34 Minn. 1, 24 N. W. 458, 6 Am. Crim. Rep. 418; *State* v. *Grear,* 29 Minn. 221, 223, 13 N. W. 140.

[8] *Dumas* v. *State,* 62 Ga. 58, 59.

[9] *State* v. *Pennington,* 124 Mo. 388, 392, 27 S. W. 1106.

ment against him for forgery in Wiltshire the evidence was not sufficient to sustain the venue of the offense in that county.[10] Where a forged deed purported to be made in the county of Harris, representing the grantor to be a resident of Galveston, and the grantee (the indicted forger) to be a resident of the county of Milan, and there was no evidence that the accused resided elsewhere than in the county of Milan, the evidence did not warrant the jury in finding that the forgery was committed in Anderson county, where the venue was laid.[11]

In an English case, where a commercial traveler was to remit collections to London daily, without deduction, and on the 1st and 2d of March, 1878, he collected two sums of money at Newark, which he did not remit until the first week in April, when one of his employers went to Grantham, his residence, and accused him of receiving and not accounting for the moneys, and he then and there handed to the employer a list of moneys collected, including the two sums, and there was no evidence that the accused returned to Grantham March 1st or 2d, it was held there was no evidence of embezzlement in Grantham.[12]

§ 109. Venue; surplusage; matter of description.—Where a minor locality is superfluously averred it is immaterial,[1] and details unnecessary to the description may be rejected as surplusage; likewise, where the descriptive part is divisible and certainty of place or offense can be obtained from either

[10] *Rex* v. *Crocker,* 2 Bos. & P. N. R. 87, 2 Leach, C. L. 987, Russ. & R. C. C. 97.

[11] *Henderson* v. *State,* 14 Tex. 503.

[12] *Reg.* v. *Treadgold,* 39 L. T. N. S. 291, 14 Cox, C. C. 220; *Jeffreys* v. *State,* 51 Tex. Crim. Rep. 566, 567, 103 S. W. 886; *People* v. *Goodrich,* 142 Cal. 216, 219, 75 Pac. 796; *State* v. *Shour,* 196 Mo. 202, 223, 95 S. W. 405.

[1] *Rex* v. *Woodward,* 1 Moody, C. C. 323; 2 Hale, P. C. 179, 244, 245; 1 East, P. C. 125; *Com.* v. *Gillon,* 2 Allen, 502, 504; *Heikes* v. *Com.* 26 Pa. 513, 515.

part.[2] But where the matter averred is stated as a matter of description, and not of venue, then it is necessary to prove it as laid.[3] Thus, in offenses against habitations, such as burglary, stealing from a dwelling house, storehouse, etc., any mistake that goes to a matter of description or situation, showing a material variance between the indictment and proof, is fatal.[4]

Thus, in an indictment for a failure to repair a highway, the situation of the highway is material.[5]

The rule is applicable to indictment for nuisances. Primarily, it is the location that gives the nuisance character to establishments, trades, and structures that in another locality would cease to have that character, and so in all the generic class of establishments that are not nuisances *per se*, but become so by location, venue is of the substance of the offense,[6] and the proof must sustain the averment.

§ 109a. Venue in arson.—An indictment for arson, where the tenement was averred to be in the sixth ward of New York, whereas it was in the fifth, was held bad.[1] The description was limited to a certain ward, and when the proof failed as that particular ward the indictment failed. Had the indictment averred the burning as of the city, without limiting it to any particular district, evidence of burning in the city

[2] *Carlisle* v. *State*, 32 Ind. 55, 59; *State* v. *Hill*, 13 R. I. 314, 315.

[3] *State* v. *Cotton*, 24 N. H. 143, 146; *Moore* v. *State*, 12 Ohio St. 387, 391; *Dennis* v. *State*, 91 Ind. 291, 294; *Droneberger* v. *State*, 112 Ind. 105, 106, 13 N. E. 259; *State* v. *Crogan*, 8 Iowa, 523, 524; *Rex* v. *Ridley*, Russ. & R. C. C. 515; *Grimme* v. *Com.* 5 B. Mon. 263.

[4] *Reg.* v. *Cranage*, 1 Salk. 385; *Rex* v. *Owen*, 1 Moody, C. C. 118, Car. Crim. Law, 309; *O'Brien* v. *State*, 10 Tex. App. 544, 546.

See *Chapman* v. *People*, 39 Mich. 357, 361; *State* v. *Crogan*, 8 Iowa, 523, 524; *Chute* v. *State*, 19 Minn. 271, 280, Gil. 230.

[5] 2 Starkie, Crim. Pl. 693.

[6] *Shaw* v. *Wrigley*, cited in 2 East, 500; *Wertz* v. *State*, 42 Ind. 161, 163.

[1] *People* v. *Slater*, 5 Hill, 401.

would have sustained the indictment.[2] So, where the offense is of a local nature, whatever is averred by way of description must be proved as laid.[3]

§ 109b. Venue in bribery.—Where a county official was indicted for bribery to influence his action in reducing the assessment on a certain lot, the indictment was held insufficient where it failed to aver the venue as a lot situated in a town of which the accused was an official.[1]

§ 109c. Venue in conspiracy.—In conspiracy, an indictment laying the offense in a particular county and state is sustained by proof of any overt act in such county and state.[1]

§ 109d. Venue in larceny.—Larceny at common law is considered as committed in every county or jurisdiction into which the thief carries the goods, for the legal possession of them still remains in the true owner, and every moment's

[2] *State* v. *Meyers,* 9 Wash. 8, 10, 36 Pac. 1051; *People* v. *Wooley,* 44 Cal. 494, 496; *Com.* v. *Barney,* 10 Cush. 480, 483; *Baker* v. *State,* 25 Tex. App. 1, 25, 8 Am. St. Rep. 427, 8 S. W. 23; *State* v. *Moore,* 24 S. C. 150, 58 Am. Rep. 241.

[3] *State* v. *Jaynes,* 78 N. C. 504, 507; *State* v. *Roseman,* 66 N. C. 634, 635; *State* v. *Burrows,* Houst. Crim. Rep. (Del.) 74; *State* v. *Whitmore,* 147 Mo. 78, 47 S. W. 1068, 11 Am. Crim. Rep. 130; *Ayres* v. *State,* 115 Tenn. 722, 91 S. W. 195.

[1] *Gunning* v. *People,* 189 Ill. 165, 171, 82 Am. St. Rep. 433, 59 N. E. 494, 15 Am. Crim. Rep. 454.

[1] *Rex* v. *Ferguson,* 2 Starkie, 489; *Com.* v. *Corlies,* 3 Brewst. (Pa.) 575; *Bloomer* v. *State,* 48 Md. 521, 535, 3 Am. Crim. Rep. 37; Wharton, Crim. Law, 10th ed. §§ 287, 1397; *United States* v. *Newton,* 52 Fed. 275; *Com.* v. *Gillespie,* 7 Serg. & R. 469, 10 Am. Dec. 475; *Com.* v. *Parker,* 108 Ky. 673, 57 S. W. 484; *People* v. *Summerfield,* 48 Misc. 242, 96 N. Y. Supp. 502, 504, 19 N. Y. Crim. Rep. 503; *Dawson* v. *State,* 38 Tex. Crim. Rep. 9, 40 S. W. 731.

As to evidence of overt act when barred by statute, *Ware* v. *United States,* 12 L.R.A.(N.S.) 1053, 84 C. C. A. 503, 154 Fed. 577, 12 A. & E. Ann. Cas. 233

continuance of the act amounts to a new taking and asportation.[1]

As between states, the state into which the thief brings the property has jurisdiction at common law,[2] though this has been disputed in some of the states.[3] It has been held in Maine and Vermont that an indictment may be sustained in the state into which the goods are brought, even though they were stolen in Canada.[4]

In the early cases in England and in this country, this rule did not apply to goods stolen outside of the Kingdom,[5] but

[1] *Murray* v. *State,* 18 Ala. 727, 728; *State* v. *Ellis,* 3 Conn. 185, 190, 8 Am. Dec. 175; *United States* v. *Mortimer,* 1 Hayw. & H. 215, Fed. Cas. No. 15,821; *People* v. *Staples,* 91 Cal. 23, 28, 27 Pac. 523; *State* v. *Cummings,* 33 Conn. 260, 264, 89 Am. Dec. 208; *Com.* v. *Parker,* 165 Mass. 526, 536, 43 N. E. 499; *State* v. *Williams,* 35 Mo. 229, 232.

Contra, see: *Lee* v. *State,* 64 Ga. 203, 204, 37 Am. Rep. 67; *State* v. *Reonnals,* 14 La. Ann. 276; *People* v. *Gardner,* 2 Johns. 477; *Strouther* v. *Com.* 92 Va. 789, 792, 53 Am. St. Rep. 852, 22 S. E. 852; *Whizenant* v. *State,* 71 Ala. 383, 385; *Rex* v. *Peas,* 1 Root, 69; *Green* v. *State,* 114 Ga. 918, 920, 41 S. E. 55; *Morton* v. *State,* 118 Ga. 306, 45 S. E. 395; *McCoy* v. *State,* 123 Ga. 143, 145, 51 S. E. 279; *State* v. *Harney,* 54 Mo. 141; *State* v. *Williams,* 147 Mo. 14, 19, 47 S. W. 891; *Hurlburt* v. *State,* 52 Neb. 428, 430, 72 N. W. 471; *Barclay* v. *United States,* 11 Okla. 503, 513, 69 Pac. 798; *Rose* v. *State,* — Tex. Crim. Rep. —, 65 S. W. 911.

[2] *State* v. *Underwood,* 49 Me. 181, 184, 77 Am. Dec. 254; *State* v. *Bartlett,* 11 Vt. 650, 654; *Com.* v. *Andrews,* 2 Mass. 14, 15, 3 Am. Dec. 17; *Com.* v. *Holder,* 9 Gray, 7, 10; *State* v. *Ellis,* 3 Conn. 186, 190, 8 Am. Dec. 175; *Cummings* v. *State,* 1 Harr. & J. 340; *Hamilton* v. *State,* 11 Ohio, 435, 438; *Myers* v. *People,* 26 Ill. 173, 177; *People* v. *Williams,* 24 Mich. 156, 163, 9 Am. Rep. 119; *State* v. *Bennett,* 14 Iowa, 479, 482; *Ferrill* v. *Com.* 1 Duv. 153; *Watson* v. *State,* 36 Miss. 593, 603; *State* v. *Newman,* 9 Nev. 48, 53, 16 Am. Rep. 3.

[3] *People* v. *Gardner,* 2 Johns. 477; *State* v. *LeBlanch,* 31 N. J. L. 82; *Simmons* v. *Com.* 5 Binn. 619; *Beal* v. *State,* 15 Ind. 378; *State* v. *Brown,* 2 N. C. (1 Hayw.) 100, 1 Am. Dec. 548; *State* v. *Reonnals,* 14 La. Ann. 276; *People* v. *Loughridge,* 1 Neb. 11, 13, 93 Am. Dec. 325; *Simpson* v. *State,* 4 Humph. 461.

[4] *State* v. *Underwood,* 49 Me. 181, 187, 77 Am. Dec. 254; *State* v. *Bartlett,* 11 Vt. 650, 655.

[5] *Butler's Case, Re,* cited in 3 Co. Inst. 113; *Reg.* v. *Peel,* 9 Cox, C. C. 220, Leigh & C. C. C. 231, 32 L. J. Mag. Cas. N. S. 65, 8 Jur. N.

in England this was remedied by statute,[6] and the rule is universal in the United States.[7]

§ 110. Venue in homicide.—At common law, murder, like all offenses, must be inquired of in the county in which it was committed. For some time it was a matter of doubt whether, when a man died in one county, of a stroke received in another county, the offense could be considered as completed in either county.[1]

In England this was met by the enactment in 1548 of the statute 2d and 3d Edward VI. chap. 24, § 11, subd. 5,[2] which provided that where a person feloniously strikes or poisons another in one county, and death occurs from the same stroke

S. 1185, 7 L. T. N. S. 336, 11 Week. Rep. 40; *Com.* v. *Uprichard,* 3 Gray, 434, 437, 63 Am. Dec. 762.

[6] 2 Russell, Crimes, 7th Eng. ed. p. 1307.

[7] See supra, note 1.

[1] 1 Hawk. P. C. chap. 25, § 36; 1 East, P. C. 361; Coke Lit. 74b; 1 Hale, P. C. 426, 500; 2 Hale, P. C. 20, 163; *Reg.* v. *Lewis,* Dears. & B. C. C. 182, 7 Cox, C. C. 277, 26 L. J. Mag. Cas. N. S. 104, 3 Jur. N. S. 525; *United States* v. *M'Gill,* (1806) 4 Dall. 427, 1 L. ed. 894, Fed. Cas. No. 15,676; *United States* v. *Armstrong,* 2 Curt. C. C. 446, Fed. Cas. No. 14,467; *State* v. *Carter,* 27 N. J. L. 500.

[2] 5 Eng. Stat. at L. p. 320.

This statute provided as follows: "For redress and punishment of which offenses, and safeguard of man's life, be it enacted by the authority of this present Parliament, that when any person or persons hereafter shall be feloniously stricken or poisoned in one county and died of the same stroke or poisoning in another county, that then an indictment thereof founden by the jurors of the county where the death shall happen, whether it shall be founden before the coroner upon the sight of such dead body, or before the justices of peace, or other justices or commissioners which shall have authority to enquire of such offenses, shall be as good and effectual in law as if the stroke or poisoning had been committed and done in the same county where the party shall die, or where such indictment shall be so founden; any law or usage to the contrary notwithstanding."

The law so remained in England from 1548 until 1826, when it was repealed by 7 Geo. IV. chap. 64, § 32, but the repealing clause enacted that the venue might be either of the county of the stroke or the death. *Reg.* v. *Ellis,* Car. & M. 564; *Towers* v. *Newton,* 1 Q. B. 320.

or poison in another county, that the indictment shall be found where the death shall happen.

This statute came in as a part of the common law, as adopted in most American states in 1607, and being a part of the common law, there should have been no confusion as to where the act was completed, and that the venue was always where death occurred. But some early decisions in this country held variously, some that the venue was where the wound was inflicted,[3] and others, where the death occurred.[4] The latter

[3] Cases laying venue where stroke given.—*Stout* v. *State,* 76 Md. 317, 321, 25 Atl. 299, 9 Am. Crim. Rep. 398; *Debney* v. *State,* 45 Neb. 856, 858, 34 L.R.A. 851, 64 N. W. 446; *Spann* v. *State,* 47 Ga. 549, 550; *State* v. *Carter,* 27 N. J. L. 499, 500; *State* v. *McCoy,* 8 Rob. (La.) 547, 41 Am. Dec. 301; *United States* v. *Guiteau,* 1 Mackey, 498, 47 Am. Rep. 247; *Com.* v. *Macloom,* 101 Mass. 1, 100 Am. Dec. 89; *Ex parte McNeeley,* 36 W. Va. 84, 15 L.R.A. 226, 32 Am. St. Rep. 831, 14 S. E. 436; *United States* v. *M'Gill,* 4 Dall, 426, 1 L. ed. 894, Fed. Cas. No. 15,676; *Hunter* v. *State,* 40 N. J. L. 495, 532; *Roach* v. *State,* 34 Ga. 78, 81; *State* v. *Bowen,* 16 Kan. 475, 477; *State* v. *Foster,* 8 La. Ann. 290, 291, 58 Am. Dec. 678; *State* v. *Fields,* 51 La. Ann. 1239, 1240, 26 So. 99; *State* v. *Kelly,* 76 Me. 331, 337, 49 Am. Rep. 620, 5 Am. Crim. Rep. 343; *People* v. *Tyler,* 7 Mich. 161, 74 Am. Dec. 703; *State* v. *Gessert,* 21 Minn. 369; *State* v. *Blunt,* 110 Mo. 322, 19 S. W. 650; *State* v. *Garrison,* 147 Mo. 548, 550, 49 S. W. 508; *Robbins* v. *State,* 8 Ohio St. 133, 160.

[4] Cases laying venue where death occurs: *State* v. *Hall,* 114 N. C. 909, 910, 28 L.R.A. 59, 41 Am. St. Rep. 822, 19 S. E. 602; *Tyler* v. *People,* 8 Mich. 326, 331; *People* v. *Gill,* 6 Cal. 637, 638; *Riley* v. *State,* 9 Humph. 646, 657; *State* v. *Cutshall,* 110 N. C. 538, 16 L.R.A. 130, 15 S. E. 261; *State* v. *Chapin,* 17 Ark. 561, 65 Am. Dec. 452; *State* v. *Grady,* 34 Conn. 118, 129; *People* v. *Adams,* 3 Denio, 190, 206, 45 Am. Dec. 468; *State* v. *Wyckoff,* 31 N. J. L. 65 (but see *State* v. *Carter,* 27 N. J. L. 499).

Where the offense is partly on sea and land, and tried by admiralty courts, the venue is where the death occurred. *People* v. *Adams,* 3 Denio, 190, 45 Am. Dec. 468; 1 East, P. C. 367; *Rex* v. *Coombes,* 1 Leach, C. L. 388; *United States* v. *Furlong,* 5 Wheat. 184, 5 L. ed. 64.

So, the killing of a man on a foreign ship by shooting from an American ship is cognizable in the courts of the foreign country. *United States* v. *Davis,* 2 Sumn. 482, Fed. Cas. No. 14,932.

So, in the killing by an innocent agent in another state. *Lindsey* v.

holding is the general rule, unless otherwise controlled by statute.

§ 111. Venue in treason.—Treason, both by the Federal and the state Constitutions, is limited to levying war against the sovereignty or giving aid and help to its enemies; the proof of it is confined to the testimony of at least two witnesses to the same overt act, or to open confession in court, and the venue of the offense may be laid in any district or jurisdiction where any overt act was committed.[1]

§ 111a. Venue where part of offense occurs in the jurisdiction.—In many cases the cause of the offense occurred apparently outside of the jurisdiction of the court, but the venue of the offense may be laid within the jurisdiction of the court whenever it can be shown by the evidence that some part of the offense occurred or accrued within that jurisdiction.

Pollution of waters.—Where waters are polluted by putting refuse into the stream in one county, the venue of the offense is properly laid in the county into which the polluted waters flow.[1]

State, 38 Ohio St. 507, 512. So, with aiders and abetters, being triable where the principal is triable. *Hatfield* v. *Com.* 11 Ky. L. Rep. 468, 12 S. W. 309.

But, under statute, conspiracy to murder completed in another county is cognizable in either county. *People* v. *Thorn,* 21 Misc. 130 47 N. Y. Supp. 46.

So, where the parties venture into the limits of the offended jurisdiction or are brought there by extradition. *State* v. *Cutshall,* 110 N. C. 538, 16 L.R.A. 130, 15 S. E 261.

The question of the jurisdiction is one of law; the place of the stroke is one of fact. *State* v. *Foster,* 8 La. Ann. 290, 58 Am. Dec. 678. For statutory provisions in the several states, see Wharton, Homicide, Bowlby's 3d ed. § 555.

[1] Wharton, Crim. Law, 10th ed. § 1810; *United States* v. *Burr,* Fed. Cas. Nos. 14,693, 14,694a; *United States* v. *Hanway,* 2 Wall. Jr. 139, Fed. Cas. No. 15,299; U. S. Rev. Stat. § 5440, U. S. Comp. Stat. 1901, p. 3676.

[1] *American Strawboard Co.* v. *State,* 70 Ohio St. 140, 148, 71 N. E.

Interstate waters.—But all matters of offense and of control of interstate waters, or where the waters flow between two states, each being equal sovereignties, the proper venue of the same is always in the United States Supreme Court, at Washington.[2]

Receiving stolen goods.—The gist of the offense of receiving stolen goods, knowing them to be stolen, is where the goods are received, and not in the county from which they were stolen nor into which they were subsequently taken after being so received,[3] and the venue is properly laid in the county into which they were so received.

Abduction of female.—In abduction, the gist of the offense being the taking for the prohibited purpose, the venue of the crime is in the jurisdiction where the procurement is undertaken, whether the girl is taken from the jurisdiction or not.[4]

Intoxicating liquors.—In prosecutions for offenses against laws relating to intoxicating liquors, the proper venue is at the place of sale.[5]

Statutory venue in either of two counties.—Where by statute, or at the election of the prosecution, an indictment may be found in either of two counties, in order to sustain the

284; *State* v. *Glucose Sugar Ref. Co.* 117 Iowa, 524, 527, 91 N. W. 794.

[2] *Missouri* v. *Illinois,* 200 U. S. 496, 50 L. ed. 572, 26 Sup. Ct. Rep. 268; *Kansas* v. *Colorado,* 206 U. S. 46, 51 L. ed. 956, 27 Sup. Ct. Rep. 655.

[3] *State* v. *Pray,* 30 Nev. 206, 94 Pac. 218; *Campbell* v. *People,* 109 Ill. 565, 569, 50 Am. Rep. 621, 4 Am. Crim. Rep. 338; *State* v. *Habib,* 18 R. I. 558, 559, 30 Atl. 462; *State* v. *White,* 76 Kan. 654, 14 L.R.A. (N.S.) 556, 92 Pac. 829.

[4] *Studer* v. *State,* 74 Ohio St. 519, 78 N. E. 1139; *State* v. *Johnson,* 115 Mo. 480, 495, 22 S. W. 463, 9 Am. Crim. Rep. 7.

But where a girl was taken, with her father's consent, into another county, it is reasonable to infer that the purpose of misusing her was not manifest until she had reached such other county, and the venue was properly laid in the latter county. *People* v. *Lewis,* 141 Cal. 543, 75 Pac. 189.

[5] *Owens* v. *State,* 47 Tex. Crim. Rep. 634, 635, 85 S. W. 794; *Luster* v. *State,* — Tex. Crim. Rep. —, 86 S. W. 326.

averment of venue, it is only necessary to prove that the offense was partly committed in the county where the prosecution was instituted.[6]

§ 112. Venue; extraterritorial principal; intraterritorial commission.—Where an extraterritorial principal directs an offense, he is liable intraterritorially for the acts of his agent in its commission.[1]

§ 113. Venue; threatening letters; libels; forged instruments.—Where threatening letters or libels or forged instruments are written in one county, and sent by mail into another, the indictment lies in the county in which the letter was received as well as that in which it was mailed, and the venue of the offense may be laid in either county.[1]

[6] *State* v. *Allen,* 21 S. D. 121, 110 N. W. 92; *Hackney* v. *State,* — Tex. Crim. Rep. —, 74 S. W. 554; *Pearce* v. *State,* 50 Tex. Crim. Rep. 507, 510, 98 S. W. 861; *State* v. *Seagraves,* 111 Mo. App. 353, 355, 85 S. W. 925; *Patterson* v. *State,* 146 Ala. 39, 41 So. 157; *Nickols* v. *Com.* 27 Ky. L. Rep. 690, 86 S. W. 513.

[1] Wharton, Crim. Law, 10th ed. §§ 278, et seq.; *Reg.* v. *Garrett,* 6 Cox, C. C. 260, Dears. C. C. 232, 2 C. L. R. 106, 23 L. J. Mag. Cas. N. S. 20, 17 Jur. 1060, 2 Week. Rep. 97; *Rex* v. *Johnson,* 7 East, 65; *Com.* v. *Smith,* 11 Allen, 243, 258; *State* v. *Grady,* 34 Conn. 119, 129; *People* v. *Adams,* 3 Denio, 190, 206, 45 Am. Dec. 468; *State* v. *Wyckoff,* 31 N. J. L. 65; *Com.* v. *Gillespie,* 7 Serg. & R. 469, 10 Am. Dec. 475; *Bloomer* v. *State,* 48 Md. 521, 534, 3 Am. Crim. Rep. 37.

[1] *Rex* v. *Girdwood,* 1 Leach, C. L. 142, 2 East, P. C. 1120; *Com.* v. *Blanding,* 3 Pick. 304, 15 Am. Dec. 214; *People* v. *Griffin,* 2 Barb. 427; *People* v. *Rathbun,* 2 Wend. 533; Wharton, Crim. Law, 10th ed. §§ 288, 1620; *Rex* v. *Burdett,* 4 Barn. & Ald. 95; *Perkin's Case,* 2 Lewin, C. C. 150; 2 East, P. C. 420; *Reg.* v. *Jones,* 4 Cox, C. C. 198; *United States* v. *Worrall,* 2 Dall. 388, 1 L. ed. 427, Fed. Cas. No. 16,766; *Re Dana,* 7 Ben. 1, Fed. Cas. No. 3,554; Wharton, Crim. Law, 10th ed. 1621; *Mills* v. *State,* 18 Neb. 575, 26 N. W. 354; *Com.* v. *Dorrance,* 14 Phila. 671.

But see *Landa* v. *State,* 26 Tex. App. 580, 581, 10 S. W. 218.

§ 113a. Venue in duels and offers to bribe.—A challenge to fight a duel is a continuous offense, and the venue may be laid as well where the challenge is received as in the place from which it is sent.[1] Likewise, of an offer to bribe contained in a letter to a public officer; the offense being continuous, the venue may be laid either as of the mailing point, or the place of its receipt.[2]

§ 113b. Venue in Federal courts.—As there are no common-law offenses known to the Federal courts,[1] the venue, in statutory offenses, which are justifiable in those courts, is regulated by statute. But, in analogy to the common law, where offenses are continuous the venue may be laid in the jurisdiction where the wrong is initiated[2] or in the jurisdiction where it is consummated.[3]

In mailing lottery advertisements, or in using the mails to defraud, the crime is complete when the prohibited matter is deposited in the mail box, and the venue may be laid there,[4] but the offense of causing the prohibited matter to be deliv-

[1] *State* v. *Farrier*, 8 N. C. (1 Hawks) 487; *State* v. *Taylor*, 1 Treadway, Const. 107; *Rex* v. *Williams*, 2 Campb. 506, 11 Revised Rep. 781; *Ivey* v. *State*, 12 Ala. 276, 278; Wharton, Crim. Law, 10th ed. § 1774; *Harris* v. *State*, 58 Ga. 332.

Aiders and abetters, see *Reg.* v. *Taylor*, L. R. 2 C. C. 147; *Com.* v. *Lambert*, 9 Leigh, 607; *Cullen* v. *Com.* 24 Gratt. 624; *State* v. *Du Bose*, 88 Tenn. 753, 13 S. W. 1088.

[2] *United States* v. *Worrall*, 2 Dall. 384, 1 L. ed. 426, Fed. Cas. No. 16,766.

[1] *United States* v. *Eaton*, 144 U. S. 677, 36 L. ed. 591, 12 Sup. Ct. Rep. 764, and cases cited.

[2] *Bridgeman* v. *United States*, 72 C. C. A. 145, 140 Fed. 577; *Davis* v. *United States*, 43 C. C. A. 448, 104 Fed. 136; *United States* v. *Murphy*, 91 Fed. 120; *Re Richter*, 100 Fed. 295; *United States* v. *Noblom*, Fed. Cas. No. 15,896.

[3] *Benson* v. *Henkel*, 198 U. S. 1, 49 L. ed. 919, 25 Sup. Ct. Rep. 569; *Barrett* v. *United States*, 169 U. S. 218, 42 L. ed. 723, 18 Sup. Ct. Rep. 327; *Kerr* v. *Shine*, 69 C. C. A. 69, 136 Fed. 61.

[4] *United States* v. *Lynch*, 49 Fed. 851.

See *United States* v. *Conrad*, 59 Fed. 458; *United States* v. *Sauer*, 88 Fed. 249.

ered is complete where delivery is made and the venue may be laid there.[5]

§ 114. Setting forth written instruments and records.— When an indictment undertakes to set forth a document according to its "tenor," it means an exact copy of the writing set forth in the words and figures of it, and binds the pleader to a strict recital;[1] or, where it is prefaced by such a phrase, "as follows," then any variance as to the words of the document, except a fault in spelling a word, is a fatal variance.[2] It is not necessary to copy the engraving or embellishments of documents, because that would be setting forth in *facsimile,* but if there is an attempt to set forth in *facsimile,* a variance

[5] *Horner* v. *United States,* 143 U. S. 207, 36 L. ed. 126, 12 Sup. Ct. Rep. 407.

[1] *Com.* v. *Stevens,* 1 Mass. 203, 204; *McDonnell* v. *State,* 58 Ark. 242, 248, 24 S. W. 105; *Thomas* v. *State,* 103 Ind. 419, 2 N. E. 808, 812; *Com.* v. *Wright,* 1 Cush. 46, 65; *Dana* v. *State,* 2 Ohio St. 91, 94; *Edgerton* v. *State,* — Tex. Crim. Rep. —, 70 S. W. 90, 15 Am. Crim. Rep. 271; *State* v. *Calendine,* 8 Iowa, 288, 296.

[2] *Rex* v. *Powell,* 1 Leach, C. L. 78; *Rex* v. *Gilchrist,* 2 Leach, C. L. 660; *Rex* v. *Aslett,* 2 Leach, C. L. 961; 2 East, P. C. 976; *Clay* v. *People,* 86 Ill. 147, 150, 2 Am. Crim. Rep. 381; *State* v. *Townsend,* 86 N. C. 676, 679; *United States* v. *Keen,* 1 McLean, 429, Fed. Cas. No. 15,510; *State* v. *Bonney,* 34 Me. 383, 384; *State* v. *Witham,* 47 Me. 165, 167; *State* v. *Bean,* 19 Vt. 530, 532; *Com.* v. *Ray,* 3 Gray, 441, 446; *State* v. *Farrand,* 8 N. J. L. 336; *Yount* v. *State,* 64 Ind. 443; *State* v. *Bibb,* 68 Mo. 286, 288; *People* v. *Marion,* 28 Mich. 255, 256; *State* v. *Pease,* 74 Ind. 263, 264; *Dyer* v. *State,* 85 Ind. 525, 526; *Haslip* v. *State,* 10 Neb. 590, 7 N. W. 331; *State* v. *Owen,* 73 Mo. 440, 442; *Jacobs* v. *State,* 61 Ala. 448, 451, 4 Am. Crim. Rep. 465; *Ex parte Rogers,* 10 Tex. App. 655, 663, 38 Am. Rep. 654; *Huddleston* v. *State,* 11 Tex. App. 22, 25.

It has been said even erasures must be noticed. *Rooker* v. *State,* 65 Ind. 86.

Where a misspelling amounts to an obscurity, the variance has been held fatal. *Potter* v. *State,* 9 Tex. App. 55, 56.

So, where the mistake destroys the sense of the instrument. *State* v. *Edwards,* 70 Mo. 480, 483; *Strader* v. *State,* 92 Ind. 376, 377; *People* v. *St. Clair,* 56 Cal. 406, 407; *Jones* v. *State,* 21 Tex. App. 349, 351, 17 S. W. 424.

may be fatal.[3] It has even been held that the contraction of a word to its initial letter is a material variance.[4]

Where a document is set forth by translation, any variance from the sense of the original is fatal.[5]

The parts of the document on which the prosecution rests need not be set out in the indictment.[6]

[3] *State* v. *Carr,* 5 N. H. 367, 369; *Com.* v. *Bailey,* 1 Mass. 62, 2 Am. Dec. 3; *Com.* v. *Taylor,* 5 Cush. 605, 609; *Com.* v. *Searle,* 2 Binn. 332, 4 Am. Dec. 446; *Buckland* v. *Com.* 8 Leigh, 732; *Griffin* v. *State,* 14 Ohio St. 55; *Langdale* v. *People,* 100 Ill. 263, 268; *State* v. *Robinson,* 16 N. J. L. 507; *People* v. *Franklin,* 3 Johns. Cas. 299; *Miller* v. *People,* 52 N. Y. 304, 11 Am. Rep. 706.

[4] *Rex* v. *Barton,* 1 Moody, C. C. 141; *Reg.* v. *Inder,* 2 Car. & K. 635, 1 Den. C. C. 325; *Com.* v. *Kearns,* 1 Va. Cas. 109.

[5] *Rex* v. *Goldstein,* Russ. & R. C. C. 473, 7 Moore, 1, 10 Price, 88, 3 Brod. & B. 201; *People* v. *Ah Woo,* 28 Cal. 206, 208.

But see *Duffin* v. *People,* 107 Ill. 113, 117, 47 Am. Rep. 431.

[6] *Testick's Case,* 1 East, 181, note; *Com.* v. *Ward,* 2 Mass. 397; *Com.* v. *Adams,* 7 Met. 50; *Perkins* v. *Com.* 7 Gratt. 654, 56 Am. Dec. 123; *Buckland* v. *Com.* 8 Leigh, 732, 734; *State* v. *Gardiner,* 23 N. C. (1 Ired. L.) 27; *Hess* v. *State,* 5 Ohio, 5, 22 Am. Dec. 767; *Langdale* v. *People,* 100 Ill. 263, 268.

As to variance in the document and proof, see *State* v. *Handy,* 20 Me. 81, 82; *State* v. *Shawley,* 5 Hayw. 256; *State* v. *Snell,* 9 R. I. 112.

But that is not so where the variance consists in mere designation, and is not part of the essential descriptive matter. *State* v. *Calvin,* R. M. Charlt. (Ga.) 151.

Nor where the forged paper has been altered. *Huffman* v. *Com.* 6 Rand. (Va.) 685.

The variance between the copy set out in the indictment and the original must be material before it can be successfully raised. *Johnson* v. *People,* 36 Colo. 445, 84 Pac. 819; *Thomas* v. *State,* 103 Ind. 419, 2 N. E. 808.

It must be *verbatim,* or according to its effect, and not according to the opinion of the pleader. *United States* v. *Watson,* 17 Fed. 145.

But it seems it will not do to attach a copy to the indictment as in the case of an obscene publication, but that it must be set forth. *Com.* v. *Tarbox,* 1 Cush. 66.

Where it is averred, "a copy of which is inserted in the indictment," but no copy is set out, it is fatal. *Com.* v. *Wood,* 142 Mass. 459, 8 N. E. 432.

A limited number of abbreviations may be used in setting out the instrument, provided the words indicated are clearly understood. *State* v. *Jay,* 34 N. J. L. 368.

It will not vitiate the indictment where it is alleged that parts omit-

§ 114a. Setting forth written instruments and documents, continued.—It will be proper to note here the pleading of documents, but only to the extent that the averment of certain words in an indictment is sustained by evidence of controvertible terms.

In setting forth a document according to its tenor, it may be preceded by such introductory words as, "to the tenor following," "in these words," or "as follows," which import an accurate copy of the document, in which case the document must be proved as laid, or the variance is fatal.[1] But the words, "manner and form," "purport and effect," or "substance," do not imply verbal accuracy.[2] Quotation marks are not sufficient to indicate tenor.[3] A document lost by or in defendant's hands need not be set forth, and this rule is not affected by the prosecutor's negligence.[4] But where a document laid as destroyed is produced, then the variance is fatal.[5] A document in a foreign language must be translated and illegible parts explained by averments.[6] The proper course is to set out, as "of the tenor following," the original, and then to aver the translation in English to be "as follows."[7] And

ted are due to illegibility. *Fomby* v. *State*, 87 Ala. 36, 6 So. 271.

[1] Supra, § 114.

[2] *Rex* v. *May*, 1 Leach, C. L. 192; 1 Dougl. K. B. 193, 194; *Com.* v. *Wright*, 1 Cush. 46; *State* v. *Brownlow*, 7 Humph. 63; *Dana* v. *State*, 2 Ohio St. 91.

[3] *Com.* v. *Wright*, 1 Cush. 46.

[4] *Com.* v. *Sawtelle*, 11 Cush. 142; *Rex* v. *Watson*, 2 T. R. 200, 1 Revised Rep. 461; *People* v. *Bogart*, 36 Cal. 245, 247; *Rex* v. *Haworth*, 4 Car. & P. 254; *United States* v. *Britton*, 2 Mason, 468, Fed. Cas. No. 14,650; *State* v. *Bonney*, 34 Me. 223; *State* v. *Parker*, 1 D. Chip. (Vt.) 298, 6 Am. Dec. 735; *People* v. *Badgley*, 16 Wend. 53; *Wallace* v. *People*, 27 Ill. 45; *Pendleton* v. *Com.* 4 Leigh, 694; *State* v. *Davis*, 69 N. C. 313; *Du Bois* v. *State*, 50 Ala. 139; *People* v. *Kingsley*, 2 Cow. 522, 14 Am. Dec. 520; *State* v. *Potts*, 9 N. J. L. 26, 17 Am. Dec. 449; *United States* v. *Howell*, 64 Fed. 110.

[5] *Smith* v. *State*, 33 Ind. 159.

[6] *Rex* v. *Goldstein*, Russ. & R. C. C. 473; 7 J. B. Moore, 1, 10 Price, 88, 3 Brod. & B. 201.

[7] Ibid.; *R. v. Szudurskie*, 1 Moody, 429; *R.* v. *Warshaner*, 1 Wood. C. C. 466; *Warmouth* v. *Cramer*, 3 Wend. 394.

so where initials appear without averment of what they mean;[8] and where there is no averment of who the officer was whose name is copied in a forged instrument, there being no averment of what the instrument purports to be.[9] "Receipt" includes all admissions of payment.[10] Acquittance means discharge from duty.[11] "Treasury notes" may be stated as such.[12] "Money" is convertible into currency.[13] "Obligations" and "undertakings" are unilateral.[14] "Property" is whatever may be appropriated.[15] "Deed" is sustained by

As to California, see special statute. *People* v. *Ah Woo,* 28 Cal. 205, 209.

[8] *Rex* v. *Barton,* 1 Moody, C. C. 141; *Reg.* v. *Inder,* 2 Car. & K. 635, 1 Den. C. C. 325.

[9] *Rex* v. *Wilcox,* Russ. & R. C. C. 50; *United States* v. *Keen,* 1 McLean, 429, Fed. Cas. No. 15,510.

[10] *Rex* v. *Testick,* 2 East, P. C. 925; *Reg.* v. *Houseman,* 8 Car. & P. 180; *Reg.* v. *Moody,* Leigh & C. C. C. 173, 31 L. J. Mag. Cas. N. S. 156, 8 Jur. N. S. 574, 6 L. T. N. S. 301, 10 Week. Rep. 585, 9 Cox. C. C. 166.

But see *Com.* v. *Lawless,* 101 Mass. 32.

[11] *Com.* v. *Ladd,* 15 Mass. 526.

[12] *United States* v. *Bennett,* 17 Blatchf. 357, Fed. Cas. No. 14,570. See *Levy* v. *State,* 79 Ala. 259, 261; *State* v. *Thomason,* 71 N. C. 146; *State* v. *Fulford,* 61 N. C. (Phill. L.) 563; *Sallie* v. *State,* 39 Ala. 691, 692; *Wells* v. *State,* 4 Tex. App. 21, 22; *Hummel* v. *State,* 17 Ohio St. 628; *State* v. *Ziord,* 30 La. Ann. 867; *Dull* v. *Com.* 25 Gratt. 965, 975; *Grant* v. *State,* 55 Ala. 201, 207; *Du Bois* v. *State,* 50 Ala. 139; *People* v. *Jackson,* 8 Barb. 637; *United States* v. *Bornemann,* 36 Fed. 257; *Reed* v. *State,* 88 Ala. 36, 6 So. 840; *Malcolmson* v. *State,* 25 Tex. App. 267, 289, 8 S. W. 468; *Baggett* v. *State,* 69 Miss. 625, 13 So. 816; *Com.* v. *Grimes,* 10 Gray, 470, 71 Am. Dec. 666.

[13] Whatever is legal tender may be described as "money." *Reg.* v. *West,* 40 Eng. L. & Eq. Rep. 564, 7 Cox, C. C. 183; *Reg.* v. *Godfrey,* Dears. & B. C. C. 426, 27 L. J. Mag. Cas. N. S. 151, 4 Jur. N. S. 146, 6 Week. Rep. 251, 7 Cox, C. C. 392; *State* v. *Downs,* 148 Ind. 324, 47 N. E. 670; *Graham* v. *State,* 5 Humph. 40, 41; *State* v. *Hill,* 47 Neb. 456, 509, 66 N. W. 541.

Judicial notice taken of value. *State* v. *Pigg,* 80 Kan. 481, 103 Pac. 121, 18 A. & E. Ann. Cas. 521.

[14] *Fogg* v. *State,* 9 Yerg. 392; *Reg.* v. *West,* 1 Den. C. C. 258, 2 Carr & K. 496, 2 Cox, C. C. 437; *Clark* v. *Newsam,* 1 Exch. 131, 5 Eng. R. & C. Cas. 69, 16 L. J. Exch. N. S. 296.

[15] *People* v. *Williams,* 24 Mich. 156, 163, 9 Am. Rep. 119.

the production of a document under seal.[16] "Undertaking" is sustained by producing a guaranty or an I. O. U.[17] Under "goods and chattels" may be introduced in evidence anything that is the subject of common-law larceny.[18] "A warrant" for the payment of money includes any writing calling for the delivery of goods or money.[19]

An "order" implies something mandatory.[20] A "request" includes a mere invitation.[21] "A bank note of value" may be

[16] *Rex* v. *Fountleroy,* 1 Car. & P. 421, 1 Moody, C. C. 52, 2 Bing. 413, 10 Moore, 1; *Rex* v. *Lyon,* Russ. & R. C. C. 255; *Reg.* v. *Morton,* 12 Cox, C. C. 456, 42 L. J. Mag. Cas. N. S. 58, L. R. 2 C. C. 22, 28 L. T. N. S. 452, 21 Week. Rep. 629.

[17] *Reg.* v. *Joyce,* 10 Cox, C. C. 100, Leigh, & C. C. C. 576, 34 L. J. Mag. Cas. N. S. 168, 11 Jur. N. S. 472, 12 L. T. N. S. 351, 13 Week. Rep. 662; *Reg.* v. *Reed,* 2 Moody, C. C. 62; *Reg.* v. *Chambers,* L. R. 1 C. C. 341, 41 L. J. Mag. Cas. N. S. 15, 25 L. T. N. S. 507, 20 Week. Rep. 103, 12 Cox, C. C. 109.

[18] *State* v. *Bonwell,* 2 Harr. (Del.) 529.

[19] *Reg.* v. *Vivian,* 1 Car. & K. 719, 1 Den. C. C. 35; *Reg.* v. *Dawson,* 2 Den. C. C. 75, 5 Cox, C. C. 220, Temple & M. 428, 20 L. J. Mag. Cas. N. S. 102, 15 Jur. 159; *Reg.* v. *Autey,* 7 Cox, C. C. 329, Dears. & B. C. C. 294, 26 L. J. Mag. Cas. N. S. 190, 3 Jur. N. S. 697, 5 Week. Rep. 737; *Reg.* v. *Raake,* 2 Moody, C. C. 66.

[20] *Reg.* v. *Williams,* 2 Car. & K. 51; *McGuire* v. *State,* 37 Ala. 161; *Reg.* v. *Carter,* 1 Car. & K. 741, 1 Den. C. C. 65, 1 Cox, C. C. 170; *Rex* v. *Lockett,* 1 Leach, C. C. 94, 2 East, P. C. 940; *People* v. *Way,* 10 Cal. 336; *Reg.* v. *Curry,* 2 Moody, C. C. 218; *Rex* v. *Cullen,* 5 Car. & P. 116, 1 Moody, C. C. 300; *Rex* v. *Richards,* Russ. & R. C. C. 193; *People* v. *Farrington,* 14 Johns. 348; *Reg.* v. *Gilchrist,* 2 Moody, C. C. 233; Car. & M. 224; *Reg.* v. *Snelling,* 22 Eng. L. & Eq. Rep. 597; *Com.* v. *Butterick,* 100 Mass. 12; *Noakes* v. *People,* 25 N. Y. 380; *Com.* v. *Fisher,* 17 Mass. 46; *State* v. *Cooper,* 5 Day, 250; *People* v. *Shaw,* 5 Johns. 236; *Hoskins* v. *State,* 11 Ga. 92; *Johnson* v. *State,* 62 Ga. 299; *Jones* v. *State,* 50 Ala. 161; *Com.* v. *Kepper,* 114 Mass. 278; *Reg.* v. *Illidge,* 2 Car. & K. 871, 3 Cox, C. C. 552, Temple & M. 127, 1 Den. C. C. 404, 18 L. J. Mag. Cas. N. S. 179, 13 Jur. 543.

[21] *Reg.* v. *Jones,* 8 Car. & P. 292; *Rex* v. *Thomas,* 2 Moody, C. C. 16; *Reg.* v. *Newton,* 2 Moody, C. C. 59; *Reg.* v. *Walters,* Car. & M. 588; *Reg.* v. *White,* 9 Car. & P. 282; *Rex* v. *Evans,* 5 Car. & P. 553; *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; *Reg.* v. *Pulbrook,* 9 Car. & P. 37.

Orders also include checks, drafts,

sustained by proof of the notes of any authorized bank.[22] Where the bank is specified, such specification must be proved.[23] "Bond" is not sustained by proof of a document not under seal.[24] "Bill of exchange" is not sustained by the production of so defective an instrument as not to amount to a negotiable bill.[25] "Promissory note" is sustained by producing a due bill.[26]

The above distinctions and others of like nature are conditioned upon terms of the statutes under which they arise. To instance, if a statute should make it larceny to steal all "undertakings" for the payment of money, then it would be sustained by producing any writing under the general designation of undertaking, relating to the payment of money, and thus include bonds, notes, due bills, etc. But, where the statute states the matters in the disjunctive, or by specification

and bills of exchange. *Rex* v. *Willoughby*, 2 East, P. C. 944; *State* v. *Nevins*, 23 Vt. 519; *People* v. *Howell*, 4 Johns. 296.

So is a post-dated check. *Reg.* v. *Taylor*, 1 Car. & K. 213; 2 Russell, Crimes, 7th Eng. ed. p. 1746.

[22] *Com.* v. *Richards*, 1 Mass. 337; *Larned* v. *Com.* 12 Met, 240; *Com.* v. *Sawtell*, 11 Cush, 142; *Com.* v. *Cahill*, 12 Allen, 540; *Eastman* v. *Com.* 4 Gray, 416; *Com.* v. *Grimes*, 10 Gray, 470, 71 Am. Dec. 666.

[23] *Rex* v. *Jones*, 1 Dougl. K. B. 300; *Rex* v. *Shaw*, 1 Leach, C. L. 79; *Rex* v. *Reading*, 2 Leach, C. L. 590; 2 East, P. C. 952; *Salisbury*, v. *State*, 6 Conn. 101; *People* v. *Holbrook*, 13 Johns. 90; *People* v. *Wiley*, 3 Hill, 194; *People* v. *Jackson*, 8 Barb. 637; *Spangler* v. *Com.* 3 Binn. 533; *Grummond* v. *State*, 10 Ohio, 510; *State* v. *Rout*, 10 N. C. (3 Hawks) 618; Starkie, Crim. Pl. 217.

Too great particularity of description leading to variance. *Rex* v. *Craven*, Russ. & R. C. C. 14, 2 East, P. C. 601; *State* v. *Williamson*, 7 N. C. (3 Murph.) 216.

[24] *Salisbury* v. *State*, 6 Conn. 101.

[25] *Reg.* v. *Curry*, 2 Moody, C. C. 218; *Reg.* v. *Mopsey*, 11 Cox, C. C. 143; *People* v. *Howell*, 4 Johns. 296; *Reg.* v. *Harper*, 44 L. T. N. S. 615, 50 L. J. Mag. Cas. N. S. 90, L. R. 7 Q. B. Div. 78, 29 Week. Rep. 743, 14 Cox, C. C. 574; *Rex* v. *Birkett*, Russ. & R. C. C. 251; *Reg.* v. *Smith*, 2 Moody, C. C. 205; *Rex* v. *Wicks*, Russ. & R. C. C. 149; *Rex* v. *Hart*, 6 Car. & P. 106; *Reg.* v. *Butterwick*, 2 Moody & R. 196; *Rex* v. *Randall*, Russ. & R. C. C. 195; *Reg.* v. *Bartlett*, 2 Moody & R. 362.

[26] *People* v. *Finch*, 5 Johns. 237.

by names such as "undertakings, bonds, or notes" then such distinction must be maintained in the indictment.

§ 115. Setting forth records.—In setting forth records, great care is necessary, as any variance will, at common law, be fatal.[1] Thus if the whole record to which perjury is incidental is not accurately set forth, there must be an acquittal.[2]

§ 116. Averment of documents by legal effect.—Whenever the object is merely to give the legal character of the document, it is only necessary to describe the document by its general designation, without setting it out in words. If the legal effect of the document be accurately given, there will be no variance.[1]

[1] *Pope* v. *Foster,* 4 T. R. 590; *Woodford* v. *Ashley,* 11 East, 508; *Dakin's Case,* 2 Wms' Saund. 291b; *United States* v. *Bowman,* 2 Wash. C. C. 328, Fed. Cas. No. 14,631; *United States* v. *McNeal,* 1 Gall. 387, Fed. Cas. No. 15,700; *Com.* v. *Monahan,* 9 Gray, 119.

[2] *Reg.* v. *Christian,* Car. & M. 388; *Rex* v. *Browne,* 3 Car. & P. 572; *Reg.* v. *Dunn,* 2 Moody, C. C. 297, 1 Car. & K. 730; *Rex* v. *Stoveld,* 6 Car. & P. 489; *State* v. *Tappan,* 21 N. H. 56; *State* v. *Ammons,* 7 N. C. (3 Murph.) 123; *Jacobs* v. *State,* 61 Ala. 448, 4 Am. Crim. Rep. 465; *Brown* v. *State,* 47 Ala. 47.

Thus an indictment charging perjury "by falsely swearing to a material matter in a writing signed by him" was not sufficient to support the charge, because the accused could not know what he was called upon to answer. *State* v. *Mace,* 76 Me. 64, 65, 5 Am. Crim. Rep. 588; *Ford* v. *Com.* 16 Ky. L. Rep. 528, 29 S. W. 446; *Harrison* v. *State,* 41 Tex. Crim. Rep. 274, 53 S. W. 863; *Ross* v. *State,* 40 Tex. Crim. Rep. 349, 351, 50 S. W. 336; *Braeutigam* v. *State,* 63 N. J. L. 38, 42 Atl. 748.

So, where the offense is predicated upon the instrument, such as forgery, criminal libel, threatening letter, passing counterfeit money, the instrument must be averred literally. *Com.* v. *Wright,* 1 Cush. 46, 63; *Wright* v. *Clements,* 3 Barn. & Ald. 503, 22 Revised Rep. 465; *Com.* v. *Harmon,* 2 Gray, 289.

[1] *Bonnell* v. *State,* 64 Ind. 498; Starkie, Crim. Pl. 217; *Craven's Case,* 2 East, P. C. 601; *United States* v. *Keen,* 1 McLean, 429, Fed. Cas. No. 15,510; *United* v. *Burroughs,* 3 McLean, 405, Fed. Cas. No. 14,695; *Com.* v. *Richards,* 1 Mass. 337; *Com.* v. *Sawtelle,* 11 Cush. 142;

§ 117. Written instruments; variance; question for jury.—Where the variance is plain and is material, the instrument should not be admitted in evidence; but if the writing is uncertain and susceptible of being read in agreement with the description in the indictment, then it becomes a question of fact for the jury under the instructions of the court.[1]

An undecipherable description need not be averred or proved.[2]

§ 118. Written instrument lost or not obtainable; averment.—Where the document on which the case rests is destroyed, lost, or in the possession of the defendant before bill found, it is sufficient to set it forth in substance or in effect, averring at the same time, as an excuse for nonpublication, its loss, destruction, detention, or whatever the fact is.

Com. v. *Cahill,* 12 Allen, 540; *People* v. *Holbrook,* 13 Johns. 90; *People* v. *Wiley,* 3 Hill, 194; *People* v. *Jones,* 5 Lans. 340; *Com.* v. *Boyer,* 1 Binn. 201; *Stewart* v. *Com.* 4 Serg. & R. 194; *State* v. *Rout,* 10 N. C. (3 Hawks) 618; *Merrill* v. *State,* 45 Miss. 651; *Flynn* v. *State,* 34 Ark. 441; *Roth* v. *State,* 10 Tex. App. 27.

But where the indictment attempts to set forth the document itself, instead of by its effect or designation, it must be correctly set forth, or, at common law, a variance is fatal. *United States* v. *Keen,* 1 McLean, 429, Fed. Cas. No. 15,510; *United States* v. *Mason,* 12 Blatchf. 497, Fed. Cas. No. 15,736; *United States* v. *Denicke,* 35 Fed. 407. See *State* v. *Owen,* 73 Mo. 440, variance between note alleged and proof. Also *Com.* v. *Hickman,* 2 Va. Cas. 323; Russell, Crimes, 7th Eng. ed. p. 1951.

[1] *Turpin* v. *State,* 19 Ohio St. 540. See *O'Neil* v. *State,* 48 Ga. 66; *Buckland* v. *Com.* 8 Leigh. 732.

Where an employee was sent with a check payable to order, to discharge a note, but without any specific direction so to do, and he used the funds, and was indicted for embezzling treasury notes and bank bills, it was ruled that the question of variance was for the jury. *Com.* v. *Gateley,* 126 Mass. 52.

In Alabama it was ruled that a demurrer based on variance could not be considered unless oyer was craved of the instrument, but the proper practice was to take advantage of the variance by plea of not guilty. *Butler* v. *State,* 22 Ala. 43.

[2] *United States* v. *Mason,* 12 Blatchf. 197, Fed. Cas. No. 15,736.

In such case, on the trial the document may be proved by parol evidence, and if there is no material variance between the averment and evidence such proof will sustain the indictment.[1]

In England, where the document is in the defendant's hands, the practice is to give notice to produce the writing at the assize, so that it may be brought before the grand jury, but such notice is not necessary where the indictment itself is a notice.[2]

Thus, on trial of an indictment for stealing a bank bill, the bill being in the defendant's possession, it is not necessary to account for the nonproduction, the finding of the indictment being sufficient notice to produce.[3] Even where in an indictment for passing counterfeit money, where it was set forth according to its tenor, not followed by any averment of loss or destruction, the production of the counterfeit may be dispensed with or proof that the defendant has destroyed

[1] *Com.* v. *Houghton,* 8 Mass. 107, 110; *Com.* v. *Sawtelle,* 11 Cush. 142; *People* v. *Bogart,* 36 Cal. 245, 247; post, §§ 199–212; *Rex* v. *Haworth,* 4 Car. & P. 254; *Rex* v. *Hunter,* 4 Car. & P. 128; *Reg.* v. *Vernon,* 12 Cox, C. C. 153; *Reg.* v. *Colucci,* 3 Fost. & F. 103; *Butcher* v. *Jarratt,* 3 Bos. & P. 145; *United States* v. *Britton,* 2 Mason, 464, Fed. Cas. No. 14,650; *People* v. *Kingsley,* 2 Cow. 522, 524, 14 Am. Dec. 520; *People* v. *Badgley,* 16 Wend. 53, 56; *State* v. *Parker,* 1 D. Chip. (Vt.) 298, 6 Am. Dec. 735; *State* v. *Potts,* 9 N. J. L. 26, 27, 17 Am. Dec. 449; *Com.* v. *Messinger,* 1 Binn. 274, 2 Am. Dec. 441; *Pendleton* v. *Com.* 4 Leigh, 694, 697; *State* v. *Davis,* 69 N. C. 313, 317; *Thompson* v. *State,* 30 Ala. 28, 30; *Reg.* v. *Boucher,* 1 Fost. & F. 486.

Where the indictment averred the stealing of a posted letter containing property, by a postal clerk, setting out only the address, a witness deposed that he employed a man to post it, ruled that he might be asked how it was addressed though no notice had been given to produce. *Reg.* v. *Clube,* 3 Jur. N. S. 698.

[2] Supra, note 1; *Rex* v. *Aickles,* 1 Leach, C. L. 294, 2 East, P. C. 675; *Reg.* v. *Downham,* 1 Fost. & F. 386; *Reg.* v. *Elworthy,* L. R. 1 C. C. 103, 37 L. J. Mag. Cas. N. S. 3, 17 L. T. N. S. 293, 16 Week. Rep. 207, 10 Cox, C. C. 507, 11 Eng. Rul. Cas. 442; *State* v. *Mayberry,* 48 Me. 218, 239; *McGinnis* v. *State,* 24 Ind. 500; *Gray* v. *Kernahan,* 2 Mill, Const. 65; *Morgan* v. *Jones,* 24 Ga. 155.

[3] *People* v. *Holbrook,* 13 Johns. 90, 94; *Com.* v. *Messinger,* 1 Binn. 274, 2 Am. Dec. 441.

the same, and other evidence of its contents is admissible.[4] The better practice is to aver the destruction, if it took place before the bill is found.[5]

§ 119. Loss; predicate for secondary evidence.—As a predicate for secondary evidence of a written instrument, it must be shown that search has been made for it where it would be most likely to be found. The amount of evidence necessary to establish its loss or destruction varies according to the nature of the document, the custody in which it is, and all the surrounding circumstances. A document of importance which one would not willingly nor negligently permit to be mislaid or destroyed calls for a much more minute and accurate search than one of less importance or temporary value.[1]

If it is proposed to give secondary evidence of a written instrument traced to the hands of a certain person, that person must be called as a witness, and it is not sufficient to let in secondary evidence to show that he was applied to and replied that he could not find it nor did not know where it was.[2]

The only distinction between civil and criminal cases in this respect is, that the accused, in a criminal prosecution, cannot be compelled to give discovery and inspection of documents in his possession. In this case it is sufficient to trace the doc-

[4] *State* v. *Potts,* 9 N. J. L. 26, 17 Am. Dec. 449.

[5] *Crossland* v. *State,* 77 Ark. 537, 543, 92 S. W. 776; *State* v. *McNaspy,* 58 Kan. 691, 38 L.R.A. 756, 50 Pac. 895; *West* v. *State,* 45 Fla. 118, 121, 33 So. 854; *State* v. *Imboden,* 157 Mo. 83, 86, 57 S. W. 536; *State* v. *Peterson,* 129 N. C. 556, 557, 85 Am. St. Rep. 756, 40 S. E. 9; *Dillard* v. *United States,* 72 C. C. A. 451, 141 Fed. 303, 305;

[1] Post, § 206; *Watson* v. *State,* 63 Ala. 19, 22; *Card* v. *Jeans,* Manning's Dig. (Eng.) 375; *Gathercole* v. *Miall,* 15 Mees. & W. 319, 15 L. J. Exch. N. S. 179, 10 Jur. 337; *Rex* v. *Hood,* 1 Moody, C. C. 281.

[2] *Rex* v. *Castleton,* 6 T. R. 236; *Williams* v. *Younghusband,* 1 Starkie, 139; *Parkins* v. *Cobbett,* 1 Car. & P. 282; *Reg.* v. *Saffron Hill,* 1 El. & Bl. 93, 22 L. J. Mag. Cas. N. S. 22; *Rex* v. *Denio,* 7 Barn. & C. 620, 1 Moody & R. 294; *Rex* v. *Rawden,* 2 Ad. & El. 156, 4 Nev. & M. 97.

ument into the possession of the accused, and when this has been done, very slight evidence is sufficient to raise the presumption of destruction.[3]

§ 120. Inspection of documents; when ordered.— While the accused is not obliged to produce any document or matter in his possession, on the ground that he cannot in the first instance be compelled to disclose anything that would incriminate him, except when he is a witness in his own behalf, this does not apply to documents found on him at the time of his arrest or brought into the custody of the law by proper warrant.[1]

Likewise the accused is entitled to have produced for him all documents on which the prosecution relies to sustain the charge on trial.[2]

[3] *Patridge* v. *Coates,* Moody & R. 156, 1 Car. & P. 534; *Burton* v. *Payne,* 2 Car. & P. 520, 31 Revised Rep. 692; *Sinclair* v. *Stevenson,* 1 Car. & P. 582, 2 Bing. 514, 10 Moore, 46; *Pritchard* v. *Symons,* Buller N. P. 254; *Gordon's Case,* 1 Leach, C. L. 300; *Baldney* v. *Ritchie,* 1 Starkie, 338; Roscoe, N. P. Ev. 18th ed. 9.

It has been stated "that an accomplice is presumed to destroy letters implicating him in guilt," hence not necessary to prove diligent search. This arises from a reading of the second syllabus in *United States* v. *Doebler,* Baldw. 519, Fed. Cas. No. 14,977.

Attaching a presumption of crime to an accused, clothed with the presumption of innocence throughout the trial, at a preliminary stage, is so contrary to all law that the error should be corrected. The reading of the opinion is in the following words on this point: "It is in proof that the letter to which it was an answer was put into the hands of defendant, related to counterfeit notes, and that the one in question related to the same subject, and was delivered to the witness by the defendant himself; under such circumstances we are of opinion that no search was necessary, as every presumption is that the letter was destroyed, and the account given by Rallston consistent with his situation and the subject of the letter." *United States* v. *Doebler,* Baldw. 519, 521, Fed. Cas. No. 14,977.

[1] *Snelgrove* v. *Stevens,* Car. & M. 508.

[2] *Thomas* v. *Dunn,* 6 Mann. & G. 274, 6 Scott, N. R. 834, 1 Dowl. & L. 535; *Woolmer* v. *Devereux,* 2 Mann. & G. 758, 3 Scott, N. R. 224,

§ 120a. Words spoken; averment and proof; variance.—When the indictment avers words spoken, as in false pretenses, perjury, slander, criminal libel, or in the common-law offense of oral blasphemy, it is enough if there is a substantial accordance between the words as laid and the words as proved. But any variance of the sense will be fatal.[1] Any portion of the words laid, complete in itself, and constituting an indictable offense, will sustain the indictment.[2]

9 Dowl. P. C. 672, 10 L. J. C. P. N. S. 207; *Reg.* v. *Colucci,* 3 Fost. & F. 103.

[1] *Conlee* v. *State,* 14 Tex. App. 222; *Com.* v. *Atwood,* 11 Mass. 93; *Gorman* v. *State,* 42 Tex. 221; 2 Bishop, Crim. Proc. §§ 783, 787, 807; *Haley* v. *State,* 63 Ala. 83; *Leverette* v. *State,* 32 Tex. Crim. Rep. 471, 473, 24 S. W. 416; *Com.* v. *Moulton,* 108 Mass. 307; *Walton* v. *State,* 64 Miss. 207, 8 So. 171; *State* v. *Frisby,* 90 Mo. 530, 2 S. W. 833; *Sharp* v. *State,* 53 N. J. L. 511, 21 Atl. 1026.

And where, on an indictment for slander, the words were averred as spoken in English, and the proof showed them spoken in German, the variance was fatal. *Stichtd* v. *State,* 25 Tex. App. 420, 425, 8 Am. St. Rep. 444, 8 S. W. 477; Townhend, Slander & Libel, § 330.

In case of words spoken in a foreign language they must be averred, together with a translation in English, as averment alone in the foreign language is not sufficient. To allege a publication of English words, and prove a publication in a foreign language, is a variance. This is the requirement in civil actions, and the rule applies with greater force in criminal prosecutions, as the accused has the constitutional right not only to be informed of the nature and cause of the accusation against him, but that if the fact exists that he may also take advantage of the same by proper pleas of autrefois convict or acquit, in a subsequent trial for the same offense.

And this is so in indictment for false pretenses. Wharton, Crim. Law, 10th ed. § 1214; *Reg.* v. *Speed,* 46 L. T. N. S. 174, 15 Cox, C. C. 24, 46 J. P. 451; *Com.* v. *Pierce,* 130 Mass. 31; *Webster* v. *People,* 1 N. Y. Crim. Rep. 190; *Marwilsky* v. *State,* 9 Tex. App. 377; *Litman* v. *State,* 9 Tex. App. 461.

Also in perjury, Wharton, Crim. Law, 10th ed. § 1313; Fost. C. L. 194; *Reg.* v. *Layer,* 8 Mod. 83; Wharton, Crim. Pl. & Pr. 9th ed. 203; *People* v. *Warner,* 5 Wend. 271; *State* v. *Bradley,* 2 N. C. (1 Hayw.) 403; *State* v. *Coffee,* 4 N. C. (Term. Rep. 272); *State* v. *Ammons,* 7 N. C. (3 Murph.) 123; *State* v. *Ah Sam,* 7 Or. 477; *Re Crowe,* 3 Cox, C. C. 123; *Reg.* v. *Fussell,* 3 Cox, C. C. 291.

Generally, *Sumner* v. *State,* 74 Ind. 52.

[2] *Com.* v. *Kneeland,* 20 Pick. 206.

§ 121. Articles described must be substantially proved.—While it is undoubtedly true that the description of articles of personal property as given in the indictment must be substantially proved to enable the defendant to plead a prior conviction or acquittal and afford opportunity for restoration to be given, still the rule should not be so rigidly applied as that it would defeat the ends of justice. And the rule that where goods are described in the indictment with unnecessary particularity, it must be proved as laid, unless the unnecessary part of the description can be rejected as surplusage, is subject to some qualification. Still it has been held that "30 yards of cloth" and "one coat" sufficiently described "one piece cassimere" and "one blue pilot coat" which it was proved the defendant stole.[1]

And "50 lbs. of flour at the value of 6 cents" may be sustained by proof of a bag of flour which costs $5, although there was no proof of its weight;[2] but where an animal, in an indictment for larceny, is described as a "yearling," it was a variance when the proof was, it was a "three-year old."[3]

And a charge of theft of a "beef steer" and proof of theft of a "steer" is fatal.[4]

And where on an indictment for the sale of liquor to A, the proof is that the sale was to A and B jointly, the variance was fatal.[5]

An averment of stealing a plowshare has been held as not sustained by proof of stealing a plow,[6] and an averment of "buckskin gloves" has been held not sustained by proof of

[1] *Com.* v. *Campbell,* 103 Mass. 436.

But it does not prove a variance, to prove more of the same kind stolen than alleged. *State* v. *Martin,* 82 N. C. 672.

[2] *State* v. *Harris,* 64 N. C. 127.

[3] *Courtney* v. *State,* 3 Tex. App. 258, 261.

[4] *Dunham* v. *State,* 9 Tex. App. 332.

[5] *Iseley* v. *State,* 8 Blackf. 403; *Brown* v. *State,* 48 Ind. 38, 39, 1 Am. Crim. Rep. 487.

[6] *State* v. *Cockfield,* 15 Rich. L. 316.

sheepskin gloves;[7] and where the indictment charged the defendant with the larceny of a number of bottles of whisky and brandy, it was ruled that this was not sustained by proof that the defendant drew the liquor from casks into bottles he took with him for the purpose.[8]

So, in larceny of a hog, "a crop off the left ear and a split in the right" is not supported by proof of "a crop off the right ear and a split in the left."[9] A charge of having in possession "one pint of milk to which milk water has been added" is not sustained by proof of a mixture of pure milk with water.[10] But a charge of stealing "one gold watch" is sufficient where the proof shows it to be ten carat gold, it appearing that such a watch is commonly called a gold watch, though it is not so called by jewelers.[11] And no variance is created between an indictment charging robbery of $10 and the proof, by the fact that the evidence shows that accused is shown to have secured a $10 bill and returned $2.[12]

Questions of variance as to goods are ordinarily for the jury,[13] and personal chattels when the subject of an offense must be adequately described.[14] When only certain articles of a class are the subjects of the offense, those articles must be specified;[15] and minerals, grass, and trees must be averred to be detached from the realty.[16]

[7] *McGee* v. *State,* 4 Tex. App. 625, 626.

[8] *Com.* v. *Gavin,* 121 Mass. 54, 23 Am. Rep. 255.

[9] *Robertson* v. *State,* 97 Ga. 206, 207, 22 S. E. 974; *Crenshaw* v. *State,* 64 Ga. 449; *State* v. *Jackson,* 30 Me. 29; *Wertz* v. *State,* 42 Ind. 161, 162; 2 Bishop, Crim. Proc. § 738; Starkie, Ev. 8 Am. ed. 628.

[10] *Com.* v. *Luscomb,* 130 Mass. 42, 43.

[11] *Pfister* v. *State,* 84 Ala. 432, 433, 4 So. 395.

[12] *Fannin* v. *State,* 51 Tex. Crim. Rep. 41, 10 L.R.A.(N.S.) 744, 123 Am. St. Rep. 874, 100 S. W. 916.

[13] *State* v. *Campbell,* 76 N. C. 261; *Com.* v. *Brailey,* 134 Mass. 527, 529; See, *State* v. *Downs,* 59 N. H. 320, 4 Am. Crim. Rep. 42.

[14] See Wharton, Crim. Pl. & Pr. § 206.

[15] Wharton, Notes Crim. Pl. § 210, ¶ 5 p. 113.

[16] Wharton, Notes Crim. Pl. § 211, ¶ 6 p. 113.

§ 122. Coin must be specifically described.—Coin must be specifically described, though it is for the jury, under proper instructions by the court, to determine whether the proof conforms to the description. The variance between "money" as averred in an indictment for false pretenses and larceny, and a silver certificate or a certificate of deposit, is fatal.[1]

So, when the indictment charged that the defendant "did unlawfully and fraudulently take $20 in money," and the proof showed the money, contained in a letter, taken by the defendant, was "a $20 bill American money," it was held that while this would be a sufficient description on demurrer, nevertheless the proof must correspond with this allegation,[2] and in general it may be said that the word "money" is restricted to "that which is legal tender,"—as legal tender coins or legal tender treasury notes of the United States.[3] When it is practicable, the number, character, and denomination of bills

[1] *Perry* v. *State,* 42 Tex. Crim. Rep. 540, 541, 61 S. W. 400, 14 Am. Crim. Rep. 546; *United States* v. *Smith,* 152 Fed. 542.

Where the variance between the pleading and proof is trifling, and no objection is taken on the ground of variance, it is not error for the trial court to disregard it. *Bell* v. *Knowles,* 45 Cal. 193, 194; *Davis* v. *Patrick,* 141 U. S. 479, 490, 35 L. ed. 826, 829, 12 Sup. Ct. Rep. 58; *Grayson* v. *Lynch,* 163 U. S. 468, 41 L. ed. 230, 16 Sup. Ct. Rep. 1064; *Liverpool & L. & G. Ins. Co.* v. *Gunther,* 116 U. S. 113, 29 L. ed. 575, 6 Sup. Ct. Rep. 306; *Giffert* v. *West,* 33 Wis. 617, 622.

Also see as to "immaterial variance." *Matthews* v. *United States,* 161 U. S. 500, 40 L. ed. 786, 16 Sup. Ct. Rep. 640; *Montgomery* v. *United States,* 162 U. S. 410, 40 L. ed. 1020, 16 Sup. Ct. Rep. 797; *Goode* v. *United States,* 159 U. S. 663, 40 L. ed. 297, 16 Sup. Ct. Rep. 136; *Rogers* v. *State,* 90 Ga. 463, 16 S. E. 205; *Putnam* v. *United States,* 162 U. S. 687, 693, 40 L. ed. 1118, 1120, 16 Sup. Ct. Rep. 923; *Com.* v. *Jacobs,* 152 Mass. 276, 25 N. E. 463.

The last two cases overruling the doctrine in *McGary* v. *People,* 45 N. Y. 153, and *Sykes* v. *People,* 132 Ill. 32, 23 N. E. 391.

[2] *Otero* v. *State,* 30 Tex. App. 450, 455, 17 S. W. 1081; *United States* v. *Greve,* 65 Fed. 488, 490; *United States* v. *Bornemann,* 36 Fed. 257; Joyce, Indictments, § 348; *Lewis* v. *State,* 28 Tex. App. 140, 142, 12 S. W. 736; *Foster* v. *State,* 71 Md. 553, 18 Atl. 972.

[3] Bishop, Statutory Crimes § 340; *Sansbury* v. *State,* 4 Tex. App. 99, 101; *Sharp* v. *State,* 61 Neb. 187,

should be set forth in the accusation, and when not, there should be an allegation giving an excuse for the want of this particularity.

But under a statute, either of the United States or of a state, it is unnecessary to state the number of denomination, or to specify any particular coin or that the same was "lawful money of the United States;" "sundry pieces of silver coin," followed by the amount, and omitting the description of each coin separately, having been deemed sufficient.[4]

But in conspiracy to commit larceny, or attempts with intent to commit robbery and the like, the same particularity is not required as where the completed crime is charged.[5]

190, 85 N. W. 38, 15 Am. Crim. Rep. 462; *Barnes* v. *State,* 40 Neb. 545, 59 N. W. 125.

[4] *Com.* v. *Grimes,* 10 Gray, 470, 71 Am. Dec. 666; *Rains* v. *State,* 137 Ind. 83, 36 N. E. 532; *State* v. *Noland,* 111 Mo. 473, 19 S. W. 715; Joyce, Indictments, § 348; *Wallace* v. *Loomis,* 97 U. S. 147, 24 L. ed. 895; *Nash* v. *Towne,* 5 Wall. 689, 18 L. ed. 527.

[5] *Reinhold* v. *State,* 130 Ind. 467, 30 N. E. 306; Joyce, Indictments, § 348; *Moore* v. *People,* 31 Colo. 336, 344, 73 Pac. 30; *Tracey* v. *State,* 46 Neb. 361, 369, 64 N. W. 1069, 1071.

Contra, *Taylor* v. *State,* 130 Ind. 66, 69, 29 N. E. 415.

In *Reg.* v. *Bond,* 1 Benn. & H. C. C. 553, where the defendant was indicted for stealing coin, but of what particular denomination the witness did not know, the indictment charged him with stealing every denomination of coin used in England. The case went up to Queen's bench and was much discussed, and all the judges but one concurred that the defendant could not be convicted, and in consequence a statute was later enacted (14 & 15 Vict. chap. 100, § 18), providing that "in every indictment in which it shall be necessary to make any averment as to any money or any note of the Bank of England or of any other bank, it shall be sufficient to describe such money or bank note simply as money, without specifying any particular coin or bank note, and such allegation as far as regards the description of the property shall be sustained by proof of any amount of coin or of any bank note, although the particular species of coin of which such amount was composed or the particular nature of the bank note shall not be proven."

And similar statutes have been enacted in a majority of the states in the Union, and by the United States, dispensing with the old common-law strictness in this regard.

For similar statute, see U. S. Rev.

§ 123. Where several articles are charged proof must be of some one article charged.—When several articles are charged, the proof must apply to one or more of the articles. Hence an indictment charging a stealing of a number of things is not supported except by proof of the larceny of some one or more of the specific things so charged.[1] Therefore an indictment for simple larceny in stealing two hogs at the same time and place, although alleging that they were the property of different persons, charges only one offense, and proof that the defendant stole one of the hogs is sufficient.[2]

And where the indictment charged the defendant with harboring and concealing a runaway slave, he may be convicted on proof of either harboring or concealing.[3]

Where the indictment charges the stealing of certain particular coin, there can be no conviction for stealing other coin.[4] Thus where a note is given to a party to change, he cannot, on an indictment for stealing the note, be convicted on proof of stealing the change. And where the defendant obtained a sovereign from the prosecuting witness in payment of a supposed debt of a shilling, and the prosecutor never intended to part with the sovereign until she received the nineteen shillings change, it was held that an indictment charging the lar-

Stat. § 1025, U. S. Comp. Stat. 1901, p. 720.

[1] Post, 125, 132, 145.

[2] *Lowe* v. *State,* 57 Ga. 171, 172, 2 Am. Crim. Rep. 344; *Haskins* v. *People,* 16 N. Y. 344, 348; *Com.* v. *Eastman,* 2 Gray, 76, 77; *People* v. *Wiley,* 3 Hill, 194, 214; *State* v. *Martin,* 82 N. C. 672, 674; *State* v. *Cameron,* 40 Vt. 555, 562; *Com.* v. *Williams,* 2 Cush. 583, 583; *Com.* v. *O'Connell,* 12 Allen, 452, 454; *State* v. *Williams,* 10 Humph. 101; *Lorton* v. *State,* 7 Mo. 55, 57, 37 Am. Dec. 179; *Com.* v. *Duffy,* 11 Cush. 145; *Palmer* v. *Stevens,* 11 Cush. 148; *State* v. *Hennessey,* 23 Ohio St. 339, 13 Am. Rep. 253.

[3] *McElhaney* v. *State,* 24 Ala. 71, 74; *Ben* v. *State,* 22 Ala. 9, 11, 58 Am. Dec. 234.

[4] Archbold, Crim. Pl. 1862 ed. 190; Wharton, Crim. Pl. & Pr. § 207; Wharton, Crim. Law, 10th ed. 944; Wharton, Crim. Pl. & Pr. 9th ed. 219; *Rex* v. *Jones,* 1 Cox, C. C. 105; *Reg.* v. *West,* 7 Cox, C. C. 183, Dears. & B. C. C. 109, 26 L. J. Mag. Cas. N. S. 6, 2 Jur. N. S. 1123, 5 Week. Rep. 50; *Rex* v.

ceny of nineteen shillings was bad, as the case if made out was that of the larceny of a sovereign.[5]

So, where an indictment charged an assault on two different persons at the same time, proof of an assault on either of them is sufficient.[6]

§ 124. Animals; description of, proved as laid.—The word "horse" is a generic term, including ordinarily the different species of that kind of animal, however diversified by age, sex, or artificial means, and therefore where the word is used in a statute without specifying the species, it is held to be used in its generic sense and to include every species of the genus horse.[1] So "cattle," for instance, is a generic term, and dogs present numberless varieties in shape, size, color, habit, and aptitude, and yet it is sufficient at common law to thus designate them, from the fact that exhaustiveness of description must stop somewhere. And likewise, whether sex must be stated or degree of maturity depends upon each peculiar statute under which the prosecution is had. Where the statute uses the term "dog," "sheep," or "horse," then these terms are regarded as general, under which it is not necessary for

Amos, 2 Den. C. C. 65, Temple & M. 423, 20 L. J. Mag. Cas. N. S. 103, 15 Jur. 90, 5 Cox, C. C. 222; *Reg.* v. *Twist,* 12 Cox, C. C. 509, 29 L. T. N. S. 546.

[5] *Reg.* v. *Bird,* 12 Cox, C. C. 257, 42 L. J. Mag. Cas. N. S. 44, 27 L. T. N. S. 800, 21 Week. Rep. 448; *Reg.* v. *Gumble,* 12 Cox, C. C. 248, 42 L. J. Mag. Cas. N. S. 7, L. R. 2 C. C. 1, 27 L. T. N. S. 692, 21 Week. Rep. 299.

The word "shilling" must be taken as descriptive of the thing stolen, and must be proved. *Reg.* v. *Bird,* 12 Cox, C. C. 259, 42 L. J. Mag. Cas. N. S. 44, 27 L. T. N. S. 800, 21 Week. Rep. 448. *Rex* v. *Deeley,* 1 Moody, C. C. 303, 4 Car. & P. 579; *Rex* v. *Owen,* 1 Moody, C. C. 118, Car. C. L. 309; *Rex* v. *Craven,* Russ. & R. C. C. 14, 2 East, P. C. 601; *Rex* v. *Jones,* 1 Cox, C. C. 105.

[6] *Com.* v. *O'Brien,* 107 Mass. 208; *Wilson* v. *State,* 45 Tex. 77, 23 Am. Rep. 602, 2 Am. Crim. Rep. 356.

After trial and conviction of stealing part of the property, the connection may be pleaded in bar of indictment charging the larceny of the other property. *Wilson* v. *State,* supra.

[1] *Banks* v. *State,* 28 Tex. 647.

the indictment to specify sex or age. On the other hand, where the statute makes a distinction between "horses," "mares," or "geldings," or between "sheep" and "lambs," then proof of a "mare" would not sustain an indictment for stealing a "horse," nor proof of a "lamb" an indictment for stealing a "sheep."[2]

[2] Under statutes making it a felony to steal any ox, cow, or heifer, where the indictment charges the defendant with stealing a cow, proof of its being a heifer will not suffice; for the statute, having mentioned both cow and heifer, proved that the words were not considered by the legislature as synonymous. *Cook's Case,* 2 East, P. C. 617; Leach, C. L. 105. See *Parker* v. *State,* 39 Ala. 365; *State* v. *Plunket,* 2 Stew. (Ala.) 11; *Turley* v. *State,* 3 Humph. 323; *Duval* v. *State,* 8 Tex. App. 370. For statutory designations, see Wharton, Crim. Pl. & Pr. § 237.

At common law an indictment for stealing a sheep is supported by proof of the stealing of any sex or variety of that animal, for the term is *nomen generalissimum. M'Cully's Case,* 2 Lewin, C. C. 272, 2 Moody, C. C. 34; *Rex* v. *Spicer,* 1 Den. C. C. 82, 1 Car. & K. 699.

See Wharton, Crim. Pl. & Pr. §§ 209, 237.

And an indictment for stealing a sheep will be supported by proof of stealing a lamb. *State* v. *Tootle,* 2 Harr. (Del.) 541.

See *Reg.* v. *Spicer,* 1 Car. & K. 699, 1 Den. C. C. 82.

A branded animal need not be described as such; but if the brand be described a variance is fatal. *Allen* v. *State,* 8 Tex. App. 360, 361.

On an indictment for stealing a horse, proof that it was a gelding is a fatal variance, the statute making a distinction between horses and geldings. *Hooker* v. *State,* 4 Ohio, 350; *Turley* v. *State,* 3 Humph. 323; *State* v. *Buckles,* 26 Kan. 237; *Brisco* v. *State,* 4 Tex. App. 219, 221, 30 Am. Rep. 162.

See Wharton, Crim. Pl. & Pr. § 237; *Banks* v. *State,* 28 Tex. 644; *Valesco* v. *State,* 9 Tex. App. 76, 77; *Marshall* v. *State,* 31 Tex. 471; *Gholston* v. *State,* 33 Tex. 342; *Persons* v. *State,* 3 Tex. App. 240, 242.

Under statute prohibiting the stealing of horses, the term "horses" is construed as including mares. *State* v. *Dunnavant,* 3 Brev. 9, 5 Am. Dec. 530; *Marshall* v. *State,* 31 Tex. 471. But see contra, *Banks* v. *State,* 28 Tex. 644. Though in South Carolina it was somewhat inconsistently ruled that, under the statute against hog stealing, an indictment for stealing a pig could not be sustained. *State* v. *M'Lain,* 2 Brev. 443.

Per contra, *Washington* v. *State,* 58 Ala. 355.

See *Rex* v. *Loom,* 1 Moody, C. C. 160; *Rex* v. *Puddifoot,* 1 Moody, C. C. 247; *Rex* v. *Beaney,* Russ. & R.

A "steer" is an animal of the cow kind.[3] "Cow" includes "heifer," [4] and a "pig" is a "hog." [5] It must be remembered, however, that although it may be unnecessary to specify color, sex, or degree of maturity, yet such specification if ventured must be proved as laid, nor can the term "live" be regarded as surplusage, and an indictment for stealing a dead animal should state that it was dead, otherwise it will be presumed it was alive.[6]

C. C. 416; *Rex* v. *Welland,* Russ. & R. C. C. 494.

In England, however, it has been said that when the name of the grown animal is given as a *nomen generalissimum,* then the young animal is included under this general term. *Rex* v. *Welland,* Russ. & R. C. C. 494.

On the other hand, where under an indictment under 9 Geo. I. chap. 22, for killing "certain cattle, to wit, one mare," the evidence was that the animal was a colt, but of which sex did not appear, the prisoner being convicted, the judges, on a case reserved, were of opinion that the words, "a certain mare," though under a *videlicet,* were not surplusage, and that the animal proved to have been killed being a colt generally, without specifying its sex, was not sufficient to support a charge of killing a mare. *Rex* v. *Chalkley,* Russ. & R. C. C. 258.

In *People* v. *Pico,* 62 Cal. 50, under a statute of larceny of "horse or mare," an indictment for larceny of a horse was held sustained by proof of larceny of a mare. The court said: "Although the courts of some of the states have held, under a statute similar to that of this state (§ 487, subdiv. 3, Penal Code), where both the words 'horse' and 'mare' are used, the proof must agree with the indictment as to the sex of the animal, yet as at common law the word 'horse' was used in its generic sense, and was held to include all animals of the horse species, whether male or female, we are of opinion that the legislature of this state, in using the word 'mare' did not intend to modify or change the common-law rule."

In Texas it has been held that proof of a theft of a beef steer will not support an indictment for stealing a steer. *Cameron* v. *State,* 9 Tex. App. 332, 336.

[3] *Watson* v. *State,* 55 Ala. 150.

[4] *People* v. *Soto,* 49 Cal. 70.

[5] *Lavender* v. *State,* 60 Ala. 60; *Keesee* v. *State,* 1 Tex. App. 298, 299; *Persons* v. *State,* 3 Tex. App. 241, 243.

For statutory designations, see Wharton, Crim. Pl. & Pr. § 237.

[6] 2 Archbold, Crim. Pr. & Pl. 348; *Rex* v. *Halloway,* 1 Car. & P. 128; *Com.* v. *Beaman,* 8 Gray, 497.

"One sheep" sustained by proof of an animal between nine and twelve months old, some calling it a lamb and others a sheep. 2 Arch-

§ 125. **Variance; in numbers immaterial.**—A variance in the number of the goods, if the number stated does not constitute the essence of the offense, is immaterial, and proof of any one of them is sufficient. But where the charge is keeping and maintaining a disorderly house, the specifications of the characteristics of the house in point of disorder are matters of description, and a case must be proved to answer to them or some of them. Thus, in an indictment charging such keeping, where the causes were set forth, and gaming was not included, it was held that the defendant could not be convicted of keeping a common gaming house;[1] and where a woman occupies a house and receives men for the purpose of com-

bold, Crim. Pr. & Pl. 350; *Reg.* v. *Spicer,* 1 Car. & K. 699, 1 Den. C. C. 82.

In *Persons* v. *State,* 3 Tex. App. 242, the court says: "The word 'horse' is a generic term, including ordinarily in its signification the different species of that kind of animals, however diversified by age, sex, use, or artificial means, and if the word 'horse' had been used in the statute without specifying the species we would have been entirely satisfied with the ruling of the court, because the word 'horse' in its generic sense would include a mare, and there would be no variance between the averment and the evidence. It could not be contended successfully that the defendant had been indicted for stealing one thing and convicted for stealing another and different thing. But from precedent and authority we feel constrained to hold that the word 'horse' was not intended to be used in its comprehensive and generic sense, and that it was used as synonymous with the word 'stallion,' or at least it was not in that connection intended to include gelding, mare, or colt. It is our duty to give to the statute such construction as will give effect to the meaning of each word, as nearly as can be consistently done with the object and purpose of the legislature."

But see *State* v. *Hoffman,* 53 Kan. 700, 704, 37 Pac. 138; *Lavender* v. *State,* 60 Ala. 60, 61; *State* v. *Baden,* 42 La. Ann. 295, 296, 7 So. 582, holding that retails as to sex, color, and variety are not necessary. Hochheimer, Crim. Law, p. 121.

[1] Post, § 132; Burns, J. P. 29th ed. by Chitty & Bears, title Evidence. *State* v. *Cameron,* 40 Vt. 555; *Com.* v. *Williams,* 2 Cush. 583; *Com.* v. *O'Connell,* 12 Allen, 451; *Lorton* v. *State,* 7 Mo. 55, 37 Am. Dec. 179.

See as to variance in sums, *Com.* v. *Williams,* 127 Mass. 285; *Linden Park Blood Horse Asso.* v. *State,* 55 N. J. L. 557, 27 Atl. 1091, 9 Am. Crim. Rep. 235; *Kollenberger* v.

mitting fornication with her, and no other women live in the house, or frequent it for purposes of prostitution, she cannot be convicted of keeping a brothel.

Nor would a general charge in an indictment that a defendant kept a brothel or a disorderly house, without stating the circumstances that made it such, avoid the possibility of variance between the accusation and proof in support of it. A description must be appended to such general charge in all cases so as to particularize it, and in this manner only it becomes specific,—satisfying the legal principle that a description of an essential fact in an indictment becomes itself essential. And by the same reasoning a man charged with keeping a tippling house cannot be convicted for keeping a gaming house.

The rule of law everywhere is that all offenses must be charged in a certain and identifiable form, and this principle is so essential to the personal security of the citizen that it is not to be impaired, no matter how great the particular exigency may appear.[2]

§ 126. Value immaterial where only descriptive.—Value or price need only be proved where they form the essence of the offense, as in larceny, where the stealing of goods

People, 9 Colo. 233, 11 Pac. 101; *Edwards* v. *People,* 26 Colo. 539, 59 Pac. 56.

Where an indictment charged the defendant with stealing five certificates of shares of stock of the number 7056, and the proof showed there was but one certificate, and not a series of five, as alleged, there was a fatal variance. *People* v. *Coon,* 45 Cal. 672; *Moore* v. *State,* 65 Ind. 213.

And it has been held that where an injury is partly local and partly transitory, and a precise local description is given, a variance in proof of the place is fatal to the whole; for the whole being one entire fact, the local description becomes descriptive of the transitory injury. *Reg.* v. *Cranage,* 1 Salk. 385; 2 Russell, Crimes 7th Eng. & 1st Canadian ed. p. 1939.

[2] *Taylor* v. *State,* 130 Ind. 66, 68, 29 N. E. 415; *Gipe* v. *State,* 165 Ind. 433, 1 L.R.A.(N.S.) 419, 422, 112 Am. St. Rep. 238, 75 N. E. 881, and cases there cited.

to the amount of $20 or upwards in value is grand, and below that sum petit larceny, or it is stated as a matter of description. It is likewise sufficient if the total value of all the property is set forth, although if such collective value is alleged and the defendant is convicted of stealing a part only, the variance would be fatal.[1] And if personal property described in the indictment is charged as having been stolen, and the proof shows it to have been attached to and become part of the realty, there can be no conviction; but otherwise if it becomes detached, and so remains long enough to acquire the character of personal property,[2] some value may be inferred without precise proof;[3] and the value of legal tenders need not be proved.[4] Nor, as a general rule, will the absence of a *videlicet* do harm where in any case the value, price, date, or sum is not material.[5]

But where the subject of an alleged larceny is money which is alleged to be "currency of the United States of America," no allegation of value is necessary, as the court will take judicial notice of the value of such money.[6]

[1] *People* v. *Rice,* 73 Cal. 220, 14 Pac. 851; *Com.* v. *Lavery,* 101 Mass. 207; *Hope* v. *Com.* 9 Met. 134, 136; *Merwin* v. *People,* 26 Mich. 298, 12 Am. Rep. 314; *People* v. *Robles,* 34 Cal. 591, 593; *State* v. *Brew,* 4 Wash. 95, 31 Am. St. Rep. 904, 29 Pac. 762.

Contra, *State* v. *Buck,* 46 Me. 531.

[2] *Langston* v. *State,* 96 Ala. 44, 11 So. 334; *Holly* v. *State,* 54 Ala. 238; *State* v. *Moore,* 33 N. C. (11 Ired. L.) 70, 71; *People* v. *Williams,* 35 Cal. 671, 674, 4 Mor. Min. Rep. 185.

"In many of the states this common-law rule has been abrogated, and recent statutes punish as larceny the taking and carrying away of fixtures, grass, trees, etc., although savoring of the realty."

[3] *Remsen* v. *People,* 57 Barb. 324; *Com.* v. *Logan,* 3 Brewst. (Pa.) 341; *Pratt* v. *State,* 35 Ohio St. 514, 35 Am. Rep. 617; *People* v. *Griffin,* 38 How. Pr. 475; *State* v. *Krieger,* 68 Mo. 98.

[4] Wharton, Crim. Pl. & Pr. § 216; *Duvall* v. *State,* 63 Ala. 12, 15.

[5] Russell, Crimes, 7th Eng. ed. p. 1940.

[6] *Turner* v. *State,* 124 Ala. 59, 61, 27 So. 272; *Gady* v. *State,* 83 Ala. 51, 53, 3 So. 429; *People* v. *Riley,* 75 Cal. 98, 99, 16 Pac. 544, 7 Am. Crim. Rep. 600.

§ 127. Collective value does not sustain specific value.— As has already been seen on an indictment charging collectively the larceny of several different articles of varied values, with only a gross value assigned, no conviction can be had on evidence of stealing only a part.[1] And in all cases of larceny, whilst it is not essentially requisite that the judge in his charge should give the definition of the offense literally in the language of the statute, yet when he fails to do so, he should inform the jury of the nature and character of the elements and ingredients composing the crime. Jurors may have a very good general idea of what is meant by larceny, and still have no conception of the rules rendered absolutely necessary by the law to the establishment of the crime. It is not only the province, but the duty, of the judge to explain to them cases of this character. In larceny the property must be such as has some specific value capable of being ascertained, and a conviction can never be sustained where there is no proof of the value of the property alleged to have been stolen. Evidence also of the ownership, as alleged in the indictment, and of the venue of the offense, is likewise necessary to sustain this charge, and proof of its value is indispensable.

But charges of burglary and larceny resulting therefrom are not so connected as to make them one transaction, and one court can take jurisdiction of one of the crimes charged, and another of the other, where the goods stolen in one county have been removed by the thief into a neigbhoring county. And a plea in abatement setting up the arrest and trial of the defendant in the county where the breaking and entering was made on a charge of burglary is no bar to a prosecution for the crime of larceny in the county into which the goods were carried.[2] The doctrine is therefore that a conviction of the

[1] *Hope* v. *Com.* 9 Met. 134; *State* v. *Longbottoms,* 11 Humph. 39; *State* v. *Murphy,* 6 Ala. 845; *Sheppard* v. *State,* 42 Ala. 531.

[2] *Sharp* v. *State,* 61 Neb. 187, 85 N. W. 38, 15 Am. Crim. Rep. 462; *State* v. *Ingalls,* 98 Iowa, 728, 68 N. W. 445; *Josslyn* v. *Com.* 6 Met. 236;

burglary cannot be pleaded in abatement of a prosecution for the larceny, but a different rule would prevail if the indictment for the burglary had also charged the larceny.

Nor in such case would the plead of *autrefois convict* be good if the indictment, while charging the burglarious entry to have been made with intent to commit larceny, does not charge the actual perpetration of theft. And by the same reasoning, a conviction of larceny is not a bar to a subsequent indictment for breaking and entering with intent to commit larceny.[3]

§ 128. Negative averments.—Where in a statute an exception or proviso qualifies the description of the offense, the general rule is that the indictment or information should negative the exception or proviso, and the indictment must always negative exceptions which are expressly made not criminal. In abortion where it is provided by statute that every person who shall wilfully and maliciously administer or cause to be administered to or taken by any person any poison or noxious substance or liquid, or who shall use or cause to be used any instrument, with the intention to procure any mis-

State v. *Warner,* 14 Ind. 572; *Wilson* v. *State,* 24 Conn. 57; *Howard* v. *State,* 8 Tex. App. 447, 449; *People* v. *Parrow,* 80 Mich. 567, 45 N. W. 514; *State* v. *Kelsoe,* 76 Mo. 505.

[3] 1 Bishop, Crim. Law, 5th ed. § 1062.

In *Sharp* v. *State,* supra, the court says: "Sound reason also upholds the proposition that the burglary and the larceny are not so connected as to make them one transaction. The mere fact that they are committed at nearly the same time does not necessarily so connect them. A burglary may exist without any larceny having been committed. So may a larceny have existed without a burglary having been committed. It is never necessary to prove a burglary to order to establish the guilt of one accused of the crime of larceny, nor is there any necessity to ever prove a larceny for any other purpose than to show intent in cases of burglary. There is a manifest fallacy in arguing that mere propinquity of time constitutes a necessary connection between the two acts, so much as to make them one transaction in law. On the contrary they are distinct and separate crimes, neither of which is necessary to the other."

carriage of any woman then being with child, shall be deemed guilty of a felony, unless it appear that such miscarriage was procured or attempted by or under advice of a physician or surgeon, with intent to save the life of such woman, or to prevent serious and permanent bodily injury to her,—the indictment must negative these exceptions and expressly allege that such miscarriage was not procured or attempted by or under the advice of any such surgeon or physician, with intent to save the life of such woman. And it is best to follow the exact language of the statute in negativing such exceptions, although it has been held that a denial of any necessity for causing such miscarriage was sufficiently explicit and sufficient.[1] But such particularity is not necessary in pleading nor in the evidence in support of the accusation, unless there are these exceptions in the statute defining the crime. And the general rule as to exceptions, provisos, and the like is that where the exception or proviso forms a portion of the description of the offense, so that the ingredients thereof cannot be accurately and definitely stated if the exception is omitted, then it is necessary to negative the exception or proviso.

[1] It is a general rule of law that the burden of proof is upon the party who bases his cause of action upon a negative allegation. Exceptions to the rule obtain only when the proof is readily at the command of the defendant and is practically beyond the reach of the prosecution. The circumstances attending the procurement of an abortion, tending to prove that it was unnecessary for the purpose of preserving the life of the mother, can be shown quite as easily on the part of the prosecution as the fact of necessity for that purpose can be proved by the defendant. 1 Greenl. Ev. § 78; *State* v. *Clements,* 15 Or. 237, 249, 14 Pac. 410; *Moody* v. *State,* 17 Ohio St. 110, 113; *Hatchard* v. *State,* 79 Wis. 357, 363, 48 N. W. 380; *State* v. *Meek,* 70 Mo. 355, 357, 35 Am. Rep. 427; *State* v. *Lee,* 69 Conn. 186, 200, 37 Atl. 75.

Contra: *Fitch* v. *People,* 45 Colo. 298, 300, 100 Pac. 1132; *Bassett* v. *State,* 41 Ind. 303, 305; *State* v. *Owens,* 22 Minn. 238, 242; *State* v *Stokes,* 54 Vt. 179, 180.

This is undoubtedly the better rule where the statute does not specifically make an exception and the necessity is relied on generally as a common-law defense. *State* v. *Rupe,* 41 Tex. 33, 34; *State* v. *Wood,* 53 N. H. 484, 495.

But where the exception is separable from the description, and is not an ingredient thereof, it need not be noticed in the accusation, for it is a matter of defense.[2] And it is not necessary to constitute a valid exception in the statute that the word "except" be used. The words "unless," "other than," "not being," "not having," all have the same legal effect and require the same form of pleading and proof.[3]

While the authorities are not harmonious as to what averments are necessary and on whom the burden of proof rests, so much depends on the different statutes, to which reference must be had in all cases, yet the better rule is that where, after general words of prohibition, an exception is created in a subsequent clause or section, it must be interposed by the accused as a matter of defense, and that it is not necessary for the prosecution to aver and prove it.[4]

[2] Joyce, Indictments, § 279; *Com.* v. *Hart,* 11 Cush. 130, 133; *State* v. *Kendig,* 133 Iowa, 164, 110 N. W. 463; *State* v. *Abbey,* 29 Vt. 66, 67 Am. Dec. 754; *State* v. *Powers,* 25 Conn. 48, 50; *Baxter's Case,* 2 East, P. C. 781; *Hale* v. *State,* 58 Ohio St. 676, 686, 51 N. E. 154; Hughes, Crim. Proc. § 2727; *Dreyer* v. *People,* 188 Ill. 44, 45, 58 L.R.A. 869, 58 N. E. 620, 59 N. E. 424; *United States* v. *Cook,* 17 Wall. 168, 21 L. ed. 538; *State* v. *Knowles,* 90 Md. 646, 658, 49 L.R.A. 695, 45 Atl. 877.

[3] Hughes, Crim. Proc. § 2728; *People* v. *Allen,* 122 Mich. 123, 124, 80 N. W. 991; *Com.* v. *Maxwell,* 2 Pick. 139, 143; *Mayer* v. *State,* 64 N. J. L. 323, 325, 45 Atl. 624; *State* v. *Butler,* 17 Vt. 145, 150; *Com.* v. *Jennings,* 121 Mass. 47, 49, 23 Am. Rep. 249; *Barber* v. *State,* 50 Md. 161, 170; *Gee Wo* v. *State,* 36 Neb. 241, 54 N. W. 513; *Villines* v. *State,* 96 Tenn. 141, 146, 33 S. W. 922; *Shelp* v. *United States,* 26 C. C. A. 570, 48 U. S. App. 376, 81 Fed. 694, 696; *Gibson* v. *State,* 54 Md. 447, 451; Hochheimer, Crim. Law § 95.

[4] *State* v. *Rupe,* 41 Tex. 33, 34; *State* v. *Wood,* 53 N. H. 484, 494; *Com.* v. *Samuel,* 2 Pick. 103; *State* v. *Morphy,* 33 Iowa, 270, 278, 11 Am. Rep. 122; Abbott, Trial Brief, Crim. 632; *State* v. *Shea,* 104 Iowa, 724, 726, 74 N. W. 687; *State* v. *Hirsch,* 45 Mo. 429, 430; *State* v. *Wilbourne,* 87 N. C. 529, 534; *State* v. *Conahan,* 10 Wash. 268, 269, 38 Pac. 996; *Edwards* v. *State,* 39 Fla. 753, 23 So. 537; Bishop, Statutory Crimes, §§ 800a–835,1042–1044, 1051,–1052, 1067–1088; *Moody* v. *State,* 17 Ohio St. 111, 113; *State* v. *Stokes,* 54 Vt. 179, 180; 2 McClain, Crim. Law, § 1149; *Marshall* v. *State,* 56

In cases where the subject of the exception is peculiarly within the defendant's knowledge and the negative cannot be proved by the prosecutor, the burden of proving the affirmative may be on the defendant as a matter of defense.[5] But a distinction here is noteworthy. It may be that the negative to be established is something which virtually imputes certain positive conditions to the defendant, as on indictments for false pretenses, where the charge of untruth is equivalent to a charge of falsity, in which case the burden of proving the negative is on the prosecution; and on an indictment for perjury, where to charge a defendant with swearing to a fact not knowing it to be true is equivalent to a charge of rash and false swearing, in which case the defendant's want of knowledge must also be shown by the prosecution. On the other hand, where the negative involves no criminality on the part of the defendant, then the burden may be on him to prove the affirmative. Thus the burden of proving the defendant to be a "traveler" under the statute prohibiting wearing of concealed weapons is on the defense.

In criminal proceedings, however, where negative averments impute a breach of the law to the defendant, the operation of this rule is sometimes counteracted by the presumption of law in favor of innocence, which presumption, making, as it were, a prima facie case in the affirmative for the defendant, drives the prosecution to proof of the negative.[6]

But where the affirmative is peculiarly within the knowledge of the party charged, the presumption of law in favor of innocence is not allowed to operate in the manner just mentioned, but the general rule is that he who asserts the affirmative is to prove it, and not he who avers the negative.[7]

Tex. Crim. Rep. 205, 206, 119 S. W. 310.

[5] Wharton, Crim. Law, 10th ed. § 1165; *Wiley* v. *State*, 52 Ind. 516, 519.

[6] 2 Russell, Crimes, 7th Eng. ed. pp. 1955, 1956.

[7] 2 Russell, Crimes, 7th Eng. ed. p. 1956; 2 Bishop, New Crim. Proc. § 367, §§ 168, 169; *State* v. *Norton*,

While, as has been noted, the authorities are conflicting on this question, the rule adopted in a recent case in North Carolina seems to state the law fully, that when a statute creates a substantive criminal offense, the description of the same being complete and definite, and by subsequent clause either in the same or some other section, a certain case or class of cases is withdrawn or excepted from its provisions, these excepted cases need not be negatived in the indictment, nor is proof required to be made in the first instance on the part of the prosecution.[8]

45 Vt. 258, 261; *Grattan* v. *State,* 71 Ala. 344.

[8] *State* v. *Connor,* 142 N. C. 700, 703, 55 S. E. 787; *United States* v. *Standard Oil Co.* 148 Fed. 719, 727; *United States* v. *Chicago, St. P. M. & O. R. Co.* 151 Fed. 84, 91; Joyce, Indictments, § 391; *O'Connor* v. *State,* 46 Neb. 157, 164, 64 N. W. 719; Overruling *Gee Wo* v. *State,* 36 Neb. 241, 54 N. W. 513.

As to the necessity of negativing exceptions on indictments for violating liquor laws, see Joyce, Indictments, 391, page and note.

In carrying weapons, want of qualification to vote, want of license in selling liquor, keeping tippling shop, and hawking and peddling, see Bishop, Statutory Crimes §§ 800a, 835, 1042, 1051, 1067, 1088.

See also *Com.* v. *Gagne,* 153 Mass. 205, 209, 10 L.R.A. 442, 26 N. E. 449; *Seville* v. *State,* 49 Ohio St. 117, 15 L.R.A. 516, 30 N. E. 621; *State* v. *Knowles,* 90 Md. 646, 658, 49 L.R.A. 695, 45 Atl. 877; *Dreyer* v. *People,* 188 Ill. 40, 62, 58 L.R.A. 869, 58 N. E. 620, 59 N. E. 424.

In prosecutions under interstate commerce act, see *United States* v. *Tozer,* 2 L.R.A. 444, 2 Inters. Com. Rep. 422, 37 Fed. 635.

In illegal sale of liquors see *Arrington* v. *Com.* 87 Va. 96, 10 L.R.A. 242, 12 S. E. 224; *Com.* v. *Gagne,* 153 Mass. 205, 10 L.R.A. 442, 26 N. E. 449.

Where the charges preferred *"ex natura rei"* as conclusively import a negation of the exception as if such exception had been negatived in express terms, the exception need not be negatived though it is in the enacting clause of the statute. Thus, if a statute were to make the malicious killing of cattle "except horses" a felony, an indictment which charged a malicious killing of a cow would be sufficient, because to state that a cow is not a horse would be useless and absurd, and not required by any technicality of criminal proceedings. *State* v. *Price,* 12 Gill & J. 260, 37 Am. Dec. 81.

An indictment alleging the burglary of a building "not adjoining or occupied with any dwelling house" need not negative the statutory words, "not adjoining or occupied with any dwelling house." Hughes,

§ 129. Divisible averments.—It is sufficient to prove so much of the indictment as shows the defendant to have been guilty of the substantive crime therein stated, though not to the full extent charged upon him, and in an indictment for the larceny of two dogs, proof of the larceny of one is sufficient, although the information alleges that one is the property of one person, and the other of another.[1]

Divisibility of this class, as we shall presently see, may relate either to the subject, the object, or the predicate. When several defendants are charged, one or more may be acquitted and the other convicted, provided enough be left to constitute the offense. When several articles are alleged to have been stolen, one can be separated from the other and a verdict had for any one. The same divisibility applies to the averments of the mode of doing the unlawful act, provided there be enough left to constitute the offense. The offense, however, of which the defendant is convicted must be, at common law, of the same class as that with which he is charged. For instance, on an indictment for simple larceny there cannot be a conviction of receiving stolen goods, but a charge of lar-

Crim. Proc. § 723; *Gundy* v. *State,* 72 Wis. 1, 3, 38 N. W. 328, 7 Am. Crim. Rep. 262; *State* v. *Kane,* 63 Wis. 260, 263, 23 N. W. 488, 6 Am. Crim. Rep. 99; *Devoe* v. *Com.* 3 Met. 316, 327.

Contra: *Byrnes* v. *People,* 37 Mich. 515, 517; *Koster* v. *People,* 8 Mich. 431, 432; *Bickford* v. *People,* 39 Mich. 209.

See also *Phillips* v. *Com.* 3 Met. 588, 590; *Com.* v. *Squire,* 1 Met. 258, 264; *Lacy* v. *State,* 15 Wis. 15, 17; *Larned* v. *Com.* 12 Met. 240, 243; *Bell* v. *State,* 20 Wis. 599, 602; *Fleming* v. *People,* 27 N. Y. 329, 334; *State* v. *Kroscher,* 24 Wis. 64, 66; *Hall* v. *State,* 48 Wis. 688, 689, 4 N. W. 1068.

[1] *State* v. *Maggard,* 160 Mo. 469, 473, 83 Am. St. Rep. 483, 61 S. W. 184, 14 Am. Crim. Rep. 437; *Lowe* v. *State,* 57 Ga. 171, 172, 2 Am. Crim. Rep. 344; *Wilson* v. *State,* 45 *Tex.* 77, 82, 23 Am. Rep. 602, 2 Am. Crim. Rep. 356; *Lorton* v. *State,* 7 Mo. 55, 57, 37 Am. Dec. 179; *State* v. *Morphin,* 37 Mo. 373; *Nichols* v. *Com.* 78 Ky. 180, 181.

As to conviction of petit larceny where the proof showed the commission of grand larceny, see 14 Am. Crim. Rep. "Larceny" p. 378, and note.

ceny and receiving stolen goods can be joined in the same indictment under different counts. Also burglary and larceny, and burglary and receiving stolen goods.[2]

§ 129a. Divisible averments, continued.—Where the statute specifically describes an offense or uses language descriptive of it, the indictment drawn thereunder should substantially follow the descriptive language, although exact compliance is not essential. For in all cases the defendant must be specially brought within all the material words of the statute, and nothing can be taken by intendment.[1] So, where a prosecution was under a statute that provided that "if any person shall take," etc., "any ore," etc., "being in such mine, shall be deemed guilty of a felony, and upon conviction thereof shall be liable to be punished in the same manner as in the case of simple larceny," it was held that the words, "being in such mine," should be set forth. To the same effect was the holding under a statute which made it punishable in anyone "to steal any lead being fixed to any dwelling house." The words, being fixed to any dwelling house," were important and it was necessary that they be covered by the indictment. When the statute specifies certain acts which if done in a particular way constitute a crime, the pleader must bring his indictment fairly within the statute and follow it with apt proof. He must describe the offense, either in the descriptive language of the statute, or in such language of his own as will

[2] *Parker* v. *People,* 13 Colo. 155, 160, 4 L.R.A. 803, 21 Pac. 1120; 1 Archbold, Crim. Pr. & Pl. (Pomeroy's notes) p. 295, note 1; Wharton, Crim. Law, § 819.

[1] *State* v. *Bellamy,* 63 Kan. 144, 147, 65 Pac. 274, 14 Am. Crim. Rep. 497; Bishop, Statutory Crimes, § 415; *Reg.* v. *Labouchere,* 14 Cox, C. C. 419.

But see 2 Russell, Crimes, 7 Eng. ed. p. 1307, as to amount of proof; *Larned* v. *Com.* 12 Met. 240, 243; *Murphy* v. *State,* 28 Miss. 638, 660.

See *State* v. *Lessing,* 16 Minn. 75, 79, Gil. 64; *State* v. *Robey,* 8 Nev. 312, 320.

by fair interpretation include such descriptive language.[2] It is always safer to follow the statute, and where a statute declares that to be larceny which was not so at common law, the elements of the statutory offense must be set out in the indictment, and proof of such statutory offense will not sustain an indictment simply charging common-law larceny.[3]

§ 130. Degrees included in offense.—Where a minor offense is included in a greater, the defendant may be acquitted of the latter and convicted of the former, and the information may charge the same offense in different ways, and separate and distinct offenses in several counts, even where the offenses charged are felonies, if they be of the same character differing only in degree.[1] And in such case while the prosecution may be ordered to elect after proof has been made as to all, upon which particular count or counts it relies, yet this can only be required when it is apparent that an attempt is made to convict the accused of two or more distinct offenses growing out of distinct and separate transactions.[2] This is the rule at common law which has been uni-

[2] *State* v. *Bellamy,* 63 Kan. 144, 147, 65 Pac. 274, 14 Am. Crim. Rep. 497.

[3] *Kibs* v. *People,* 81 Ill. 599, 600, 2 Am. Crim. Rep. 114.

[1] *Mason* v. *State,* 29 Tex. App. 24, 30, 14 S. W. 71; 2 Bishop, Crim. Proc. chap. 32; 1 Archbold, Crim. Pr. & Pl. chap. 39; 1 Wharton, Crim. Law, 415–418; *Bainbridge* v. *State,* 30 Ohio St. 264, 271; *People* v. *Aikin,* 66 Mich. 460, 469, 11 Am. St. Rep. 512, 33 N. W. 821, 7 Am. Crim. Rep. 345; *State* v. *Felner,* 19 Wis. 561, 562; *Prindeville* v. *People,* 42 Ill. 217, 220; Moore, Crim. Law, § 800; *Com.* v. *Brown,* 121 Mass. 69, 82; *Com.* v. *Birdsall,* 69 Pa. 482, 484, 8 Am. Rep. 283; *Dixon* v. *State,* 3 Iowa, 416; *Beckwith* v. *People,* 26 Ill. 500, 503; *Herman* v. *People,* 9 L.R.A. 182, and note, 131 Ill. 594, 599, 22 N. E. 471; *Parker* v. *People,* 4 L.R.A. 803, and brief, 13 Colo. 155, 160, 21 Pac. 1120.

[2] 1 Archbold, Crim. Pr. & Pl. 8th ed. 295, and note; *Keeler* v. *State,* 15 Tex. App. 112, 115; *Com.* v. *Sullivan,* 104 Mass. 552, 553; *Mayo* v. *State,* 30 Ala. 32, 33; *Martin* v. *State,* 79 Wis. 165, 174, 48 N. W. 119; *State* v. *Flye,* 26 Me. 312, 316; Clark, Crim. Proc. p. 293; Wharton, Homicide, Bowlby's ed. § 557; 2

formly adopted in most of the states. While it is permissible to so join and charge two or more offenses in separate counts, such as illegally marking and branding a colt, and in another count with the larceny of the colt, it is never proper to charge a felony and a misdemeanor in the same indictment, even in separate counts, unless they constitute successive grades of the offense. The test is in all cases where they are so joined, Are they cognate offenses? So, also, in forgery, a charge of uttering and publishing it may be joined, and it is the constant practice to receive evidence of several libels and assaults under the same indictment. So a defendant may be charged with the larceny of money belonging to A, and, by another count, with the larceny of the same kind and amount of money from a person "unknown," provided it was at the same time and place and so stated to be; nor is it necessary to allege that such unknown person was other than the accused. So larceny may be found with robbery, and in general it may be said that the indictment may comprise as many counts, not repugnant otherwise, as are necessary to meet any possible contingencies in the evidence. It is even permissible at and by the strict rules of the common law and in those states where this form of pleading now prevails, to charge the mode of death in homicide to have been by hanging with a rope and cutting with a knife in the same count of the indictment. In many states this has been regulated by statutes which hold, in effect, that an indictment or information may contain as many counts charging the same offense as the pleader may deem necessary, and that the same will be sufficient if any one count is sufficient.

To this rule there are few exceptions, and these, as has been seen, are by reason of modern statutes. In Texas it is held

Bishop, Crim. Proc. chap. 30; Bishop, Directions & Forms, chap. 2, §§ 15-24; Texas Penal Code, art. 605; Gen. Law Tex. 17th Leg. chap. 57, p. 60, Form 2.

under a charge of murder that a count with assault to kill and murder may be joined, but this is so only for the reason that by statute in that state all felonious killings are held to be murder; and in Massachusetts the defendant may be convicted of any one of the different felonies charged.[3] So the defendant may be convicted of an assault, on an indictment for assaulting an officer when in the execution of his duty, provided it was an act that he could do and perform legally in his official capacity, and thereby of obstructing the administration of justice. On an indictment for entering and breaking a dwelling house in the daytime and stealing therein, the defendant may be found guilty of stealing in the dwelling house in the daytime, or only of stealing. And in all cases of larceny of an aggravated nature the defendant may be convicted of simple larceny if the value of the goods or property stolen is less in amount than that prescribed in the statute constituting such larceny of higher grade, and the jury so finds.[4]

So the defendant may be charged with a conspiracy and with the commission of an act pursuant thereto, in the same accusation.[5]

§ 131. Perjury; proof of one assignment sufficient.— Where, as in cases of perjury and of subornation of perjury, several distinct assignments of perjury are made, the indictment will be sustained if any one of these be proved, if that by itself be sufficient to constitute the offense; and two or more statements may be assigned as perjury in the same count of the indictment.[1] And a single witness corroborated by

[3] *Benson* v. *Com.* 158 Mass. 164, 167, 33 N. E. 384; Clark, Crim. Proc. p. 294; *Com.* v. *Jacobs,* 152 Mass. 276, 281, 25 N. E. 463; *Com.* v. *Adams,* 127 Mass. 15, 18.

[4] Joyce, Indictments, § 410.

[5] Joyce, Indictments, § 411; *People* v. *Austin,* 1 Park. Crim. Rep. 154; *Dill* v. *State,* 35 Tex. Crim. Rep. 240, 242, 60 Am. St. Rep. 37, 33 S. W. 126.

[1] *Reg.* v. *Rhodes,* 2 Ld. Raym.

other witnesses testifying to circumstances bearing upon the *corpus delicti* is sufficient, in contradistinction to the common-law doctrine, that the testimony of two witnesses was required. The recent accepted law is that the requirement now is merely such sufficient evidence as counterbalances the oath of the accused and the legal presumption of his innocence.[2]

So, in false pretenses, anyone of the alleged false pretenses being itself within the statute, and shown to be the inducing cause through which the prosecutor parted with his property, relying upon the same, and believing them to be true, will be sufficient to support a conviction.[3]

886; *Rex* v. *Ady*, 7 Car. & P. 140; *State* v. *Hascall*, 6 N. H. 358; *State* v. *Mills*, 17 Me. 211, 216; *Com.* v. *Johns*, 6 Gray, 274, 276; *Williams* v. Com. 91 Pa. 493, 499.

See also *DeBernie* v. *State*, 19 Ala. 23, 24; *Page* v. *State*, 59 Miss. 474, 475; Wharton, Crim. Law, 10th ed. 1316; *Moore* v. *State*, 32 Tex. Crim. Rep. 405, 407, 24 S. W. 95; *Com.* v. *Grant*, 116 Mass. 17, 20, 1 Am. Crim. Rep. 500; *State* v. *Norris*, 9 N. H. 96; *Harris* v. *People*, 64 N. Y. 148, 2 Am. Crim. Rep. 416; *Wood* v. *People*, 59 N. Y. 117, 122; Roscoe, Crim. Ev. 6th Am. ed. 763; *People* v. *Warner*, 5 Wend. 271, 273; *State* v. *Shupe*, 85 Am. Dec. 485, and note, 16 Iowa, 36.

See note on variance in perjury 15 Am. Crim. Rep. p. 602; *Com.* v. *Parker*, 2 Cush. 212, 214.

[2] *Rex* v. *Hill*, Russ. & R. C. C. 190; *People* v. *Haynes*, 11 Wend. 557, 562; *People* v. *Blanchard*, 90 N. Y. 314, 318; *Webster* v. *People*, 92 N. Y. 422, 425; Wharton Crim. Law, 10th ed. §§ 1167, 1168, 1218.

For libel and blasphemy, one assignment sufficient. *Reg.* v. *Labouchere*, 14 Cox, C. C. 419; *Com.* v. *Kneeland*, 20 Pick. 206, 215; *United States* v. *Wood*, 14 Pet. 440, 10 L. ed. 532; *Com.* v. *Pollard*, 12 Met. 225; *State* v. *Gibbs*, 10 L.R.A. 749, and note, 10 Mont. 213, 25 Pac. 289; *State* v. *Heed*, 57 Mo. 252, 253, 1 Am. Crim. Rep. 502; *Williams* v. *Com.* 91 Pa. 493, 499; *Venable* v. *Com.* 24 Gratt. 639, 640; *Com.* v. *Butland*, 119 Mass. 317, 320; *People* v. *Davis*, 61 Cal. 536; *Candy* v. *State*, 23 Neb. 436, 438, 36 N. W. 817; *Territory* v. *Williams*, 9 N. M. 400, 402, 54 Pac. 232; *Waters* v. *State*, 30 Tex. Crim. Rep. 284, 287, 17 S. W. 411; 9 Enc. Ev. pp. 759, 760.

[3] 2 Wharton, Crim. Law, § 776; 2 Bishop, Crim. Law, § 418; *People* v. *Blanchard*, 90 N. Y. 314, 318; *State* v. *Chingren*, 105 Iowa, 169, 171, 74 N. W. 946; *Hathcock* v. *State*, 88 Ga. 91, 94, 13 S. E. 959, 9 Am. Crim. Rep. 705, 709; *Com.* v. *O'Brien*, 172 Mass. 249, 251, 52 N. E. 77; *Woodruff* v. *State*, 61 Ark 157, 164, 32 S. W. 102; *State* v. *Vor-*

So, in indictments for libel and confidence games, it is necessary to prove only one of the assignments, and in illegal voting and treason, the overt acts may, on the same principle, be divided.[4] So, on an indictment for extortion, alleging that the defendant extorted 20 shillings, it is sufficient to prove that he extorted 1 shilling.[5] An indictment for embezzling two bank notes of equal value is supported by proof of the embezzlement of one bank note only.[6] On an indictment for stealing over $100, one may be convicted for stealing less than $100.[7] And on an indictment for having in possession more than ten pieces of counterfeit coin, the defendant may be found guilty of having in his possession less than ten.[8]

§ 132. Burglary and larceny in same count under Code.—It frequently occurs that, in an information or indictment, the same count may charge two offenses, such as burglary and larceny, and in such case there can be a conviction of either under the Code of different states where such joinder is permitted. Such charging of two separate offenses and a possible conviction of either crime has been held not to render the count for burglary insufficient, for the reason that where the two offenses are charged in the same count the

back, 66 Mo. 168, 172; *Webster* v. *People,* 92 N. Y. 422, 425; Underhill, Crim. Ev. § 439; Hughes, Crim. Law & Proc. § 652; *Limouze* v. *People,* 58 Ill. App. 314.

[4] But in libel, words spoken or published on another occasion, charging a separate and distinct crime from that set forth in the complaint, are not admissible for the purpose of showing malice or for any other purpose. *Upton* v. *Hume,* 24 Or. 420, 21 L.R.A. 493, 498, 41 Am. St. Rep. 863, 33 Pac. 810.

[5] *Rex* v. *Burdett,* 1 Ld. Raym. 149.

See *Rex* v. *Carson,* Russ. & R. C. C. 303.

[6] *Rex* v. *Carson,* Russ. & R. C. C. 303; *Rex* v. *Furneaux,* Russ. & R. C. C. 335; *Rex* v. *Tyers,* Russ. & R. C. C. 402.

[7] *Com.* v. *Griffin,* 21 Pick. 523, 525; *Com.* v. *O'Connell,* 12 Allen, 451.

But some part of the notes or coin alleged must be proved.

[8] *Com.* v. *Griffin,* 21 Pick. 523, 525

rule is that, on a conviction, the theft would be included in the burglary, and no judgment could be rendered for the larceny, and that in such case the conviction for burglary would bar a subsequent prosecution for the theft.[1] But under such count no judgment could be rendered for the larceny, nor could a conviction be had for both offenses and a separate punishment assessed for each, or a joint punishment for both. So, under such a count, if the defendant should be convicted by a verdict of "guilty as charged in the indictment," such verdict would be a nullity, and a motion for a new trial or in arrest would be good.

And such count so embracing conjointly two offenses in the same count may be insufficient to charge burglary and yet be sufficient in charging the larceny, and in such case the prosecution, after the evidence is closed, can dismiss as to the charge of burglary and proceed under the charge of theft.[2]

§ 133. Conspiracy; overt act; divisible averments.— Overt acts in conspiracy may be divisible. Thus, upon an indictment for conspiring to prevent workmen from continuing to work, it is sufficient to prove a conspiracy to prevent one workman from working,[1] and in this connection it is well

[1] *Williams* v. *State,* 21 Tex. Crim. Rep. 70, 72, 5 S. W. 838.

It will be observed that this rule obtains only where, by statute, provision is made with regard to offenses including different degrees, such as where burglary is declared to include "every species of house breaking and theft or other felony, when charged in the indictment in connection with the burglary. Tex. Rev. Code Crim. Proc. art. 714, subdiv. 5; *Miller* v. *State,* 16 Tex. App. 417, 420, 5 Am. Crim. Rep. 94.

[2] Bishop, Crim. Proc. § 424.

[1] Wright, Crim. Conspiracies, p. 178 and note; *Reg.* v. *Rowlands,* 17 Q. B. 671, 2 Den. C. C. 364, 21 L. J. Mag. Cas. N. S. 81, 16 Jur. 268, 5 Cox, C. C. 466; Greenhood, Pub. Pol. 648 et seq. The law of Trade Unions by William Earle; 2 Roschers, Political Economy, Lalors's ed. pp. 845–885; Political Economy & Criminal Law by Wharton, 3 Crim. L. Mag. p. 1. "Workmen may combine lawfully for their own protection and common benefit,—for the advancement of their own interests, for the development of skill in

to bear in mind that in this character of crime the conspiracy, *i. e.*, the unlawful combination, agreement, and confederacy, is the essence of the offense, while the overt act is but an insignificant affair.[2] So a conspiracy to prevent witnesses from attending court would be established by proof of a conspiracy to prevent one witness from so doing. As a general rule, however, no overt act is necessary to be shown to render this offense complete, although by statute in some states it is so necessary to prove. And this is the rule in the courts of the United States.[3]

§ 134. Divisible averments; proof of either sufficient.— Where an indictment contains divisible averments in the shape of predicates, as, that the defendant "forged or caused to be forged," proof of either averment will be sufficient.[1] And a

their trade or to prevent overcrowding therein, or to encourage those belonging to their trade to enter their guild for the purpose of raising their wages or to secure a benefit which they can claim by law. The moment, however, they proceed by threats, intimidation, violence, obstruction, or molestation, or where their object be to impoverish third persons, or to extort money from their employers or to ruin their business, or to encourage strikes or breaches of contract among others, or to restrict the freedom of others for the purpose of compelling employers to conform to their views, or to attempt to enforce rules upon those not members of their association, they render themselves liable to indictment." Wright, Crim. Conspiracies, p. 178.

See also *United States* v. *Workingmen's Amalgamated Council,* 26 L.R.A. 158, 4 Inters. Com. Rep. 831, 54 Fed. 994; *United States* v. *Elliott,* 5 Inters. Com. Rep. 148, 64 Fed. 27; *United States* v. *Debs,* 5 Inters. Com. Rep. 163, 64 Fed. 724; 2 McClain, Crim. Law, § 963.

[2] Wright, Crim. Conspiracies, p. 139.

[3] McClain, Crim. Law, § 966; U. S. Rev. Stat. § 5440, U. S. Comp. State. 1901, p. 3676; *United States* v. *Reichert,* 32 Fed. 142: *United States* v. *Cassidy,* 67 Fed. 698; *United States* v. *McCord,* 72 Fed. 159; *United States* v. *Milner,* 36 Fed. 890.

[1] *Rex* v. *Middlehurst,* 1 Burr. 400; *Hoskins* v. *State,* 11 Ga. 92; post, §§ 138 et seq.; Wharton, Crim. Law, 10th ed. § 727; Wharton, Crim. Pl. & Pr. § 742.

defendant may be convicted of printing and publishing a libel upon an indictment which charges him with composing, printing, and publishing.[2] Proof of killing by one of several instruments averred will also sustain an indictment for homicide whenever it is necessary to set forth the means;[3] and so of killing by inflicting several wounds, the proof of one would be responsive to the complaint.[4] On the same reasoning, where two intentions are cumulatively ascribed to one act, as, that an assault was committed upon a female, with intent to abuse and carnally know her, proof of either of these intentions will be sufficient.[5] And this rule has also been held to apply to an indictment charging the defendant with libel of certain magistrates, with intent to defame them, and with a malicious intent to bring the administration of justice into contempt, where it was said that if the defendant had published such libel with either of these intentions the jury should convict.[6]

§ 135. Indictment charging in the disjunctive.—It is also a well-established rule of criminal pleading that an indictment may charge conjunctive acts constituting the offense which are stated disjunctively in the statute. And this is so proper and allowable where a statute makes two or more

[2] *Rex* v. *Hunt,* 2 Campb. 585; *Rex* v. *Williams,* 2 Campb. 646; *State* v. *Locklear,* 44 N. C. (Busbee, L.) 205; *Com.* v. *Morgan,* 107 Mass. 199.

[3] *Beavers* v. *State,* 58 Ind. 530. See *Casey* v. *People,* 72 N. Y. 393; *State* v. *McDonald,* 67 Mo. 13.

[4] Wharton, Crim. Law, 10th ed. 535.

[5] Post, § 740; Wharton, Crim. Law, 10th ed. §§ 108, 119; *Rex* v. *Dawson,* 1 Eng. L. & Eq. Rep. 589; 3 Starkie, 62; *Reg.* v. *Hanson,* Car. & M. 334, 2 Moody, C. C. 245; *Rex* v. *Cox,* Russ. & R. C. C. 362, 1 Leach, C. L. 71; *Rex* v. *Davis,* 1 Car. & P. 306; *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. *Dineen,* 10 Minn. 407, Gil. 325; *State* v. *Cocker,* 3 Harr. (Del.) 554; *Phillips* v. *State,* 36 Ark. 282.

[6] *Rex* v. *Evans,* 3 Starkie, 35, 23 Revised Rep. 754.

distinct acts connected with the same transaction indictable, each one of which may be considered as representing a stage in the same offense. If a defendant should be charged with murder by poison simply, the prosecution would be compelled to establish a murder by poison, and one committed in no other way; but if the indictment alleges murder committed by poison and in the perpetration or in the attempt to perpetrate robbery, then such indictment would be good and cover that phase of the case.[1]

§ 136. Joint and single offenses in same count.—Where two are charged with a joint and single offense, *e. g.*, larceny, either may be found guilty: but they cannot be found guilty of separate parts, and if so found guilty separately a pardon must be obtained or a *nolle prosequi* entered as to the one who stands second upon the indictment, before judgment can be given against the other.[1]

And an indictment averring that two persons at a certain time and place "was a common seller of intoxicating liquors" is sufficient to sustain a conviction of the first after a *nolle prosequi* has been entered as to the second.[2] But where several are indicted for burglary and larceny, one may be found guilty of the burglary and larceny, and the others of the larceny only.[3] And in a joint indictment one may be charged with inveigling, stealing, and carrying away a slave, and an-

[1] Joyce, Indictments, § 382; *Roach* v. *State,* 8 Tex. App. 478, 490.

[1] *Cox* v. *State,* 76 Ala. 66, 68; *Berry* v. *State,* 65 Ala. 117, 120; *Rex* v. *Hempstead,* Russ. & R. C. C. 344; *O'Connell* v. *Reg.* 11 Clark. & F. 155, 9 Jur. 25, 1 Cox, C. C. 413; *Com.* v. *Wood,* 12 Mass. 313; *Com.* v. *Cook,* 6 Serg. & R. 577, 9 Am. Dec. 465.

[2] *Com.* v. *Colton,* 11 Gray, 1; *Klein* v. *People,* 31 N. Y. 229; *People* v. *McIntyre,* 1 Park. Crim. Rep. 371; *People* v. *Donnelly,* 2 Park. Crim. Rep. 182; *Boies* v. *State,* 2 McMull. L. 252.

[3] *Rex* v. *Butterworth,* Russ. & R. C. C. 520; post, §§ 584, 585.

other or others with having aided or counseled him to do so.[4] And two persons who were unlawfully fishing in a great pond at the same time, from the same boat, may be joined as defendants in a complaint for so doing, although each was fishing on his own account.[5]

Where, however, several distinct felonies are charged in the same indictment, the indictment is not thereby rendered bad, but the judge may call on the prosecution to elect upon which felony the trial shall proceed, and may thereafter exclude all evidence as to acts tending to prove any felony which is no part of the same transaction or admissible under some other rule of evidence. This course prevents the jury from being influenced in determining the criminality of the accused by evidence relating to distinct offenses which would not have been admissible on an indictment for a single felony.[6]

And likewise it is said that at the common law a defendant indicted as accessory to two or more persons might be convicted as accessory to one;[7] but he cannot be convicted as accessory after the fact to murder on an indictment for the principal offense.[8] But a count charging a person with being an accessory before the fact may be joined with a count charging the same person with being accessory after the fact to the same felony, and the prosecutor will not be compelled to

[4] *State* v. *Clayton*, 11 Rich. L. 581, 594; *State* v. *McCoy*, 2 Spears, L. 711; *United States* v. *Holland*, 3 Cranch, C. C. 254, Fed. Cas. No. 15,377.

[5] *Com.* v. *Weatherhead*, 110 Mass. 176, 178; *State* v. *Comstock*, 46 Iowa, 265, 266; 2 Russell, Crimes, 7th Eng. ed. 1952.

[6] *Reg.* v. *Bradlaugh*, 15 Cox, C. C. 217; *Rex* v. *Kingston*, 8 East, 41, 9 Revised Rep. 373; *Campbell* v. *Reg.* 11 Q. B. 799, 2 New Sess. Cas. 297, 17 L. J. Mag. Cas. N. S. 89, 12 Jur. 117, 2 Cox, C. C. 463; *State* v. *Woodard*, 38 S. C. 353, 17 S. E. 135; *Redman* v. *State*, 1 Blackf. 429; *People* v. *Hawkins*, 34 Cal. 181; Russell, Crimes, 7th Eng. ed. p. 1953.

[7] Russell, Crimes, 7th Eng. ed. 135.

[8] Russell, Crimes, 7th Eng. ed. p. 134.

elect upon which he will proceed, and the defendant may be found guilty upon both.[9]

§ 137. Divisibility extended by statute.—By statutes now of almost universal adoption, the common-law rules in this respect have been largely extended. Thus, in Massachusetts it is now held that on an indictment for rape the prisoner may be convicted of incest, or assault and battery,[1] and on a charge of manslaughter the defendant may be convicted of assault and battery.[2] But it was held in a prior case that on an indictment for murder there cannot at common law be a conviction of an assault with intent to do murder.[3] By statutes in most jurisdictions there may be now convictions of an attempt on indictments for the consummated offense.[4] Upon examination it will be found that such statutes provide substantially that all assaults in their nature felonious, and many felonies as well, include all assaults of an inferior degree.[5]

§ 138. Surplusage.—All unnecessary words may, on trial or arrest of judgment, be rejected as surplusage if the indictment would be good upon striking them out. All such immaterial and superfluous words will be rejected unless with-

[9] Ibid.

Evidence of death, in another county, of one mortally wounded in the county where the trial is had, is not inadmissible in aid of a prosecution for murder, on the ground that there is a variance from the indictment charging the killing within the county, where the statute permits trial of the offender in either county. *Coleman* v. *State*, 83 Miss. 290, 64 L.R.A. 807, 809, 810, 35 So. 937, 1 A. & E. Ann. Cas. 406.

[1] *Com.* v. *Goodhue*, 2 Met. 193; *Com.* v. *Drum*, 19 Pick. 479. See post, 584, 585.

[2] *Com.* v. *Drum*, 19 Pick. 479.

[3] *Com.* v. *Roby*, 12 Pick. 496.

[4] Wharton, Crim. Pl. & Pr. § 742.

[5] Texas Code Crim. Proc. art. 714, subdiv. 2.

It is interesting to note how far this rule obtains in England, and the following table illustrates from 2 Russell on Crimes, 7th Eng. ed. page 1968:

Statutory provisions: On indictment for—	Jury may convict of—	Statute:
Murder of a new-born child.	Concealment of the birth or feloniously destroying before birth.	24 & 25 Vict. chap. 100, § 60.
Manslaughter of a child under sixteen by a person over sixteen who had custody, etc.	Cruelty to the child.	8 Edw. VII. chap. 68, § 12.
Administering poison with intent to endanger life or so as to inflict grevious bodily harm.	Administering poison with intent to injure, aggrieve, or annoy.	24 & 25 Vict. chap. 100, §§ 23–25.
Feloniously wounding.	Unlawfully wounding.	14 & 15 Vict. chap. 1955 (i).
Robbery.	Assault with intent to rob.	24 & 25 Vict. chap. 96, § 41 (j).
Felonious demolition by rioters.	Unlawful damage by rioters.	24 & 25 Vict. chap. 97, §§ 11, 12.
Rape of a girl under thirteen.	Indecent assault.	48 & 49 Vict. chap. 69, § 9. 8 Edw. VII. chap. 45, 5. 4. (3).
Incest.	Offenses under § 4 or 5 of the criminal law, Ont. act of 1885.	8 Edw. VII. chap. 45, 5. 4. (3).
Corrupt practices in elections.	Illegal practices at elections.	46 & 47 Vict. chap. 51, D. 52. 47 & 48 Vict. chap. 70, § 30.
Any completed felony or misdemeanor.	Attempt to commit full offense.	14 & 15 Vict. chap. 100, § 9.
Embezzlement or fraudulent application or disposition of property.	Simple larceny or larceny as a clerk or servant or as a person employed in the public service or police.	24 & 25 Vict. chap. 96, §§ 68–72.
Larceny.	Embezzlement or fraudulent disposition or application of property.	24 & 25 Vict. chap. 96, § 72.

out them the indictment cannot be supported, but where these immaterial averments are in any sense descriptive of the identity of what is essential then they cannot be so dispensed with.[1] Even by this means an indictment on its face defective by insensible or repugnant allegations may be made good by discharging phrases which destroy or pervert its meaning. So, where an indictment charged an offense against Matt Taylor, "whose Christian name is otherwise unknown," it was held not bad, as the words quoted could be rejected as surplusage.[2] Where an indictment alleged, "Thomas Morris did, etc.," and continuing, "he, the said Thomas Morris," it was held that the latter five words might be stricken out and that the indictment was good without them.[3]

Surplusage, as the modern doctrine goes, independent of statute, may always be rejected to aid the sense, and does not render the indictment bad. The danger is in its introduction, that when confounded with important and necessary allega-

[1] Clark, Crim. Proc. 178; 1 Hale, P. C. 535; *State* v. *Gilbert,* 13 Vt. 647, 651; *Moyer* v. *Com.* 7 Pa. 439; *United States* v. *Foye,* 1 Curt. C. C. 364, Fed. Cas. No. 15,157; *Raisler* v. *State,* 55 Ala. 64; *State* v. *Ellis,* 4 Mo. 474, 476; *McGregor* v. *State,* 16 Ind. 9; *Wells* v. *Com.* 12 Grav, 326; *Simons* v. *Bollinger,* 154 Ind. 83, 48 L.R.A. 234, 236, 56 N. E. 23; *Trenholm* v. *Commercial Nat. Bank,* 38 Fed. 323; *Com.* v. *Chiovaro,* 129 Mass. 489, 483; *Com.* v. *Pray,* 13 Pick. 359; *Fulford* v. *State,* 50 Ga. 591, 593; *Littell* v. *State,* 133 Ind. 577, 578, 33 N. E. 417; *State* v. *Mayberry,* 48 Me. 218, 234; *Com.* v. *Randall,* 4 Gray, 36, 38; *Lewis* v. *State,* 113 Ind. 59, 61, 14 N. E. 892; *State* v. *Palmer,* 35 Me. 9, 12; *Fant* v. *People,* 45 Ill. 259; *People* v. *White,* 22 Wend. 167, 171; *Com.* v. *Luscomb,* 130 Mass. 42, 43; Gillett, Crim. Law, § 133; *State* v. *Moore,* 33 N. C. (11 Ired. L.) 70; *Com.* v. *Gavin,* 121 Mass. 54, 23 Am. Rep. 255; *Com.* v. *Arnold,* 4 Pick. 251; *State* v. *Canney,* 19 N. H. 135; *Com.* v. *Atwood,* 11 Mass. 93; *State* v. *Bailey,* 31 N. H. 521; *State* v. *Corrigan,* 24 Conn. 286; 1 Bishop, Crim. Proc. § 482.

[2] *Taylor* v. *State,* 100 Ala. 68, 14 So. 875.

[3] *Rex* v. *Morris,* 1 Leach, C. L. 109; *Com.* v. *Hunt,* 4 Pick. 252; *United States* v. *Howard,* 3 Sumn. 12, Fed. Cas. No. 15,403.

And, in an affray, the "use of a deadly weapon" if averred in an indictment can be rejected. *State* v. *Hooper,* 82 N. C. 663; *State* v. *Moore,* 82 N. C. 659.

tions the prosecution imperils its case, for the reason that when one cannot be stricken out without the other, then the whole averment must stand, and proof must be forthcoming in support of it all.

The distinction between variance and surplusage is laid down with great perspicuity by Justice Story in United States v. Howard, 3 Sumn. 14, 15, Fed. Cas. No. 15,403. He says: "Two questions generally arise. The first is, What allegations must be proved and what may be disregarded in evidence? The second is, what is sufficient proof of allegations which cannot be disregarded in evidence? The former includes the consideration of what constitutes mere surplusage in an indictment; the latter, what constitutes variance. Mere surplusage will not vitiate an indictment, and need not be established in proof. The material facts which constitute the offense charged must be stated, and it must be proved in evidence. But allegations not essential to such purpose, which might be entirely omitted without affecting the charge and without detriment to the indictment, are considered as mere surplusage, and may be disregarded in evidence. But no allegation, whether it be necessary or unnecessary, whether it be more or less particular, which is descriptive of the identity of that which is legally essential to the charge in the indictment, can ever be rejected as surplusage."

So, where a jury in its verdict finds not only the issues submitted to them, but embraces in the verdict the determination of matters extraneous, these redundant matters are denominated surplusage.[4]

[4] *Statler* v. *United States,* 157 U. S. 277, 39 L. ed. 700, 15 Sup. Ct. Rep. 616; *Henderson* v. *People,* 165 Ill. 607, 46 N. E. 711, 29 Am. & Eng. Enc. Law, p. 1026.

In a statutory averment, words additional to those in the statute may be rejected as surplusage. *Snell* v. *People,* 29 Ill. App. 470.

So, where an indictment alleged "lawful currency of the United States of Kentucky," the words "of Kentucky" are surplusage. *Travis* v. *Com.* 96 Ky. 77, 27 S. W. 863.

Also the word "feloniously," used in charging extortion, may be re-

§ 139. Impertinent allegations rejected as surplusage.—There can be no good reason in requiring proof of allegations which are impertinent and useless; the identity of those which are essential to the claim or charge with the proof being all that is material. Thus, a statement in an information for failure to stop an automobile on a public highway when signaled by a person driving a horse, that the signal was given by one riding "for and on behalf of the driver," is surplusage.[1] And where A & B are laid as "a firm," the last two words are surplusage.[2]

Thus, if it were alleged that A, being armed with a bludgeon and disguised feloniously stole, etc., the watch of B, the allegation that he was "armed and disguised," being foreign to the charge, could be wholly rejected. Likewise where it was charged that the defendant did bite or cut off the ear of the prosecutor, etc., this, being superfluous and impertinent, could be discarded.[3] And that a person "died" from the effects of an alleged abortion can be discarded as aggravation only.[4]

But the presence in an indictment of surplusage is never good ground for a motion to quash.[5]

jected as surplusage. *Com.* v. *Philpot,* 130 Mass. 59.

Where one offense is sufficiently charged, but the words insufficiently charge a higher offense, the latter may be rejected as surplusage, and the information will be good as to the one sufficiently charged. *Smith* v. *State,* 85 Ind. 553.

Allegations wholly foreign to any element of offense charged may be rejected as surplusage, but should those averments be descriptive of some element, though more in detail than is necessary, they must be proved. *Shrouder* v. *State,* 121 Ga. 615, 49 S. E. 702.

[1] *State* v. *Goodwin,* 169 Ind. 265, 82 N. E. 459.

[2] *Rawls* v. *State,* 48 Tex. Crim. Rep. 623, 89 S. W. 1071.

[3] *Scott* v. *Com.* 6 Serg. & R. 224; *Com.* v. *Randall,* 4 Gray, 36, 38; *Churchill* v. *Hunt,* 2 Barn. & Ald. 685, 1 Chitty, 480, 22 Revised Rep. 807; *McCarney* v. *People,* 83 N. Y. 408, 411, 38 Am. Rep. 456.

[4] *Com.* v. *Adams,* 127 Mass. 15. See *Lohman* v. *People,* 1 Const. 379.

[5] *United States* v. *Moody,* 164 Fed. 269.

Where the words, "without the consent and against the will" of the person robbed, did not vitiate in robbery. *Flannagan* v. *State,*

§ 140. **The word "feloniously" unnecessary; when.**—It frequently occurs that in charging misdemeanors either at the common law or under statute, the word "feloniously" is used, and that in an indictment for felony the same word is unnecessarily inserted.

While some authorities hold that the word "feloniously" is characteristic of the crime, and an offense must be shown conforming to it in grade, still the better doctrine is that in such cases the word may be eliminated as surplusage and entirely disregarded.[1] While this word must be used in the indictment whenever found in the statute under which the complaint is drawn, yet its presence when not so provided in the statute, never vitiates.[2] So the averment of ownership may be expunged when immaterial.[3]

And where a robbery was alleged to have been committed in the dwelling house of A B, it was held that a variance as

55 Tex. Crim. Rep. 162, 116 S. W. 54; *Smith* v. *State,* 145 Ind. 176, 177, 42 N. E. 1019; *Kelley* v. *State,* 51 Tex. Crim. Rep. 508, 103 S. W. 189.

So, where the indictment alleged the assault "with a stone" which he, the defendant, "then and there held," the word "with" was rejected. *Turns* v. *Com.* 6 Met. 224, 225.

"Permitting persons to play with cards and other unlawful games," —"unlawful games" rejected. *Com.* v. *Bolkom,* 3 Pick. 281.

"A short distance in the country to look at land on Bray's bayou." The last two words rejected. *Warrington* v. *State,* 1 Tex. App. 168, 174.

Mr. Bishop says: "Whenever there is a necessary allegation which cannot be rejected, yet the pleader makes it unnecessarily minute in the way of description, the proof must satisfy the description as well as the main part, since the one is essential to the identity of the other. 1 Bishop, Crim. Proc. § 489.

And he cites *United States* v. *Keen,* 1 McLean, 429, Fed. Cas. No. 15,510; *State* v. *Jackson,* 30 Me. 29; *United States* v. *Brown,* 3 McLean, 233, Fed. Cas. No. 14,666; *United States* v. *Howard,* 3 Sumn. 12, Fed. Cas. No. 15,403; *State* v. *Noble,* 15 Me. 476; *Dick* v. *State,* 30 Miss. 631.

[1] Joyce, Indictments, §§ 266–334; *State* v. *Judd,* 132 Iowa, 296, 297, 109 N. W. 892, 11 A. & E. Ann. Cas. 91; *Com.* v. *Philpot,* 130 Mass. 59.

[2] *State* v. *Williams,* 30 Mo. 364.

[3] *Stevens* v. *Com.* 4 Leigh, 683; *Lohman* v. *People,* 1 N. Y. 379, 49 Am. Dec. 340.

to this was inconsequential, as the crime could be committed there or elsewhere.[4] The test to apply in all cases is, Do the words in question negative the crime intended to be charged? If they do they are harmful, otherwise not.[5]

§ 141. Effect of videlicet.— The object of a *videlicet* is to point out and indicate that the pleader does not undertake to prove the precise circumstance as alleged;[1] and also to show in connection with a clause immediately preceding, a specification which, if material, goes to sustain the indictment generally, and if immaterial, may be rejected as surplusage;[2] and its effect is to relieve the pleader from the necessity of proving a nonessential descriptive averment.[3] In other words it does not bind the pleader to an exact recital where it is not otherwise required, nor, on the other hand, will it make a material averment immaterial.[4] If what precedes be matter of direct averment and material, then what is stated under it will be deemed material and traversable, and if traversable it must be proved.[5] It cannot, as a general rule, be used to preface anything contrary or repugnant to the premises, nor can it increase or diminish the precedent matter. And if it attempts to do either, the statement made under it will be rejected as

[4] *Pye's Case,* 2 East, P. C. 785.

[5] 12 Current Law, p. 14; *State* v. *Barrett,* 121 La. 1058, 46 So. 1016; *State* v. *McGowan,* 36 Mont. 422, 96 Pac. 552.

[1] *Chicago Terminal Transfer R. Co.* v. *Young,* 118 Ill. App. 226.

[2] Wharton, Crim. Pl. & Pr. §§ 122, 158a; 1 Starkie, Crim. Pl. 251; *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; *Ryalls* v. *Reg.* 11 Q. B. 781, 797, 17 L. J. Mag. Cas. N. S. 92; *Com.* v. *Hart,* 10 Gray, 468; *People* v. *Jackson,* 3 Denio, 101, 45 Am. Dec. 449.

[3] 1 Greenl. Ev. § 69; *State* v. *Heck,* 23 Minn. 549, 550.

[4] 10 Enc. Pl. & Pr. p. 480; *State* v. *Grimes,* 50 Minn. 123, 127, 52 N. W. 275.

[5] *State* v. *Grimes,* 50 Minn. 123, 127, 52 N. W. 275; *State* v. *Heck,* 23 Minn. 549, 550.

"The precise and legal use of a *videlicet* in every species of pleading is to enable the pleader to isolate, to distinguish, and to fix with certainty that which was before

surplusage.[6] But where the pleader omits the use of the *videlicet* in averring that which is not material, he will be concluded by what he has positively averred without it, and thereby will make such matter material, and will be so bound to prove exactly what he stated.[7]

§ 142. Aggravation and inducements rejected as surplusage.—The same principle extends to cases where the evidence fails to prove circumstances not altogether impertinent, but which merely affect the magnitude or extent of the claim or charge; and here, although circumstances are alleged, which, if proved, would have been of legal importance, yet, although the evidence failed to establish the whole of what is alleged, the principle adverted to still operates to give effect to what is proved, to the extent to which it is proved.[1] "The principles," remarks Mr. Starkie, "which require the cause of action or ground of offense to be stated, are satisfied: the adversary is not taken by surprise, for no fact is admitted in evidence which is not alleged against him: and the court is enabled to pronounce on the legal effect of the part which is established as true, by the verdict of the jury, and the record shows the real nature and extent of the right or liability established."[2] Thus, where an indictment in one count charges

general, and which, without such explanation, might, with equal propriety, have been applied to different objects." Joyce, Indictments, § 269; *Com.* v. *Hart*, 10 Gray, 465, 467.

[6] 19 Enc. Pl. & Pr. p. 252 and cases.

[7] 19 Enc. Pl. & Pr. p. 254.

[1] If in negativing a statutory exception the language used negatives more than is required, this is no objection when the sole effect is to put the prosecution to stricter proof. *Beasley* v. *People*, 89 Ill. 571, 577.

Where in one count A is charged as principal with the murder of E, and B, C, and D are charged with aiding and abetting A in committing the crime, the conclusion of the count, charging all four as guilty of murder, is not essential, and may be rejected as surplusage. *Hawley* v. *Com.* 75 Va. 847, 850.

[2] Starkie, Ev. 1550, 1565; *United States* v. *Howard*, 3 Sumn. 12, Fed. Cas. No. 15,403; *McCulley* v. *State*, 62 Ind. 428, 431; *Cameron* v. *State*, 13 Ark. 712.

And see supra, §§ 127–132

a rescue, and also an assault and battery, and the defendant is convicted generally, if the averments as to the rescue are uncertain or bad, these may be rejected as superfluous and immaterial, and the court may proceed to pass judgment upon the verdict, as for an assault and battery.[3] And in conformity with the view above stated, a carrier of the mail may be convicted of an offense punishable generally under the law, though not as carrier; and if he is charged in the indictment as carrier, the word "carrier" will be considered as surplusage."[4]

§ 143. Otherwise when allegation goes to essence.— Essential allegations cannot be rejected as surplusage. Thus, in an indictment for false pretenses there was held to be a material and fatal variance between the allegation that the defendant said that he had paid a sum of money into the bank, and the proof that he said a sum of money had been paid into the bank, without saying by whom.[1] It is otherwise where the legal meaning of the acts is the same. In an indictment for murder an allegation that death was produced with a knife will be supported by proof that it was produced by a dagger, sword, or staff, or any instrument capable of the same effect.[2] An indictment charged that the assault was made with a razor, while the proof tended to show that the wound was inflicted with a pocket knife, and the court stated that it was sufficient if the substance of the charge was proved, without regard to the exact instrument used.[3] So, with shooting

[3] *State* v. *Morrison,* 24 N. C. (2 Ired. L.) 9; *State* v. *Burt,* 25 Vt. 373, 376; *Com.* v. *Randall,* 4 Gray, 36, 38.

[4] *United States* v. *Burroughs,* 3 McLean, 405, 407, Fed. Cas. No. 14,695.

[1] *Rex* v. *Plestow,* Campb. 494. See *Com.* v. *Pearce,* 130 Mass. 31, 32; *Com.* v. *Luscomb,* 130 Mass. 42, 44; Supra, § 122; *State* v. *Purify,* 86 N. C. 681, 682; *State* v. *Clark,* 23 N. H. 429; *Mosely* v. *State,* 9 Tex. App. 137, 138.

[2] *Mackalley's Case,* 9 Coke, 67a; Archibold, Crim. Pr. & Pl. 9th ed. 382.

[3] *Hull* v. *State,* 79 Ala. 32, 33.

with a gun, proof that he shot with a pistol held no variance.[4] The trend of modern decisions, it will be found, is to the effect that the substance of homicide being the felonious killing, proof of any killing in any manner or by any means that conform substantially with the indictment is sufficient, and that the strictness of the ancient rule as to variance between the proof and the indictment has been much relaxed.[5]

And where the indictment charged the defendant with a nuisance in erecting a dam by reason of which the animal and vegetable matter collecting became offensive, etc., but the proof showed that the nuisance was caused not by the means described, but from the rise and fall of the water in the pond and the action of the sun on the vegetable matter on the margin, it was held there was no variance.[6]

§ 144. Differentia between major and minor offense.— The same principle may also be used to explain the cases elsewhere referred to, in which a man charged with a greater offense may be convicted of one of lesser degree contained in it.[1] Thus if A be charged with feloniously killing B with

[4] *Turner* v. *State,* 97 Ala. 57, 58, 12 So. 54.

[5] Underhill, Crim. Ev. § 314; Abbott, Trial Brief Crim. p. 583; *State* v. *Smith,* 32 Me. 369, 373, 54 Am. Dec. 578; *State* v. *Lautenschlager,* 22 Minn. 514, 522; *Harris* v. *People,* 64 N. Y. 148, 153, 2 Am. Crim. Rep. 416; *Drummer* v. *State,* 45 Fla. 17, 33 So. 1008, 13 Am. Crim. Rep. 694; *Gray* v. *State,* 44 Fla. 436, 33 So. 295, 13 Am. Crim. Rep. 205; *Boyd* v. *Com.* 22 Ky. L. Rep. 1017, 39 S. W. 518, 13 Am. Crim. Rep. 703. But see *Jones* v. *State,* — Tex. Crim. Rep. —, 62 S. W. 758, 13 Am. Crim. Rep. 693.

[6] *People* v. *Townsend,* 3 Hill, 479.

[1] *Watson* v. *State,* 21 L.R.A. (N.S.) 1, and note, 116 Ga. 607, 608, 43 S. E. 32; supra, § 131; Wharton, Crim. Law, 8th ed. § 542; Wharton, Crim. Pl. & Pr. §§ 244–246, 465; *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. *Mitchell,* 12 Eng. L. & Eq. Rep. 588; *State* v. *Waters,* 39 Me. 54, 68; *State* v. *Dearborn,* 54 Me. 442, 443; *State* v. *Hardy,* 47 N. H. 538; *State* v. *Coy,* 2 Aik.

malice prepense and aforethought, and all but the fact of the express malice be proved, A may be convicted of manslaughter in either degree, for the indictment contains all the allegations essential to that charge; but a conviction of a crime lesser in degree than that charged in the information and in the verdict of the jury naming it, and affixing the appropriate punishment, is equivalent to an acquittal of the higher degrees.[2]

And it is held that statutes which declare that the effect of a new trial is to place the cause in the same position in which it was before any trial had taken place do not apply in cases admitting of degrees, where a party having been convicted of a lesser degree is accorded a new trial. In such case the rule is that the case stands for trial upon the degree for which the conviction was had and the degrees inferior thereto; and that with respect to such degrees the case stands as if no previous trial had been had.[3]

(Vt.) 181; *State* v. *Burt,* 25 Vt. 373; *State* v. *Johnson,* 30 N. J. L. 185; *Francisco* v. *State,* 24 N. J. L. 30; *Hutchison* v. *Com.* 82 Pa. 473, 478, 2 Am. Crim. Rep. 362, 4 Mor. Min. Rep. 208; *State* v. *Flannigan,* 6 Md. 167, 171; *Davis* v. *State,* 39 Md. 355, 363; *Stewart* v. *State,* 5 Ohio, 242, 243; *State* v. *Kennedy,* 7 Blackf. 233; *Foley* v. *State,* 9 Ind. 363; *Gillespie* v. *State,* 9 Ind. 380; *Wroe* v. *State,* 20 Ohio St. 460, 465; *State* v. *Lessing,* 16 Minn. 75, 78 Gil. 64; *State* v. *Robey,* 8 Nev. 312, 316; *Swinney* v. *State,* 8 Smedes & M. 576, 584; *State* v. *Fleming,* 2 Strobh. L. 464, 470; *Johnson* v. *State,* 14 Ga. 55, 59; *Carpenter* v. *State,* 23 Ala. 84, 85; *Watson* v. *State,* 5 Mo. 497, 499; *Reynolds* v. *State,* 11 Tex. 120, 121; *McBride* v. *State,* 7 Ark. 374; *Cameron* v. *State,* 13 Ark. 712, 714.

In *State* v. *Robey,* 8 Nev. 312, it was held that an indictment charging an assault with intent to commit murder will sustain a conviction of an assault with a deadly weapon with an intent to inflict a bodily injury.

That where a party is indicted for a riot he cannot be convicted of an assault, see *Ferguson* v. *People,* 90 Ill. 510. Otherwise where the indictment avers an assault. Wharton, Crim. Law, 8th ed. § 1550.

[2] *State* v. *Halliday,* 112 La. 846, 850, 36 So. 753; *State* v. *West,* 45 La. Ann. 932, 13 So. 173; *People* v. *Ham Tong,* 155 Cal. 579, 24 L.R.A. (N.S.) 481, 484, 132 Am. St. Rep. 910, 102 Pac. 262.

[3] *Robinson* v. *State,* 21 Tex. App. 160, 166, 17 S. W. 632; *Vance* v. *State,* 70 Ark. 272, 68 S. W. 37;

And so on indictments for adultery there can be convictions for fornication, for, if the carnal intercourse proved by the evidence would be sufficient to establish the crime of adultery, it would also be sufficient to prove and sustain a conviction for fornication where a marriage is not necessary and not proven. But under an indictment for fornication a person cannot be convicted of adultery, because marriage is not an element of the latter, while it is essential to the former.[4]

Again, an indictment charging that the defendant did "embezzle, steal, take and carry away" will be good for larceny, the "embezzle" being rejected as surplusage.[5]

By statute in most states, however, the offense of embezzlement in its various forms is expressly made larceny, and the usual form of the indictment under these statutes is to set out in the indictment the facts constituting the crime, and then aver "that so the defendant committed the larceny."

And, as has been seen, proof of any conversion of property or funds mentioned in the indictment, no matter how small in amount, is sufficient.[6]

Levy v. *State,* 70 Ark. 610, 68 S. W. 485.

[4] *Respublica* v. *Roberts,* 2 Dall, 124, 2 L. ed. 316; *Dinkey* v. *Com.* 17 Pa. 126, 129, 55 Am. Dec. 542; *State* v. *Cowell,* 26 N. C. (4 Ired. L.) 231, 232; Contra, *State* v. *Pearce,* 2 Blackf. 318; *Smitherman* v. *State,* 27 Ala. 23, 24; Bishop, Statutory Crimes, § 690; *Kelley* v. *State,* 32 Tex. Crim. Rep. 579, 580, 25 S. W. 425; Clark Crim. Law, § 129; *Bodiford* v. *State,* 86 Ala. 67, 68, 11 Am. St. Rep. 20, 5 So. 559.

[5] *Com.* v. *Simpson,* 9 Met. 138, 142; Wharton, Crim. Law, § 858; Wharton, Crim. Pl. & Pr. § 246; *People* v. *Jones,* 53 Cal. 58, 59.

So, theft has been held to include receiving and concealing. *Vincent* v. *State,* 10 Tex. App. 330, 332.

But contra: *State* v. *Honig,* 9 Mo. App. 298, 300; *Leftwich* v. *Com.* 20 Gratt. 716, 720; *People* v. *Allen,* 5 Denio, 76.

[6] *United States* v. *Harper,* 33 Fed. 471; *Conley* v. *State,* 14 Am. Crim. Rep. 449, and notes, 69 Ark. 454, 456, 14 S. W. 218.

§ 145. Number and quantity may be distributively proved.—The same rule applies to allegations of number, quantity, and magnitude, where the proof, *pro tanto,* supports the claim or charge. Hence, as we have already seen, if a man be charged with stealing ten sovereigns, he may be convicted of stealing five.[1]

§ 146. Descriptive averments must be proved.—But where there is an allegation which describes, defines, qualifies, or limits a matter material to be charged, it is taken as a descriptive averment, and the general rule obtains that it must be proved as laid, even though such particularity of description was unnecessary.[1] So, under a statute making it larceny from the house, to break and enter the house with intent to steal, or after breaking or entering said house, stealing therefrom anything of value, an accusation charging larceny from the dwell-

[1] Supra, § 132; Wharton, Crim. Law, 8th ed. § 951. See Wharton, Crim. Pl. & Pr. § 742; *Com.* v. *Griffin,* 21 Pick. 523.

[1] *Trice* v. *State,* 116 Ga. 602, 42 S. E. 1008, 14 Am. Crim. Rep. 510; *United States* v. *Howard,* 3 Sumn. 12, Fed. Cas. No. 15,403; *United States* v. *Brown,* 3 McLean 233, Fed. Cas. No. 14,666; *State* v. *Noble,* 15 Me. 476, 478; *State* v. *Lashus,* 67 Me. 564; *State* v. *Canney,* 19 N. H. 135, 137; *State* v. *Langley,* 34 N. H. 529, 532; *Com.* v. *Atwood,* 11 Mass. 93, 94; *Com.* v. *Tuck,* 20 Pick. 356, 359; *Com.* v. *Varney,* 10 Cush. 402, 404; *Com.* v. *Livermore,* 4 Gray, 18, 20; *Com.* v. *Dejardin,* 126 Mass. 46, 47, 30 Am. Rep. 652, 3 Am. Crim. Rep. 290; *People* v. *Jones,* 5 Lans. 340; *State* v. *Johnston,* 51 N. C. (6 Jones, L.) 485; *Morgan* v. *State,* 61 Ind. 447, 448, 3 Am. Crim. Rep. 246; *Sweat* v. *State,* 4 Tex. App. 617, 621; supra, § 109.

Under the Ohio statute, where an indictment charged the defendant with stealing a silver teapot, and other named articles of silver ware, and the evidence on the trial showed that the articles stolen were plated ware, consisting of only one twenty-fifth part silver, and there was no finding of the court or evidence showing that the variance was material to the merits of the case or prejudicial to the defendant, it was held that the variance was not fatal, and the defendant was properly convicted, there being a good legal description of the articles stolen after the false word "silver" is rejected. *Goodale* v. *State,* 22 Ohio St. 203, 204. And also see *Campbell* v. *State,* 35 Ohio St. 70.

ing house of a person named is not sustained by proof that he was the owner in fee of a hotel which he rented to another, and that the larceny was committed in a room of the hotel. Thus where money alleged to have been stolen was unnecessarily described as "money of the U. S.," and the proof failed in this particular, the conviction was reversed.[2] On indictment for theft, charged that the money was the property of W. B. Henar and W. A. Francis, and was taken from their possession. It appears from the evidence that Henar was playing poker with certain other men, the appellant being among the number. Henar won some money, dealing several times. Then accused dealt, Henar receiving four aces, when accused ceased to be dealer, another taking his place. In betting Henar put $45 on the table, and a friend, Francis, standing by and glancing at his hand, offered to back him, and placed $78 in the pot. One of the players on the call showed four kings, when Henar said he had four aces, but not showing them a foul was called, his cards seized and cast down as six cards, and in the confusion the others seized the money, Henar failing to get any. Held that, inasmuch as Francis loaned the money to Henar, it all belonged to the latter, while the indictment alleged that it was the property of Henar.[3]

On an indictment for stealing a pine log particularly marked, the mark must be proved as laid, and a description of trees in an indictment for unlawfully cutting the same, although unnecessarily minute, cannot be dispensed with. So, in reciting public statutes and in unnecessarily inserting the ownership of stolen goods.[4]

[2] *Marshall* v. *State*, 71 Ark. 415, 418, 75 S. W. 584, 14 Am. Crim. Rep. 469; *Hamilton* v. *State*, 60 Ind. 193, 194, 28 Am. Rep. 653; *Watson* v. *State*, 64 Ga. 61, 63; *Kibs* v. *People*, 81 Ill. 599, 600, 2 Am. Crim. Rep. 114.

[3] *Hernandez* v. *State*, 43 Tex. Crim. Rep. 80, 81, 63 S. W. 320, 14 Am. Crim. Rep. 537.

[4] *State* v. *Copp*, 15 N. H. 213, 215; *United States* v. *Foye*, 1 Curt. C. C. 364, Fed. Cas. No. 15,157; *State* v. *Weeks*, 30 Me. 182, 183;

But where corporate existence is set forth in the indictment it is not necessary to show by the authenticated articles of incorporation that it was a corporation. Proof that it did business as such and was such, if only *de facto,* and possessed the property in question, is sufficient.[5]

§ 147. Merely formal language may be rejected as surplusage.—Language merely formal in an indictment may always be rejected. Thus, the words "then and there" in the concluding part of a charge against a person present who is abetting a murder may be considered as surplusage or referred to the act done, which caused the death, and not to the time and place of death;[1] and so of the words, "languishing did live" in an indictment for murder.[2] The words *contra formam statuti* erroneously inserted in an indictment for a common-law offense, may be rejected as surplusage,[3] and the words, "goods and chattels," when unnecessary may be thus discharged.[4]

State v. *Johnston,* 51 N. C. (6 Jones, L.) 486; supra, § 94; *State* v. *Noble* 15 Me. 476, 477; *Com.* v. *Butcher,* 4 Gratt. 544, 545; Comyns's, Dig. Pl. chap. 29; *Gray* v. *State,* 11 Tex. App. 411; *Rex* v. *Woolford,* 1 Moody & R. 384; *Com.* v. *King,* 9 Cush. 284, 289; supra, § 140; *Lowell* v. *People,* 229 Ill. 227, 236, 82 N. E. 226.

[5] 8 Enc. Ev. p. 136; *Braithwait* v. *State,* 28 Neb. 832, 836, 45 N. W 247; *State* v. *Grant,* 104 N. C. 908, 910, 10 S. E. 554; *People* v. *Oldham,* 111 Cal. 648, 651, 44 Pac. 312.

[1] *State* v. *Fley,* 2 Brev. 338, 4 Am. Dec. 583; *Com.* v. *Sargent,* 129 Mass. 115, 122.

[2] *Com.* v. *Gable,* 7 Serg. & R. 423; *Com.* v. *Bell,* Addison (Pa.) 171, 173, 1 Am. Dec. 298.

[3] *State* v. *Buckman,* 8 N. H. 203, 29 Am. Dec. 646; *State* v. *Gove,* 34 N. H. 510, 515; *State* v. *Phelps,* 11 Vt. 116, 119, 34 Am. Dec. 672; *Com.* v. *Hoxey,* 16 Mass. 385, 387; *Southworth* v. *State,* 5 Conn. 325, 329; *Cruiser* v. *State,* 18 N. J. L. 206; *State* v. *White,* 15 S. C. 381; *State* v. *Sparks,* 78 Ind. 166, 168; *People* v. *Buchanan,* 1 Idaho, 681, 685. See *Cox* v. *State,* 8 Tex. App. 254, 309, 34 Am. Rep. 746; *Calvert* v. *State,* 8 Tex. App. 538, 539.

[4] *Rex* v. *Morris,* 1 Leach, C. L. 109; *Com.* v. *Eastman,* 2 Gray, 76, 4 Gray, 416, 418.

§ 148. **Misuse of words not sufficient to vitiate an indictment.**—The words "in" or "at" in an indictment have the same meaning attached to them as commonly understood, and, while frequently the subject of legal adjudications, the word "at" has been held equivalent to "in" or "within," to "in" or "near," to "into." In Louisiana it was held that "at the parish of Caddo" was equivalent to "in the parish of Caddo." [1] And "at the county" to "in the county." [2] And Mr. Bishop says it is immaterial whether "in" or "at" is used in the allegation of place.[3]

§ 149. **Intent; variance.**—The question of intent as related to presumptions or inferences will be discussed later.[1] The question of variance, with regard to intent, arises when certain evidence is objected to, because the intent sought to be proved is not precisely the intent averred in the indictment, and yet is so closely related to it that the party, in attempting to consummate the act proved, must be regarded as having contemplated as a probable result of his conduct the act alleged.

The most common illustration of this is that of shooting into or throwing a bomb into a crowd, or leaving an explosive compound in a public place or building. And while the unlawful intent may be inferred from the act, still there is no artificial rule of law which requires or allows a particular intent to be presumed from given facts, where as a matter of fact it appears from the evidence that such particular intent was not entertained by the defendant. And so in an assault to murder, there must appear to have been an intent to kill the person actually assaulted, and if the intent shown was unmistakably to kill another, the variance will be fatal.

[1] *State* v. *Nolan*, 8 Rob. (La.) 513, 520.

[2] *Augustine* v. *State*, 20 Tex. 450, 452.

[3] Bishop, Crim. Proc. § 378; 16 Am. & Eng. Law, pp. 123–125.

[1] Post § 707.

The defendant was indicted and convicted on a charge of shooting at Sandy Mitchell, with intent to kill and murder. The proof was that he shot at Henry Creighton, with intent to kill him, according to his own declaration subsequent to the homicide, and that in so doing he accidentally hit Mitchell, an innocent bystander, and upon this point there was no conflict in the evidence. The supreme court, in passing on the question, said: "The verdict is wholly unsupported by the evidence. It is true that the jury, in response to the instruction for the state, have found, in substance, that the accused shot at Sandy Mitchell, with the intent to kill and murder him but the verdict must have been through some misapprehension of law or fact. There is no doubt of the rule that a man shall be presumed to intend that which he does, or which is the natural and necessary consequence of his act, and that malice, in this class of cases, may be presumed from the character of the weapon used. If the evidence in the case at bar was limited to the mere fact of shooting and the striking of Mitchell, as the result of the shot, or if the evidence as to the person intended to be killed was conflicting, we might accept the verdict as conclusive: but the record before us leaves no room for doubt. Indeed it is conclusive that Creighton, and not Mitchell, was the person aimed at and designed to be hit. To sustain the indictment in this case, it was incumbent on the part of the state to prove that the accused shot at and intended to kill Mitchell, whereas the proof is that he shot at Creighton with intent to kill him. The essential averments of the indictment are therefore not only not sustained, but absolutely negatived."[2]

[2] *Barcus* v. *State*, 49 Miss. 17, 18, 19 Am. Rep. 1, 1 Am. Crim. Rep. 249, 250.

At common law there were no degrees of himicide, and all homicide with malice aforethought, whether express or implied, was simple murder. 1 Clark & M. Crimes, § 252.

If an intent is unnecessarily alleged, it cannot as a rule affect the validity of the indictment, but will

On an indictment for murder, the prosecution is not required to prove an intent to take life as an essential to conviction, for an intent to do serious bodily harm, without provocation or excuse or justification, followed by a homicide, constitutes murder. Nor would such failure to prove intent constitute a variance. But murder does not comprehend an assault with intent to do great bodily harm, where such an assault is an offense provided for by statute. And where an act is made a crime by statute, regardless of the intent, an averment that it was "wilfully done" is surplusage.[3]

To avoid a variance between the intent averred and the intent offered to be proved, it is better to allege the same act with different intents in separate counts of the indictment.

§ 150. Averment of specific and proving conflicting intent.—Where, however, a specific intent is laid in the indictment, and proof is of another, independent, the variance is fatal.[1] And an allegation of intent to defraud one person will not be sustained by proof of an intent to defraud another person.[2] On an indictment for assault with intent to rape, there could be no conviction of an intent to rob or murder, nor on an indictment for assault with intent to maim, of an intent

be regarded as surpulsage. Clark, Crim. Proc. pp. 192–333; *Rex* v. *Higgins*, 2 East, 5.

For a full discussion of the law of intent and malice in homicide, and considered under the more modern doctrine of inferences of fact, and not as presumptions of law, see Wharton, Homicide, Bowlby's 3d ed. "Malice in homicide generally," chap. 8.

[3] Where an act is made an offense by statute, without reference to the intent, a charge in the indictment that it was wilfully done, is surplusage, and the intent need not be proved; the intent with which the act is done being deemed immaterial where the act is denounced by statute. *State* v. *Southern R. Co.* 122, N. C. 1052, 1061, 41 L.R.A. 246, 249, 30 S. E. 133; *McGuire* v. *State*, 50 Ind. 284, 286; *State* v. *Hattabough*, 66 Ind. 223, 230; *Veazie's Case*, 7 Me. 131.

[1] *Robinson* v. *State*, 53 Md. 151, 153, 36 Am. Rep. 399.

[2] *Schayer* v. *People*, 5 Colo. App. 75, 78, 37 Pac. 43.

to kill under such circumstances that an actual killing would not have been murder. And in all assaults with attempts, the specific intent as alleged must be proved.[3]

Where under an indictment for murder in the first degree to constitute which a specific intent to take life is necessary, the evidence shows only an intent to do bodily harm, the variance is fatal.[4]

It may be said that intent being an essential element in all criminal offenses, an instruction declaring that, when a crime is committed, the law presumes the intent, is absurd and meaningless.[5]

§ 151. Mere description may be rejected as surplusage.—An indictment charging the unlawful sale of intoxicating liquors to a person named "and to divers other persons to the grand jury unknown" sufficiently states an offense. The words, "and to divers other persons to the grand jury unknown," may be rejected as surplusage.[1] And in an indictment for keeping a disorderly house, the words, "in the said house certain evil-disposed persons, etc.," were held unnecessary, and that the prosecution was not required to prove it.[2]

[3] Clark, Crim. Proc. § 330; *Robinson* v. *State,* 53 Md. 151, 153, 36 Am. Rep. 399; *Clark* v. *Com.* 16 B. Mon. 206, 213; *Com.* v. *Magowan,* 1 Met. (Ky.) 368, 71 Am. Dec. 480; *People* v. *Crowley,* 100 Cal. 478, 480, 35 Pac. 84; *State* v. *Jackson,* 30 Me. 29, 30; *United States* v. *Brown,* 3 McLean, 233, Fed. Cas. No. 14,666; *State* v. *Carroll,* 13 Mont. 246, 247, 33 Pac. 688; *Com.* v. *Harley,* 7 Met. 506, 509; *Com.* v. *Kellogg,* 7 Cush. 473, 477; 1 Hale, P. C. 561; *Neubrandt* v. *State,* 53 Wis. 89, 92, 9 N. W. 824; 2 East, P. C. 51; *People* v. *Mulkey,* 65 Cal. 501, 4 Pac. 507.

[4] Wharton, Crim. Law, 10th ed. §§ 377 et seq.

[5] *State* v. *Painter,* 67 Mo. 84, 86.

[1] Hughes, Crim. Law & Proc. § 1444; *State* v. *Jeffcoat,* 54 S. C. 196, 197, 32 S. E. 298; *Com.* v. *Manning,* 164 Mass. 547, 548, 42 N. E. 95.

[2] *State* v. *Dame,* 60 N. H. 479, 49 Am. Rep. 331, 4 Am. Crim. Rep. 444; *State* v. *Bailey,* 31 N. H. 521, 526.

CHAPTER IV.

PRIMARINESS AS TO DOCUMENTS.

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I. General Rule.

§ 151b. Primary evidence.—Primary evidence, or as it is more accurately termed, the best evidence, is that kind of evidence which assures the greatest certainty of the fact sought to be proved.[1] In criminal prosecutions it is an essential requisite that only the best evidence shall be received to prove the charge against the defendant, which means that no evidence is to be received that indicates that there is still better proof of the fact in the possession or under the power of the party producing it.[2]

Primary, in the sense now before us, means that which the parties, whose rights are to be determined, have set forth as the final expression of their views. To illustrate, on indictment for libel, the manuscript of the published article is sec-

[1] Cal. Civ. Code, § 1829; Ga. Civ. Code, § 5164.

[2] *Gray* v. *Pentland*, 2 Serg. & R. 22, 33; *Williams* v. *East India Co.* 3 East, 192, 6 Revised Rep. 589; Taylor, Ev. 10th ed. § 391; Gilbert, Ev. 1st ed. 4.

"The reason of the rule that secondary evidence shall not be substituted for evidence of a higher nature which the case admits of is that an attempt to submit the inferior for the higher implies that the higher would give a different aspect to the case of the party introducing the lesser. The ground of the rule is a suspicion of fraud." *United States* v. *Wood*, 14 Pet. 430, 10 L. ed. 527; Century Dict. Title Evidence.

"The evidence primarily required by law as the best evidence of a fact to be proved; chiefly used in relation to written documents, and in general requiring their contents to be proved by the documents themselves." Webster's New Int. Dict, p. 1704, "Primary."

ondary; a reprint by third parties is secondary; but the primary evidence is the newspaper itself as issued by the party whose liability is sought to be established.[3] Mr. Bentham classes evidence into original and unoriginal,[4] and Mr. Best follows with original and derivative,[5] but the proper distinction rests on the relationship of the document in controversy to the person to whom it is imputed. If it springs directly from him, then it is primary so far as he is personally concerned; if it was provisional, to be merged into a subsequent paper, then it is secondary to such subsequent paper.

The test of secondary evidence is not inferiority, but removal by the interposition of another medium, from the object to be proved. Thus, in several thousand sheets, the last prints may be indistinct, but a libel contained in the last is as much primary evidence as that in the first, while a copy is excluded as secondary, as that is produced by the interposition of another medium.[6] Hence the maxim, that secondary evidence goes not to conclusiveness, but to grade. It is excluded not because of inferiority, but because it presupposes that direct, primary evidence is held back by the party offering it.[7]

A mere stranger, for instance, is as able to testify to the identity of a person as is his intimate friend. Hence, as to witnesses of the same degree, though one may be inferior to another, that fact does not exclude him.[8] The test is, "Do you testify at first hand?" If so, no matter how weak the impression, the testimony is receivable as primary testimony, because it is first hand, and of the superior grade. Again, the testimony of a bystander is primary evidence of a conversation that he overhears, although it is not likely to be so ac-

[3] *Brunswick* v. *Harmer,* 14 Q. B. 185, 19 L. J. Q. B. N. S. 20, 14 Jur. 110; *Rex.* v. *Amphit,* 6 Dowl. & R. 126, 4 Barn. & C. 35, 28 Revised Rep. 206; *Bond* v. *Central Bank,* 2 Ga. 92.

[4] Rat. Jud. Ev. b VI, chap. 3.

[5] Supra, §§ 5–11, in "Preliminary considerations."

[6] *Bond* v. *Central Bank,* 2 Ga. 92.

[7] *Lanham* v. *State,* 7 Tex. App. 126.

[8] Post, § 360, §§ 549–550

curate as that of a participant.[9] The fact that an alleged writer is not called to the forgery of his signature does not exclude the other witnesses.[10] An ordinary observer may testify as to the character of blood stains, though experts were attainable who might have spoken with more authority.[11] So, a nonexpert may give testimony as to insanity, though an expert might have been secured for the purpose.[12]

§ 151c. Primary evidence; illustrations.—The best proof of an act is the testimony of the person who did the act or who saw it done. The best proof of words spoken is the testimony of the person who spoke the words or who heard them spoken. The best proof of a writing is the writing itself. Hence, while it is natural to think of the best evidence as documentary evidence, it does not always imply that the best evidence of a fact has been reduced to writing; but primary evidence, written or oral, is that which, when produced, raises no suggestion or indication that any other or better proof is to be had.[1]

§ 151d. Secondary evidence.—Secondary evidence is that which shows that better or primary evidence exists as to

[9] *Peeples* v. *Smith,* 8 Rich. L. 90.

[10] *Rex* v. *Hazy,* 2 Car. & P. 458; *Reg.* v. *Hurley,* 2 Moody & R. 473; *Smith* v. *Prescott,* 17 Me. 277; *Ainsworth* v. *Greenlee,* 8 N. C. (1 Hawks) 190; *McCaskle* v. *Amarine,* 12 Ala. 17; Wharton Ev. §§ 705–707.

[11] *People* v. *Bell,* 49 Cal. 486; post, §777a.

[12] Post, § 417, note 3.

[1] So, where a witness had written a letter about a certain matter, he is not precluded from testifying as to such matter in those respects where it was not covered by the letter. *Poitevent* v. *Scarborough,* — Tex. Civ. App. — 117 S. W. 443.

So, the issue being the course of a stream, as to whether it had shifted, before the bed was abandoned by avulsion, old settlers who had known the course of the stream for many years were competent to testify, as being the best evidence obtainable. *Coulthard* v. *McIntosh,* 143 Iowa, 389, 122 N. W. 233.

the proof of a fact in question.[1] It is that class of evidence which is relevant to the fact in issue, it being first shown that the primary evidence of the fact is not obtainable.[2] Secondary evidence performs the same function as that of primary evidence, but differs only in degree, and to the extent of that degree is inferior to primary or the best evidence.

§ 152. Secondary evidence inadmissible.—In the earlier periods of the common law, and out of a technical regard for the sanctity of person and of property, following the Magna Charta, the courts exercised no power to enforce the production of documents to be used as evidence in a case.[1]

But immediately there arose the necessity for the best evidence in a case, and in those cases where one party had possession of a document or writing that belonged equally to both, the courts began to compel its production for the inspection of the adversary for purposes of suit.[3]

In all cases the exclusion of secondary evidence of a producible document is based on the ground that, when such document can be obtained, it is against the policy of the law that it should be proved at second hand, through agencies by which it is open to greater or less misrepresentation.[3] The first general rule deduced is that secondary evidence is inadmissible.

[1] *Putnam* v. *Goodall,* 31 N. H. 419; Standard Dict. title "Evidence;" Anderson's Law Dict. "Evidence," p. 420.

[2] Black's Law Dict. p. 1071; Century Dict. title "Evidence;" Georgia Code, § 5164.

[1] Best, Ev. § 624; *Lester* v. *People,* 150 Ill. 408, 41 Am. St. Rep. 375, 23 N. E. 387, 37 N. E. 1004.

[2] *Kelly* v. *Eckford,* 5 Paige, 548; *Willis* v. *Bailey,* 19 Johns, 268; *Bank of Utica* v. *Hilliard,* 6 Cow. 62.

An attorney may be required to testify that a certain paper is in existence and in his possession, but he cannot be compelled to disclose its contents if it has been deposited with him by his client. *Brant* v. *Klein,* 17 Johns. 335; *Jackson ex dem Neilson* v. *M'Vey,* 18 Johns. 330.

[3] *Rex* v. *Doran,* 1 Esp. 127; *Reg.* v. *Kitson,* Dears. C. C. 187, 22 L. J. Mag. Cas. N. S. 118, 17 Jur. 122. 6 Cox, C. C. 159; *Rex* v. *O'Connell,* Arm. & T. 103; *Rex* v. *Coppull,* 2

§ 153. Record facts cannot be proved by parol.—That which could be proved by record, we have first to observe, cannot ordinarily be proved by parol.[1] Thus the filing of a paper must be proved by the certificate of the clerk;[2] the discontinuance of an action must be proved by the record;[3] a pardon must be proved by the warrant;[4] a divorce must be proved by the decree.[5] Parol evidence cannot, therefore, be received of a binding over for a crime;[6] of conviction of a crime;[7] of a bastardy order;[8] of the desertion of a soldier, of which there is an official record;[9] of the action of a town meeting, of which

East, 25; *Com.* v. *James,* 1 Pick. 375; *Com.* v. *M'Pike,* 3 Cush. 181, 184, 50 Am. Dec. 727; *Com.* v. *Kinison,* 4 Mass. 646; *Bassett* v. *Marshall,* 9 Mass. 312; *People* v. *Broughton,* 49 Mich. 339, 13 N. W. 621; *Dean* v. *Com.* 4 Gratt. 541.

On indictment for arson, to prove that the property was insured, where the charge was commission of the act with intent to defraud the insurance company, the policy of insurance must be produced to prove the fact of insurance, and evidence of that fact will not be received from the books of the company until the absence of the policy is shown. *Rex* v. *Doran,* 1 Esp. 127; *Reg.* v. *Kitson,* Dears. C. C. 187, 22 L. J. Mag. Cas. N. S. 118, 17 Jur. 122, 6 Cox, C C. 159.

[1] See Wharton, Ev. § 63. See *Rex* v. *Hube,* Peake, N. P. Cas. 132; *State* v. *Thompson,* 19 Iowa, 299; *State* v. *Lougineau,* 6 La. Ann. 700; *State* v. *Smith,* 12 La. Ann. 349; *State* v. *Edwards,* 19 Mo. 674.

[2] *Peterson* v. *Taylor,* 15 Ga. 483, 60 Am. Dec. 705.

[3] *Sheldon* v. *Frink,* 12 Pick. 568.

[4] *Spalding* v. *Saxton,* 6 Watts, 338.

[5] *Tice* v. *Reeves,* 30 N. J. L. 314.

[6] *Smith* v. *Smith,* 43 N. H. 536.

[7] *Reg.* v. *Dillon,* 14 Cox, C. C. 4; *United States* v. *Biebusch,* 1 McCrary, 42, 1 Fed. 213; *Clement* v. *Brooks,* 13 N. H. 92; *Com.* v. *Quin,* 5 Gray, 478; *Com.* v. *Gallagher,* 126 Mass. 54; *Newcomb* v. *Griswold,* 24 N. Y. 298; *Peck* v. *Yorks,* 47 Barb. 131; *Farley* v. *State,* 57 Ind. 331; *Bartholomew* v. *People,* 104 Ill. 601, 44 Am. Rep. 97; *Johnson* v. *State,* 48 Ga. 116; *People* v. *Reinhart,* 39 Cal. 449; *State* v. *Rugan,* 68 Mo. 214; *Cooper* v. *State,* 7 Tex. App. 194; post, § 489.

See next section as qualifying this. And see *Long* v. *State,* 10 Tex. App. 186. That a witness may be asked whether he has not been in prison, see post, § 474.

[8] *Tyrrel* v. *Woodbridge Twp.* 27 N. J. L. 416.

[9] *Terrell* v. *Colebrook,* 35 Conn. 188. Though see *Wilson* v. *McClure,* 50 Ill. 366. See Wharton. Ev. § 61.

a record is required to be kept;[10] of the time of the terms of a court;[11] of a bankrupt discharge;[12] of the institution of suits;[13] or of the character of the pleadings and docket proceedings.[14] So, on an indictment for disturbing a Protestant congregation, Lord Kenyon ruled that the taking of the oaths under the Toleration act, being matter of record, could not be proved by parol evidence.[15]

§ 154. Incidents collateral to record may be proved by parol.—But incidents collateral to a record, when not of record, may be proved by parol.[1] Thus parol evidence has been held admissible to prove that two records relate to the same cause of action,[2] though in such cases the records must

[10] *Cameron* v. *School Dist. No. 2*, 42 Vt. 507.

[11] *Michener* v. *Lloyd*, 16 N. J. Eq. 38.

[12] *Regan* v. *Regan*, 72 N. C. 195.

[13] *Sherman* v. *Smith*, 20 Ill. 350; *Hughes* v. *Christy*, 26 Tex. 230.

[14] *Foster* v. *Trull*, 12 Johns. 456; *Harker* v. *Dement*, 9 Gill, 7, 52 Am. Dec. 670; *Reilly* v. *Cavanaugh*, 29 Ind. 435; *Milan* v. *Pemberton*, 12 Mo. 598; *Flynn* v. *Merchants' Mut. Ins. Co.* 17 La. Ann. 135; *Gliddon* v. *Goos*, 21 La. Ann. 682.

[15] *Rex* v. *Hube*, Peake, N. P. Cas. 132. In *Reg.* v. *Rowland*, 1 Fost. & F. 72, Bramwell, B., held that on an indictment for perjury, in order to prove the proceedings of the county court, it was necessary to produce either the clerk's minutes, or a copy thereof bearing the seal of the court; the county court act (9 & 10 Vict. chap. 95, § 111), directing that such minutes should be kept, and that such minutes should be admissible.

So a diploma must be proved by the production of it. *McAllister* v. *State*, 156 Ala. 122, 47 So. 161.

A certificate of conviction by a justice of the peace in the statutory form and legally filed cannot be contradicted by parol. *People* v. *Powers*, 7 Barb. 462; *Burnham* v. *Howe*, 23 Me. 489.

[1] Wharton, Ev. § 64.

[2] See *Reg.* v. *Bird*, 2 Den. C. C. 94, 5 Cox, C. C. 20; *Perkins* v. *Walker*, 19 Vt. 144; *Com.* v. *Dillane*, 11 Gray, 67; *Com.* v. *Sutherland*, 109 Mass. 342; *Porter* v. *State*, 17 Ind. 415; *State* v. *Maxwell*, 51 Iowa, 314, 1 N. W. 666; *Duncan* v. *Com.* 6 Dana, 295; *State* v. *Andrews*, 27 Mo. 267; *State use of Cochran* v. *Scott*, 31 Mo. 121; *State* v. *Thornton*, 37 Mo. 360; *State* v. *DeWitt*, 2 Hill, L. 282, 27 Am. Dec. 371; *State* v. *Matthews*, 9 Port. (Ala.) 370.

See fully post, § 593, to the effect that parol evidence is admis-

be first put in evidence;[3] to prove that a judgment was put in evidence in a former suit;[4] to prove the alteration of a record;[5] to prove attendance on court as a witness;[6] to prove a jurat of town officers, in lack of record;[7] to prove that a certain entry was not recorded;[8] to prove that a particular person had been in prison;[9] to prove the attendance of juries and of judges as parts of a trial;[10] to prove that a bill before a grand jury was not ignored, but only continued.[11]

How far a record can be impeached will be considered in the following section.[12]

Where a matter is collateral to the real issues, and it comes in question, and proof of it is admissible, it may be shown by parol evidence, and need not be established by documentary evidence.[13]

sible to identify or distinguish records.

[3] *Webb* v. *Alexander,* 7 Wend. 281; *Inman* v. *Jenkins,* 3 Ohio, 272.

[4] *Denny* v. *Moore,* 13 Ind. 418.

[5] *Brier* v. *Woodbury,* 1 Pick. 362.

[6] *Baker* v. *Brill,* 15 Johns. 260; *Brown* v. *Com.* 76 Pa. 319.

[7] *Hathaway* v. *Adison,* 48 Me. 440.

[8] Post, §§ 166, 617.

[9] Post, § 474; *Real* v. *People,* 42 N. Y. 270, s. c. 55 Barb. 186; *Rathbun* v. *Ross,* 46 Barb. 127; *Howser* v. *Com.* 51 Pa. 332.

[10] *Massey* v. *Westcott,* 40 Ill. 160.

[11] *Knott* v. *Sargent,* 125 Mass. 95.

[12] Post, § 596a.

[13] *Moore* v. *State,* 159 Ala. 97, 48 So. 688; *State* v. *Clark,* 64 W. Va. 625, 63 S. E. 402; *Williams* v. *State,* 149 Ala. 4, 43 So. 720; *State* v. *Dudenhefer,* 122 La. 288, 47 So. 614; *State* v. *Decker,* 217 Mo. 315, 116 S. W. 1096; *Eads* v. *State,* 17 Wyo. 490, 505, 101 Pac. 946. See also *Belding* v. *Archer,* 131 N. C. 287, 317, 42 S. E. 800; *Andrews* v. *Creegan,* 19 Blatchf. 294, 7 Fed. 477; *Scullin* v. *Harper,* 24 C. C. A. 69, 46 U. S. App. 673, 78 Fed. 460; *Bunzel* v. *Maas,* 116 Ala. 68, 82, 22 So. 568; *Daniels* v. *Smith,* 130 N. Y. 696, 698, 29 N. E. 1098; *Archer* v. *Hooper,* 119 N. C. 581, 582, 26 S. E. 143.

So, on a trial for smuggling, the witness who handled the money may testify as to its disposition, as that is an incidential matter. *Dunbar* v. *United States,* 156 U. S. 185, 39 L. ed. 390, 15 Sup. Ct. Rep. 325.

On indictment for forgery if a receipt introduced in evidence on another trial, such action being merely collateral and incidental, the witness may testify to it without the production of the record. *Allen* v. *State,* 79 Ala. 34.

§ 155. Of administrative records parol evidence is inadmissible.—Wherever a statute requires that a record of administrative acts should be kept by law, the same rule is applied. Hence, parol evidence of a person's enlistment in the service of the United States is not admissible.[1]

§ 156. Parol evidence of writings never admissible on cross-examination.—A written instrument can never be proved by parol on cross-examination.[1] When a witness is cross-examined as to a writing, the writing must be shown to him,[2] and he must have time to notice its contents.[3]

On a trial for wife murder, parol evidence of a suit for divorce by deceased against defendant is admissible. *Binns* v. *State,* 66 Ind. 428; *Malcek* v. *State,* 33 Tex. Crim. Rep. 14, 24 S. W. 417.

Where there was no question of defense of property raised, a party shot at may testify that he was in possession under a writ from the sheriff, without production of the writ. *Taylor* v. *Com.* 17 Ky. L. Rep. 1214, 34 S. W. 227.

On a trial for larceny, where the state sought to show that the offense was not the first one, the accused may be asked if he had not been arrested for stealing, and the question is not open to the objection that the record is the best evidence. *State* v. *Murphy,* 45 La. Ann. 958, 13 So. 229.

So, where a defendant offers himself as a witness, he may be examined as to a former conviction without production of the record. *State* v. *Ellwood,* 17 R. I. 763, 24 Atl. 782.

So, where the question of marriage is incidental and collateral to another issue, such marriage may be proved by parol. *Mobley* v. *State,* 41 Fla. 621, 26 So. 732; *Root* v. *Fellowes,* 6 Cush. 29.

[1] *Atwood* v. *Winterport,* 60 Me. 250. See cases Wharton, Ev. § 65.

[1] *Speyer* v. *Stern,* 2 Sweeny, 516; *Newcomb* v. *Griswold,* 24 N. Y. 298; *Gaffney* v. *People,* 50 N. Y. 416.

[2] *Stephens* v. *People,* 19 N. Y. 549; *Stamper* v. *Griffin,* 12 Ga. 450; *Callanan* v. *Shaw,* 24 Iowa, 441; *Cavanah* v. *State,* 56 Miss. 299.

[3] *Morrison* v. *Myers,* 11 Iowa, 538.

The question, as to whether a witness, under cross-examination, could be interrogated concerning a writing not in his hands nor yet in evidence in the cause, seems to have first arisen in England, in *Queen's Case,* 2 Brod. & B. 286, 22 Revised Rep. 662, 11 Eng. Rul. Cas. 183, and there was answered by the judges in the negative. In 1854, Parliament enacted the statute 17 & 18 Vict. chap. 125, § 24, where it was provided that "a witness may be cross-examined as to

§ 157. Statutory designation of evidence not necessarily exclusive.—It sometimes happens that a statute designates a certain kind of evidence as proof of certain facts, as in cases where a statute legitimates a particular kind of copy, or prescribes that having spirituous liquor on a counter in a public house shall be prima facie proof of selling. This designation, however, does not, unless it expressly so provides, exclude other proof of such facts.[1]

§ 158. Prima facie proof applied to intent.—The doctrine of prima facie case applies to question of intent, where it is an ingredient of the offense, independent of statutory enactment, and in such case, the law presuming that the defendant intended the natural and ordinary result of his acts, it devolves upon defendant to rebut such prima facie case as to intent.[1]

previous statements made by him in writing, or reduced into writing, relative to the subject-matter of the cause, without such writing being shown to him." But if it was sought to impeach the witness, it was essential to first show him the writing.

The statute was repealed in 1892, but is practically in force by reason of § 5 of the Crim. Proc. act 1865, 28 & 29 Vict. chap. 18.

The rule has never obtained in America, although in *Randolph* v. *Woodstock*, 35 Vt. 291, it was followed. The better rule is in all cases, whether interrogation only or impeachment, to show the witness the writing, and to lay a foundation for its introduction and further proof. To do otherwise would in the majority of cases have an unfair effect upon the witness and upon his credit, and to allow proof of such matters without first bringing his attention directly to the matter in issue in order to refresh his powers of memory as to the transaction, would deprive him of that reasonable protection which it is the duty of the court to afford him. This should be specifically done, and he should be asked as to time, place, and circumstances, and in the grave and serious questions of criminal issues the rule ought to be rigidly enforced; and the English cases have gone to a wide limit in securing this protection to the prisoner. *Angus* v. *Smith*, Moody & M. 473; *Crowley* v. *Page*, 7 Car. & P. 789.

[1] See Wharton, Ev. § 69, for cases.

[1] *State* v. *Barbee*, 92 N. C. 820, 6 Am. Crim. Rep. 178; *State* v. *Phifer*, 90 N. C. 721; *People* v.

§ 159. Prima facie proof as affected by lapse of time.—The force and weight of prima facie proof is often materially weakened, if not altogether destroyed, by the lapse of time. In a prosecution for criminal homicide, where the defense was insanity, it was held that an adjudication upon which the defendant was committed to the asylum for the insane several years before the commission of the homicide, during the last two years of which period the defendant was at liberty on parole, was no longer prima facie proof of insanity.[1]

§ 160. No primary evidence is rejected because of its faintness.—A series of forged notes may be issued, some peculiarly distinct, others faint. If the forger be put on trial for the manufacturing of forged paper, the faint note is as much primary evidence as is the distinct. In other words, that which constitutes the test of secondariness is not inferiority as to distinctness, but removal, by the interposition of intelligent media, from the object to be proved. There may be several thousand sheets, to take another illustration, printed from the same type, and the last sheets printed may be blurred and confused; but on an indictment for a libel contained in the impression the last is as much an original as the first, and would be as admissible as the first; while a written copy made by an amanuensis from the first would be excluded, because secondary.[1] Hence comes the maxim, that secondariness goes not to conclusiveness, but to grade. Secondary evidence is excluded not merely because it is inferior, but because it presupposes more direct and immediate evidence held back by

Munn, 65 Cal. 211, 3 Pac. 650, 6 Am. Crim. Rep. 431; *People* v. *Sweeney,* 55 Mich. 586, 22 N. W. 50; *Hopt* v. *Utah,* 110 U. S. 574, 28 L. ed. 262, 4 Sup. Ct. Rep. 202, 4 Am. Crim. Rep. 431.

[1] See *Hempton* v. *State,* 111 Wis. 127, 86 N. W. 596, 12 Am. Crim. Rep. 657; *State* v. *Wilner,* 40 Wis. 304.

[1] *Bond* v. *Central Bank,* 2 Ga. 92.

the party offering.[2] We may extend these remarks to the relation between eyewitnesses with superior and those with inferior opportunities of observation. A mere stranger, for instance, is as admissible to testify to identity as is an intimate friend. So, among witnesses standing on the same grade, one may be inferior to another as to trustworthiness, but this does not exclude him.[3] The test is, "Do you testify at first hand?" If so, no matter how weak may be the impression on the mind of the person testifying, the testimony of a mere bystander is primary evidence of a conversation he overhears, though not likely to be so accurate as that of a participant.[4] The fact, also, that the alleged writer is not called as to the forgery of his signature does not exclude other witnesses.[5] An ordinary observer, also, will be permitted to testify as to blood stains, though experts were attainable who might have spoken more authoritatively;[6] and on the same reasoning a nonexpert may be received to prove insanity, though an expert might have been secured for this purpose.[7] To keep back, however, an intelligent eyewitness, and bring forward one of weak capacity, is always ground for suspicion; and as to documents, where secondary evidence, likely to be of high accuracy, is suppressed by a party, the court may refuse to permit him to produce evidence of an inferior type until the superior be accounted for.[8] Hence if a party has a *facsimile* of a lost paper, he cannot prove such paper by calling a witness as to its contents.[9] A letter book, however, in which press copies are taken, is held to be so far a copy as to stand in the same relation to the orig-

[2] Post, § 360; Wharton, Ev. § 72.
[3] Post, §§ 360, 549, 550.
[4] *Peeples* v. *Smith,* 8 Rich. L. 90.
[5] *Rex* v. *Hazy,* 2 Car. & P. 458; *Reg.* v. *Hurley,* 2 Moody & R. 473; *Smith* v. *Prescott,* 17 Me. 277; *Ainsworth* v. *Greenlee,* 8 N. C. (1 Hawks) 190; *McCaskle* v. *Amarine,* 12 Ala. 17; Wharton, Ev. §§ 705–707.
[6] *People* v. *Bell,* 49 Cal. 486.
[7] Post, § 417.
[8] Wharton, Ev. §§ 72, 90.
[9] *Stevenson* v. *Hoy,* 43 Pa. 191.

inal as do copies taken from itself. The letter book, and copies taken from it, are equally secondary.[10]

§ 160a. Prima facie proof; burden of proof.—Notwithstanding the existence of statutes that provide for prima facie proof and equally for presumptions, as well as the ancient common-law doctrine of the inference of malice, the rule in criminal cases unqualifiedly is that the burden of proof never rests on the accused to show his innocence, or to disprove the facts necessary to establish the crime with which he is charged. The defendant's presence at and participation in the *corpus delicti* are affirmative material facts that the prosecution must show beyond a reasonable doubt to sustain a conviction.[1]

It is only when the defendant sets up independent matters of defense or matters in avoidance of the allegations of the indictment that the burden of proof is on the defendant.[2]

§ 161. Written secondary evidence inadmissible.—Hence copies of documents, under the limitations just ex-

[10] Wharton, Ev. §§ 72, 93; Citing *Goodrich* v. *Weston,* 102 Mass. 363, 3 Am. Rep. 469.

[1] *People* v. *Nelson,* 85 Cal. 421, 24 Pac. 1006; *Walters* v. *State,* 39 Ohio St. 215, 4 Am. Crim. Rep. 33; *Davis* v. *United States,* 160 U. S. 469, 40 L. ed. 499, 16 Sup. Ct. Rep. 353; *People* v. *Roberts,* 122 Cal. 377, 55 Pac. 137, 11 Am. Crim. Rep. 31; *Shoemaker* v. *Territory,* 4 Okla. 118, 43 Pac. 1059, 11 Am. Crim. Rep. 36; 1 Greenl. Ev. § 74 note.

[2] *Kent* v. *People,* 8 Colo. 563, 9 Pac. 852, 5 Am. Crim. Rep. 406; *Schultz* v. *Territory,* 5 Ariz. 239, 52 Pac. 352, 11 Am. Crim. Rep. 44.

In *Shoemaker* v. *Territory,* 4 Okla. 118, 43 Pac. 1059, 11 Am. Crim. Rep. 36, the court says: In *State* v. *Hamilton,* 57 Iowa, 596, 11 N. W. 5, it is held that, where the defense of an *alibi* is relied on, the burden of proof is on the defendant to establish it by a preponderance of the evidence, but there is in the case a very strong and most able dissent by Adams, Ch. J., also concurred in by Mr. Justice Day, and in our view of the law the dissenting opinion is much the best law written in the case. It shows, indeed, how absolutely dangerous to liberty is the rule placing the burden of proof on the defendant.

pressed and elsewhere more fully noticed, are as inadmissible as are oral statements of their contents.[1]

§ 162. Secondary evidence of letters and other correspondence.—Secondary evidence of letters, telegrams, and other correspondence can never be received until the nonproduction of the original is accounted for.[1] When this requirement is met, such correspondence is admissible where it is part of the *res gestæ* of the offense,[2] or as an admission of the sender,[3] or as impeaching evidence showing written statements inconsistent with the oral testimony.[4]

Duplicate copies of such correspondence made concurrently with the original, such as impressions by inserting sheets of carbon paper, or any means by which more than one duplicate original is produced at the same time, are all equally primary.[5]

II. Exceptions to the Rule.

§ 163. When parol and written evidence are equally primary.—When parol and documentary evidence are

[1] Wharton, Ev. § 73.

[1] *People* v. *Hammond,* 132 Mich. 422, 93 N. W. 1084; *State* v. *Hopkins,* 50 Vt. 316, 3 Am. Crim. Rep. 357; *State* v. *McCoy,* 70 Kan. 672, 79 Pac. 156; *Combs* v. *Com.* 15 Ky. L. Rep. 660, 25 S. W. 590; *Hurst* v. *State,* — Tex. Crim. Rep. —, 40 S. W. 264; *Ford* v. *State,* — Tex. Crim. Rep. —, 56 S. W. 338; *McCullough* v. *State,* 50 Tex. Crim. Rep. 132, 94 S. W. 1056.

[2] See *Chrisman* v. *Carney,* 33 Ark. 316; *Crane* v. *Malony,* 39 Iowa, 39; *Merrill* v. *Downs,* 41 N. H. 72.

[3] *Burton* v. *State,* 107 Ala. 108, 18 So. 284; *Rumph* v. *State,* 91 Ga. 20, 16 S. E. 104; *Simons* v. *People,* 150 Ill. 66, 36 N. E. 1019; *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; *Monteith* v. *State,* 114 Wis. 165, 89 N. W. 828; *Cooper* v. *Perry,* 16 Colo. 436, 27 Pac. 946; *Com.* v. *Jeffries,* 7 Allen, 548, 83 Am. Dec. 712.

[4] *Buffum* v. *York Mfg. Co.* 175 Mass. 471, 56 N. E. 599.

[5] See *International Harvester Co.* v. *Elfstrom,* 101 Minn. 263, 12 L.R.A.(N.S.) 343, 118 Am. St. Rep.

equally primary, proof of a fact may be had through either.[1] Thus, the date of A's birth is registered by his parents; this is primary evidence. But the testimony of a relative, cognizant of A's birth, is also primary evidence of the fact.[2] The arrival of a railroad train at a certain point may be shown by parol testimony as well as by the time table.[3] Inscriptions, marks, brands, labels, can be proved by parol, although there is documentary evidence of the same facts.[4] The fact that a party has been in prison can be proved by parol without producing the record of conviction.[5] Parol evidence is also admissible of a license hanging on a wall, such license being put in evidence as a matter of description, for the purpose of identifying the building.[6] The reason for these exceptions is that when a document exists, not for the purpose of supplying specific words for limiting a thing, but for the purpose of giving a generic designation which can be equally proved by parol, then the parol proof is equally primary with the document.

626, 112 N. W. 252, 11 A. & E. Ann. Cas. 107.

Also as to secondary evidence of letters and telegrams, see *Dunbar* v. *United States,* 156 U. S. 185, 39 L. ed. 390, 15 Sup. Ct. Rep. 325.

[1] Wharton, Ev. § 77.

[2] *Evans* v. *Morgan,* 2 Cromp. & J. 453, 2 Tyrw. 396; *Reg.* v. *Mainwaring,* Dears. & B. C. C. 132, 26 L. J. Mag. Cas. N. S. 10, 2 Jur. N. S. 1236, 5 Week. Rep. 119, 7 Cox, C. C. 192; *Morris* v. *Miller,* 4 Burr. 2057; *Re Sussex Peerage,* 11 Clark & F. 85, 8 Jur. 793; *Com.* v. *Norcross,* 9 Mass. 492; *Carskadden* v. *Poorman,* 10 Watts, 82, 36 Am. Dec. 145; *Beeler* v. *Young,* 3 Bibb, 520; *Bynum* v. *State,* 46 Fla. 142, 35 So. 65. But see *State* v. *Miller,* 71 Kan. 200, 80 Pac. 51, 6 A. & E. Ann. Cas. 58, and *Loose* v. *State,* 120 Wis. 115, 97 N. W. 526.

As to competent proof, see *Campbell* v. *Everhart,* 139 N. C. 503, 52 S. E. 201.

[3] *Chicago, B. & Q. R. Co.* v. *George,* 19 Ill. 510, 71 Am. Dec. 239.

[4] *Com.* v. *Morrell,* 99 Mass. 542; *Com.* v. *Blood,* 11 Gray, 74; *Com.* v. *Dearborn,* 109 Mass. 370; *Shackelford* v. *State,* — Tex. Crim. Rep. —, 53 S. W. 884.

[5] *Real* v. *People,* 42 N. Y. 270; *Rathbun* v. *Ross,* 46 Barb. 127; *Howser* v. *Com.* 51 Pa. 332.

[6] *Com.* v. *Brown,* 124 Mass. 318; *Com.* v. *Powers,* 116 Mass. 337;

§ 164. Authority of public officer may be proved by parol.—Proof that an individual has acted notoriously as a public officer is prima facie evidence of his official character, without producing his commission or appointment.[1] It may also be proved by parol (there being nothing in the certificate to such effect) that a person taking an acknowledgment was a justice of the peace or some proper officer,[2] and that certain persons were partners, without producing the articles.[3] So, as is elsewhere more fully shown, the fact of agency may be proved prima facie by recognition of the principal.[4] But secondary proof of the contents of a letter of appointment cannot be received in evidence to establish the agency of a government agent, without first accounting for the nonproduction of the original.[5]

§ 164a. And so of charter corporations.—The same rule has been extended to corporations, it being unnecessary to prove the charter of a corporation acting and recognized gen-

Collins v. *State,* 47 Tex. Crim. Rep. 497, 84 S. W. 585; *Maddox* v. *State,* — Tex. Crim. Rep. —, 55 S. W. 832.

[1] Post, § 832; *Berryman* v. *Wise,* 4 T. R. 366; *Doe ex dem. James* v. *Brawn,* 5 Barn. & Ald. 243, 24 Revised Rep. 347; *M'Gahey* v. *Alston,* 2 Mees. & W. 206, 2 Gale, 238, 6 L. J. Exch. N. S. 29; *Reg.* v. *Roberts,* 38 L. T. N. S. 690, 14 Cox, C. C. 101; *Rex* v. *Gordon,* 1 Leach C. L. 515, 516, 1 East, P. C. 312; *Shelley's Case,* 1 Leach, C. L. 381; *United States* v. *Reyburn,* 6 Pet. 352, 367, 8 L. ed. 424, 430; *Jacob* v. *United States,* 1 Brock. 520, Fed. Cas. No. 7,157; *Minor* v. *Tillotson,* 7 Pet. 100, 101, 8 L. ed. 622, 623; *Bank of United States* v. *Dandridge,* 12 Wheat. 70, 6 L. ed. 554; *Cabot* v. *Given,* 45 Me. 144; *State* v. *Roberts,* 52 N. H. 492; *Webber* v. *Davis,* 5 Allen, 393. See *State* v. *Livingston,* Houst. Crim. Rep. (Del.) 71. See Wharton, Crim. Law, 8th ed. §§ 1589, 1617, 1671.

[2] *Rex* v. *Howard,* 1 Moody & R. 187; *Rhoades* v. *Selin,* 4 Wash. C. C. 715, Fed. Cas. No. 11,740; *Shults* v. *Moore,* 1 McLean, 520, Fed. Cas. No. 12,824; *State* v. *McNally,* 34 Me. 210, 56 Am. Dec. 650.

[3] *Alderson* v. *Clay,* 1 Starkie, 405, 18 Revised Rep. 788.

[4] Post, § 833.

[5] *United States* v. *Boyd,* 5 How. 29, 12 L. ed. 36.

erally as such.[1] Whether the court will take judicial notice of a charter is elsewhere considered.[2]

§ 165. Where the party charged admits contents of the document.—A party, also, who admits a document to have certain contents may relieve the opposite party from producing such document.[1] And a defendant who on cross-examination admits that he possessed or passed certain papers may make it unnecessary for the prosecution to put these papers in evidence.[2] This is also the case with his answers as to prior imprisonments.[3]

§ 166. Summaries of voluminous documents may be received.—Of public documents, which public policy requires to be kept without removal, in their archives, sworn abstracts or summaries, as well as extracts, may be received.[1] This liberty, however, is not allowed as to bank books, which must at common law be produced in court, or their absence accounted for,[2] nor as to the books of a railroad company.[3] Nor can the certificate of a public officer having charge of public records, that a certain fact appears by the records, be received, as the records themselves must be proved or exemplified;[4] though an officer may be called upon to prove that

[1] Supra, § 102a; post, § 254; *Calkins* v. *State,* 18 Ohio St. 366, 98 Am. Dec. 121; *State* v. *Baltimore & O. R. Co.* 15 W. Va. 363, 36 Am. Rep. 803; *State* v. *Thompson,* 23 Kan. 338, 33 Am. Rep. 165; Wharton, Crim. Pl. & Pr. § 111.

[2] Wharton, Ev. §§ 292, 293. See *Johnson* v. *State,* 65 Ind. 204.

[1] Post, § 684.

[2] Post, §§ 430, 474.

[3] Post, § 474.

[1] Wharton, Ev. § 80; *Roberts* v. *Doxon,* Peake, N. P. Cas. 83; *Meyer* v. *Sefton,* 2 Starkie, 276, 19 Revised Rep. 720; *Burton* v. *Driggs,* 20 Wall. 133, 22 L. ed. 301; *Doe ex dem. Henderson* v. *Roe,* 16 Ga. 521. See *Johnson* v. *Kershaw,* 1 De G. & S. 264, 11 Jur. 553, 795.

[2] *Ritchie* v. *Kinney,* 46 Mo. 298.

[3] *McCombs* v. *North Carolina R. Co.* 67 N. C. 193.

[4] *Wayland* v. *Ware,* 109 Mass. 248. See *Weidman* v. *Kohr,* 4 Serg. & R. 174.

a certain entry is not in the docket.[5] And where a mass of private documents to be inquired into is so great that they cannot possibly be mastered in court, then, whenever a result can be ascertained by calculation, the result of such calculation, subject to be tested by other expert witnesses, is admissible.[6]

§ 167. Secondary evidence of transitory documents.—Secondary evidence may be given of documents so evanescent and transient that the incapacity of the party to produce them may be assumed without proof. Thus, without production or explanation of nonproduction, witnesses have been permitted to give parol evidence of inscriptions on banners at public meetings;[1] of the writings, as we have seen, on a trunk tag, at least for purposes of identification;[2] of a license hanging on a wall;[3] of the marks on clothes and other articles of personal property;[4] and of marks on the heads of certain barrels, for the purpose of identifying them.[5]

§ 168. And so as to things which cannot be brought into court.—Unmovable structures, such as monuments or tombstones, with the inscriptions that are on them, may be proved either by photographs or by copies duly proved.[1] In

[5] *McGrath* v. *Seagrave,* 2 Allen, 443, 79 Am. Dec. 797; *Com.* v. *Evans,* 101 Mass. 25; Post, § 616.

[6] Stephen, Ev. p. 70, citing *Roberts* v. *Doxon,* Peake, N. P. Cas. 83; *Meyer* v. *Sefton,* 2 Starkie, 276, 19 Revised Rep. 720.

[1] *Rex* v. *Hunt,* 3 Barn. & Ald. 566, 22 Revised Rep. 485; *Sheridan's Case,* 31 How. St. Tr. 679; *R.* v. *O'Connell,* Arm. & T. 235.

[2] *Com.* v. *Morrell,* 99 Mass. 542.

[3] Supra, § 163.

[4] *Com.* v. *Pope,* 103 Mass. 440. See *Com.* v. *Hills,* 10 Cush. 530.

[5] *United States* v. *Graff,* 14 Blatchf. 381, Fed. Cas. No. 15,244. See also *Com.* v. *Blood,* 11 Gray, 74; *Com.* v. *Dearborn,* 109 Mass. 370.

[1] *Jones* v. *Tarlton,* 9 Mees. & W. 675, 1 Dowl. P. C. N. S. 625, 11 L. J. Exch. N. S. 267, 6 Jur. 348; *Reg.* v. *Fursey,* 6 Car. & P. 84; *Doe ex dem. Coyle* v. *Cole,* 6 Car. & P. 360; *Haslam* v. *Cron,* 19 Week. Rep. 969; *North Brookfield* v. *Warren,* 16 Gray, 171. See *Shrewsbury Peerage Case,* 7 H. L. Cas. 1, 16; post, § 544.

the same way proof may be made of marks on trees;[2] of libels written on walls;[3] of placards posted on walls.[4] It must appear, however, that the paper is so attached to the wall as to be irremovable.[5] And the courts have admitted duly certified copies of papers in a country which forbids the removal of the originals;[6] and in such cases abstracts of voluminous, but unobtainable, foreign documents may be received.[7]

§ 169. Record proof of marriage; lex loci contractus.— In ordinary cases, on the principle of *locus regit actum,* a marriage must be celebrated with the formalities prescribed in the country of its solemnization, for if these are not observed within the country where they are essential to a valid marriage, such marriage cannot be held valid extraterritorially.[1] Thus where the law of the place makes the record the proper proof of the marriage, that record must be produced.[2] But marriage in the United States is so generally a civil contract, to which the assent of the parties is the essential factor, that where they have lived together as man and wife in the United States, it will require very strong proof that their marriage was void for want of formality where celebrated, to induce the courts, in a civil suit, to hold it invalid so as to render the children illegitimate or to stigmatize the union as adulterous.[3] Where people marry in their domicil, with the intention of settling in

[2] See note 1, supra.

[3] *Mortimer* v. *M'Callan,* 6 Mees. & W. 67, 9 L. J. Exch. N. S. 73, 4 Jur. 172.

[4] *Bruce* v. *Nicolopulo,* 11 Exch. 133, 3 C. L. R. 775, 24 L. J. Exch. N. S. 321, 3 Week. Rep. 483. See *Bartholomew* v. *Stephens,* 8 Car. & P. 728; *Com.* v. *Brown,* 124 Mass. 318.

[5] *Jones* v. *Tarlton,* 9 Mees. & W. 675, 1 Dowl. P. C. N. S. 625, 11 L. J. Exch. N. S. 267, 6 Jur. 348.

[6] Post, § 187; Wharton, Ev. § 83.

[7] Wharton, Ev. § 81.

[1] Wharton, Confl. L. §§ 127 et seq; *Holmes* v. *Holmes,* 1 Abb. (U. S.) 526, Fed. Cas. No. 6,638; post, § 530-533.

[2] Post, § 533; *State* v. *Horn,* 43 Vt. 20; *State* v. *Wallace,* 9 N. H. 515; *Jackson* v. *People,* 3 Ill. 232; *Glenn* v. *Glenn,* 47 Ala. 204.

[3] Wharton, Confl. L. § 173.

the United States, they are properly subject to the law of their intended domicil, and after they arrive in this country are to be regarded as man and wife.[4]

Marriages of citizens of the United States while domiciled abroad are not to be held void because they are not solemnized with all the formalities prescribed by the law of the place. And, while it has been argued with great ability, that marriages void at the place of celebration are void everywhere, the rule so deduced is open to serious question.[5] Admitting the force of the rule does not invalidate the marriages of such citizens while domiciled abroad, since French and German courts of high authority have held that the domiciled subjects of other states are to be governed, as to the capacity and forms of matrimony, by their own law. And, it is always to be remembered that, in any view, the *judex fori* will presume, until the contrary is proved, that a marriage abroad was in conformity with the *lex loci contractus*.[6]

In this work we are concerned with the evidentiary facts of marriage, and the degree and measure of proof necessary to establish or to avoid the marriage, when its validity is called into question before the proper determining tribunal.

§ 170. Proof of by parol; when.—The *lex loci contractus* may prescribe that no marriage shall be valid unless solemnized and recorded in a particular way; the *lex fori* may prescribe that in this respect the provisions of the *lex loci contractus* must be shown to have been satisfied, to prove a marriage in such cases. Except in such cases, not likely to occur,

[4] *Hutchins* v. *Kimmell,* 31 Mich. 133, 18 Am. Rep. 164 (Cooley, J.); London Law Mag. 1878, 236; Revue Gen. du droit, Sept. & Oct. 1877.

[5] Wharton, Confl. L. 171.

[6] Post, § 827; *Reg.* v. *Newton,* 2 Moody & R. 506; *Com.* v. *Holt,* 121 Mass. 61; *Com.* v. *Jackson,* 11 Bush, 679, 21 Am. Rep. 225, 1 Am. Crim. Rep. 74; *Arnold* v. *State,* 53 Ga. 574; *Brown* v. *State,* 52 Ala. 338.

marriage may be proved by parol, and this is a rule of international law.[1]

Although defined, in this country, as a civil contract, marriage differs from all other contracts in its consequences to the body politic, and because of this the state never stands indifferent, but is a party whose interest must always be considered.

At the outset of any attack, every presumption, as we shall see later,[2] is in favor of the legality of the marriage, and as incident thereto, the presumptions of good faith, regularity, and legitimacy.

Because of the nature of the contract and the presumptions attending it marriage is most frequently established by parol proof. This generally consists of the testimony of witnesses present at the ceremony,[3] and it may consist of proof by cohabitation and admission.[4]

A ceremonial marriage may be shown by eyewitnesses to the ceremony; and such testimony, being in direct connection with the object to be proved, is primary or direct evidence, which is sometimes necessary to establish the fact of marriage,[5] and it is sufficient for the witness to state that the mar-

[1] Wharton, Confl. L. § 171; Wharton, Crim. Law, 10th ed. §§ 1700 et seq; *Com.* v. *Holt,* 121 Mass. 61; *Van Tuyl* v. *Van Tuyl,* 8 Abb. Pr. N. S. 5; *Bissell* v. *Bissell,* 55 Barb. 325; *Physick's Estate,* 2 Brewst. (Pa.) 179; *Guardians of Poor* v. *Nathans,* 2 Brewst. (Pa.) 149; *Richard* v. *Brehm,* 73 Pa. 140, 13 Am. Rep. 733; *Illinois Land & Loan Co.* v. *Bonner,* 75 Ill. 315; *Brewer* v. *State,* 59 Ala. 101; *Murphy* v. *State,* 50 Ga. 150; *Dickerson* v. *Brown,* 49 Miss. 357; *Campbell* v. *Gullatt,* 43 Ala. 57; *Williams* v. *State,* 54 Ala. 131, 25 Am. Rep. 665. See *Omohundro's Estate,* 66 Pa. 113; *People* v. *Broughton,* 49 Mich. 339, 13 N. W. 621; *Baughman* v. *Baughman,* 29 Kan. 283; *Patterson* v. *Gaines,* 6 How. 550, 12 L. ed. 553; *Williams* v. *Walton & W. Co.* 9 Houst. (Del.) 322, 32 Atl. 726; *Odd Fellows' Ben. Asso.* v. *Carpenter,* 17 R. I. 720, 24 Atl. 578; *McQuade* v. *Hatch,* 65 Vt. 482, 27 Atl. 136.

[2] Post, § 171.

[3] Post, § 173.

[4] Wharton, Crim. Law, 10th ed § 1700.

[5] *Kilburn v. Mullen,* 22 Iowa, 498;

riage was celebrated according to the usual form, though he may not be able to give the details of the ceremony nor to state the words used.[6]

Where proof is sought through the fact of cohabitation, it must be of such a character with relation to the conduct of the parties as to have created in the community a reputation of marriage.[7]

It does not follow because the parties cohabit, that they are actually married. It may be a pretense to cover up an illicit intercourse, and if the illicit intercourse, known to be such at its inception, continues, where there is no impediment to the marriage, the illicit character will be presumed to continue until the changed relation of the parties is proved.[8]

It may be that the parties honestly believed themselves to be married, but that such belief was founded on a mistake of fact. It may be that in the community marriage is loosely applied to sexual relations not strictly marital.[9] It may be that

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; *State* v. *Ulrich,* 110 Mo. 350, 19 S. W. 656; *Lord* v. *State,* 17 Neb. 526, 23 N. W. 507, 6 Am. Crim. Rep. 17; *State* v. *Clark,* 54 N. H. 456, 1 Am. Crim. Rep. 34; *Lyman* v. *People,* 198 Ill. 544, 64 N. E. 974.

[6] *Lord* v. *State,* 17 Neb. 526, 23 N. W. 507, 6 Am. Crim. Rep. 17.

[7] *Yardley's Estate,* 75 Pa. 207; *Heminway* v. *Miller,* 87 Minn. 123, 91 N. W. 428; *Eldred* v. *Eldred,* 97 Va. 606, 34 S. E. 477; *Sharon* v. *Sharon,* 79 Cal. 633, 22 Pac. 26, 131; *McBean* v. *McBean,* 37 Or. 195, 61 Pac. 418; *Drawdy* v. *Hesters,* 130 Ga. 161, 15 L.R.A.(N.S.) 190, 60 S. E. 451; *White* v. *White,* 82 Cal. 427, 7 L.R.A. 799, 23 Pac. 276; *Thompson* v. *Nims,* 83 Wis. 261, 17 L.R.A. 847, 53 N. W. 502; *Dunbarton* v. *Franklin,* 19 N. H. 257.

But such reputation must be uniform, and not open to a question of divided opinion of the community. *Barnum* v. *Barnum,* 42 Md. 251; *Jackson* v. *Jackson,* 80 Md. 176, 30 Atl. 752; *Comly's Appeal,* 185 Pa. 208, 39 Atl. 890.

[8] *White* v. *White,* 82 Cal. 427, 7 L.R.A. 799, 23 Pac. 276; *Potter* v. *Clapp,* 203 Ill. 592, 96 Am. St. Rep. 322, 68 N. E. 81; *Barnes* v. *Barnes,* 90 Iowa, 282, 57 N. W. 851; *Van Dusan* v. *VanDusan,* 97 Mich. 70, 56 N. W. 234; *Gall* v. *Gall,* 114 N. Y. 109, 21 N. E. 106; *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.

[9] Post, § 827.

the community was jealous of the sanctity of the marriage relation, and would repel any attempt to invade that sanctity. Reputation in such a community would be of value as showing the belief of its members that the parties were actually married.[10] The proof becomes stronger when it shows that the parties fitted into a compact and extended family relation, in which the family relationship of the several members of a large group were reciprocally acknowledged as legitimate. Because of this variance in the surrounding circumstances, the better rule is that proof from cohabitation is a question of fact.[11] Cases frequently arise in which the fact of marriage may be adequately proved by reputation, and by marital cohabitation, with the admission it necessarily involves.[12]

The degree of proof differs with the nature of the proceeding in which the question of marriage is involved. If the question is collateral, proof by cohabitation is all that is required; if the main issue is the question of the marriage itself, then it must be proved by the record or by eyewitnesses.

Thus the burden is upon the prosecution to establish an actual marriage in prosecutions for bigamy, polygamy, adultery, and criminal conversation; and proof of the marriage, in such case, by common reputation or proof of living together, is not sufficient.[13]

[10] Post, § 246.

[11] *White* v. *White,* 82 Cal. 427, 7 L.R.A. 799, 23 Pac. 276; *Gall* v. *Gall,* 114 N. Y. 109, 21 N. E. 106.

[12] *Evans* v. *Morgan,* 2 Cromp. & J. 453, 2 Tyrw. 396, post, § 172.

[13] *Johnson* v. *State,* 60 Ark. 308, 30 S. W. 31; *State* v. *Dooris,* 40 Conn. 145; *State* v. *Matlock,* 70 Iowa, 229, 30 N. W. 495; *State* v. *White,* 19 Kan. 445, 27 Am. Rep. 137; *State* v. *Edmiston,* 160 Mo. 500, 61 S. W. 193; *Damon's Case,* 6 Me. 148; *Cox* v. *State,* 117 Ala. 103, 41 L.R.A. 760, 67 Am. St. Rep. 166, 23 So. 806; *Com.* v. *Lucas,* 158 Mass. 81, 32 N. E. 1033; *State* v. *St. John,* 94 Mo. App. 229, 68 S. W. 374.

In its international relations, the law of the solemnization of marriage may be thus stated:

1. When a marriage by competent parties is proved to have been solemnized abroad, the presumption is that it was in accordance with the *lex loci contractus.*

2. The old common law of Eng-

Statutory regulation of marriage, in this country, is usually merely directory, and where such statutes do not prohibit or

land, adopting in this respect the canon law, validates consensual marriages contracted by competent parties, irrespective of ecclesiastical benediction; and this law was brought to the United States by the English colonists, and became part of the common law of the English settled states.

3. Each sovereignty will maintain its distinctive policy as to marriage. France, for instance, as in Jerome Bonaparte's Case, may decline to accept an American marriage as changing the status of one of her domiciled subjects. On the other hand, in the United States, we would hold such marriage binding, when validily solemnized within our borders, by parties whom we regard competent. This is now settled in England to be the case when it is only by the law of the domicil of one of them that the marriage is invalid. But, on reason and on authority, we must hold with Sir J. Hannen (*Sottomayer* v. *De Barros,* 41 L. T. N. S. 281, 49 L. J. Prob. N. S. 1, L. R. 5 Prob. Div. 94, 27 Week. Rep. 917, 5 Eng. Rul. Cas. 814), that even though by the court of the domicil of both parties the marriage is invalid, it would still be sustained by the courts of the state where the marriage is solemnized, where, by the laws of that state, the parties would have been capable of marriage if subjects.

Each sovereignty applying its distinctive policy, as has been said, to its subjects, the courts of domicil, should the parties return to it after contracting a marriage abroad, would hold the marriage invalid in all cases in which its own prohibition is based on national policy, or on national conception of morals, and not on matters of form. We may illustrate this by the earlier English rulings as to the marriage of a man with his sister-in-law and by our own rulings in cases of marriages of negroes with whites. In some states these marriages are void. There can be no question that domiciled citizens of states marrying in defiance of this prohibition, in England, would be regarded in England as validly married. There is no doubt that should they return, after the marriage, to their domicil, the courts of that domicil would hold the marriage invalid.

Nor does it follow that because a state requires certain conditions to validate marriages within its borders, the marriage of foreigners, within such borders, without complying with such conditions, would be held invalid by the courts of the domicil of the parties so marrying.

Undoubtedly this position has been disputed by high authority; but for it the following reason may be given: First. In marriage, as has been said, each sovereignty is governed, as to matters involving state policy or morals, by its distinctive standards. Secondly. We have American rulings to this ef-

forbid other forms of marriage, a common-law marriage, consummated in accordance with the rules of common law, is valid and may be proved as such.

§ 171. Proof of marriage.—An important distinction, however, is to be noticed between suits in which the legitimacy of children or the sanctity of the domestic relation is at issue,

fect, holding that American citizens, marrying abroad, though without complying with requisites established by the law of the place of solemnization, will be regarded as lawfully married by the courts of their domicil, if such marriage would have been valid if solemnized at such domicil. Thirdly. German and French courts, as has been stated in the text, have held that in such cases the *lex domicillii* is to control, and that if the marriage of Americans in Paris, for instance, is in conformity with the law of their domicil, though not in conformity with the law of France, it would be held good in France. If good in France, it would be regarded, even by those who insist upon the ubiquity of the *lex loci contractus,* as good in the United States. For authorities on these points, see Wharton, Crim. Law, 8th ed. § 1698 et seq. In Massachusetts and Maryland it has been held, in deviation from the canon and common law, that a marriage contracted merely *per verba de præsenti* is not valid without the ceremony, prescribed by statute. *Com.* v. *Munson,* 127 Mass. 460, 34 Am. Rep. 411; *Denison* v. Denison, 35 Md. 361. See, however, for a more liberal view, *Barnum* v. *Barnum,* 42 Md. 251. See also *Holmes* v. *Holmes,* 1 Abb. (U. S.) 525, Fed. Cas. No. 6,638; *Grisham* v. *State,* 2 Yerg. 589.

The right to prove marriages by parol is not affected by the statutes permitting parties to be called as witnesses. *Rockwell* v. *Tunnicliff,* 62 Barb. 408.

In France under § 201 and 202 of the Civil Code, it is required that the marriage be celebrated at the domicil of one of the parties; that domicil can only be acquired after six months' residence; there must be a record of the proposed marriage with two publications thereof, with an interval of eight days between the publications, and this must be made before the door of the town hall; the consent of the girl's parents, if living, must be had if she is under twenty-one. A girl of nineteen was at school in Milan, Italy; she eloped with a citizen of the Argentine Republic to Paris, where a marriage ceremony was performed, and later removed with her husband to Buenos Ayres. By failure to observe the marriage regulations, no marriage status was established although civil rights of property attached. *Re Hall,* 61 App. Div. 266, 70 N. Y. Supp. 406.

and those criminal in character. There is always a strong presumption in favor of the legality of every marriage on grounds of good morals and public policy,[1] and as an incident thereto the presumption of legitimacy,[2] as well as that of good faith,[3] and of regularity.[4] In criminal prosecutions we have against the alleged unlawful marriage the presumption of innocence, as such marriage must be proved beyond all reasonable doubt.[5] No man is presumed to do an unlawful act, and the law is prompt in the application of that salutary rule that morality, and not immorality; marriage, and not concubinage,—are presumed.[6]

We cannot, therefore, hold the decisions in the last class of cases binding on the former. In this country the distinction is of peculiar interest. An emigrant lands on our shores, with a wife whom he has married, without the observance of those restrictions which the distinctive social condition of many European states have imposed. He rears children, whom he acknowledges and who claim, after his decease, to inherit his estate. Here, the validity of the marriage being in litigation two important presumptions arise to sustain the legitimacy of the children:

The first is the presumption of the regularity and validity

[1] *Tuttle* v. *Raish,* 116 Iowa, 331, 90 N. W. 66; *Re Rash,* 21 Mont. 170, 69 Am. St. Rep. 649, 53 Pac. 312; *State* v. *McGilvery,* 20 Wash. 240, 55 Pac. 115; *Smith* v. *Fuller,* 138 Iowa, 91, 16 L.R.A.(N.S.) 98, 115 N. W. 912; *Pittinger* v. *Pittinger,* 28 Colo. 308, 89 Am. St. Rep. 193, 64 Pac. 195.

[2] *Bury's Case,* 5 Coke, 98 b; *Morris* v. *Davies,* 5 Clark & F. 163, 1 Jur. 911; *Banbury Peerage Case,* 1 Sim. & Stu. 153.

[3] Best, Ev. § 349; *Kopke* v. *People,* 43 Mich. 41, 4 N. W. 551.

[4] Post, § 829.

[5] *Squire* v. *State,* 46 Ind. 459; Com. v. *Jackson,* 11 Bush, 679, 21 Am. Rep. 225, 1 Am. Crim. Rep. 74; *McCombs* v. *State,* 50 Tex. Crim. Rep 490, 9 L.R.A.(N.S.) 1036, 123 Am. St. Rep. 855, 99 S. W. 1017, 14 A. & E. Ann. Cas. 72.

[6] *Teter* v. *Teter,* 101 Ind. 129, 51 Am. Rep. 742; *Johnson* v. *Johnson,* 114 Ill. 611, 55 Am. Rep. 883, 3 N. E. 232; 2 Nelson, Div. & Sep. § 580; *Lampkin* v. *Travelers' Ins. Co.* 11 Colo. App. 249, 52 Pac. 1040.

of every marriage; and the second is that, where the evidence is equally balanced, or divided, the courts in all cases of legitimacy will favor the hypothesis of matrimony.[7] But a different line of presumptions, however, applies where an emigrant comes to this country without a wife, marries here, establishes a home and a family, and then is arrested here on a charge of bigamy based on an alleged prior marriage in his native land. If in such case he should be charged with bigamy in contracting the second marriage, the prosecution, instead of being aided by presumptions, which, in doubtful cases, turn the scales in its favor, has to encounter presumptions which, on a doubtful case, will turn the scales against it. The defendant's second marriage is not challenged, and is looked upon with peculiar favor by the judicial policy of a country such as this, where home building is encouraged and family growth considered the badge of lofty citizenship. The fact of the first marriage is the gist of the prosecution's case, and to it applies eminently the maxim that the charge of guilt to justify a conviction must be sustained by the evidence to a moral certainty and beyond reasonable doubt.[8] Hence we find courts inclined when marriage is to be adjudicated on in its civil relations, to regard the husband's own admissions as proof of the fact, or reputation in the community, with proof of cohabitation, while shrinking from this conclusion when the object is to sustain a criminal prosecution against him for bigamy.[9] Confessions are never authoritative unless there is

[7] *Patterson* v. *Gaines,* 6 How, 550, 12 L. ed. 553; *Shafher* v. *State,* 20 Ohio, 3; *Reg.* v. *Willshire,* L. R. 6 Q. B. Div. 366, 44 L. T. N. S. 222, 50 L. J. Mag. Cas. N. S. 57, 29 Week. Rep. 473, 14 Cox, C. C. 541, 45 J. P. 375; *Hyde Park* v. *Canton,* 130 Mass. 505; *People* v. *Feilen,* 58 Cal. 218, 41 Am. Rep. 258; *Hull* v. *State,* 7 Tex. App. 593; Wharton, Crim. Law, 10th ed. §§ 1682, 1708; *Reg.* v. *Curgerwen,* L. R. 1 C. C. 1; *Reg.* v. *Jones,* 48 L. T. N. S. 768; *Pickens's Estate,* 163 Pa. 14, 25 L.R.A. 477, 479, 29 Atl. 875; *Eisenlord* v. *Clum,* 126 N. Y. 552, 12 L.R.A. 836, 841, 27 N. E. 1024.

[8] Wharton, Confl. L. § 150.

[9] Where record proof is not requisite, admissions may be received in proof of marriage. *Reg.* v. *Simmonsto,* 1 Car. & K. 164, 1 Cox, C. C.

clear proof of the *corpus delicti,* and never exchange places, and in this instance the *corpus delicti* is plainly the alleged first marriage. But how can this be clearly proved independent of the defendant's admission or confession? In view of the issue being criminal, we can easily understand how a court should say, as some have, "The *lex loci contractus* prescribes certain solemnities as necessary to constitute the formalities of marriage, and therefore in view of the maxim, *Locus regit actum,* we must hold that any other proof of the fact of marriage is but secondary, and is not to be received." Had the first wife been brought to this country and here acknowledged, the case would have been different. But where the prosecution rests simply on a technical first marriage, it is not inconsistent in courts who recognize the validity of a consensual marriage, to hold that such technical first marriage should, in a criminal issue, in order to be made out beyond a reasonable doubt, be proved in the way the *lex loci contractus* prescribes, and that secondary evidence should only be received when the prescriptions of the *lex loci contractus*

30; *Truman's Case,* 1 East, P. C. 470; *Reg.* v. *Upton,* 1 Car. & K. 165, note; *Cayford's Case,* 7 Me. 57; *State* v. *Hodgskins,* 19 Me. 155, 36 Am. Dec. 742; *State* v. *Libby,* 44 Me. 469, 69 Am. Dec. 115; *Com.* v. *Holt,* 121 Mass. 61; *State* v. *Lash,* 16 N. J. L. 380, 32 Am. Dec. 397; *Com.* v. *Murtagh,* 1 Ashm. (Pa.) 272; *Wolverton* v. *State,* 16 Ohio, 173, 47 Am. Dec. 373; *Carmichael* v. *State,* 12 Ohio St. 553; *Jackson* v. *People* 3 Ill. 231; *State* v. *Seals,* 16 Ind. 352; *State* v. *Sanders,* 30 Iowa, 582; *Warner* v. *Com.* 2 Va. Cas. 95; *Oneale* v. *Com.* 17 Gratt. 582; *State* v. *Hilton,* 3 Rich. L. 434; 45 Am. Dec. 783; *State* v. *Britton,* 4 M'Cord, L. 256; *Cook* v. *State,* 11 Ga. 53, 56 Am. Dec. 410; *Cameron* v. *State,* 14 Ala. 546, 48 Am. Dec. 111; *Langtry* v. *State,* 30 Ala. 536; *Williams* v. *State,* 54 Ala. 131, 25 Am. Rep. 665; *Robinson* v. *Com.* 6 Bush, 309; *Com.* v. *Jackson,* 11 Bush, 679, 21 Am. Rep. 225, 1 Am. Crim. Rep. 74; *Gorman* v. *State,* 23 Tex. 646.

But where the confession is without proof of cohabitation and reputation, it will not sustain a conviction. *Dove* v. *State,* 3 Heisk. 360; *Weinberg* v. *State,* 25 Wis. 370; *Reg.* v. *Savage,* 13 Cox, C. C. 178, overruling *Reg.* v. *Newton,* 2 Moody & R. 503; *Miles* v. *United States,* 103 U. S. 304, 26 L. ed. 481; *Jones* v. *Jones,* 48 Md. 391, 30 Am. Rep. 466.

are peculiarly onerous, or when the primary evidence cannot be obtained.[10]

The usual proviso that a certain number of years' absence of the first consort, unheard of, will be a defense, need not be negatived by the prosecution, but is a matter of defense.[11]

It is otherwise, however, where the exception describes the offense in the enacting clause.[12]

§ 172. Admissions of the parties; corroboration; when question of fact.—Admissions by the parties themselves, where free and voluntary, are sufficient to prove the first marriage.[1] Such admissions are of two kinds: First, those incidental to cohabitation; second, those not so incidental. Admissions, in connection with cohabitation, are sufficient proof of marriage, within the limitations hereafter noticed.[2] Admissions of the parties, not incidental to cohabitation, are

[10] *Reg.* v. *Savage,* 13 Cox, C. C. 178.

[11] *Parker* v. *State,* 77 Ala. 47, 54 Am. Rep. 43; 2 McClain, Crim. Law, § 1080; *Kopke* v. *People,* 43 Mich. 41, 4 N. W. 551; *Bode* v. *State,* 7 Gill, 326; *Stanglein* v. *State,* 17 Ohio St. 453; *Fleming* v. *People,* 27 N. Y. 329; *Com.* v. *Boyer,* 7 Allen, 306; *Barber* v. *State,* 50 Md. 161; *State* v. *Gonce,* 79 Mo. 600, 4 Am. Crim. Rep. 68; *State* v. *Abbey,* 29 Vt. 60, 67 Am. Dec. 754; *State* v. *Johnson,* 12 Minn. 476, Gil. 378, 93 Am. Dec. 241; *State* v. *Williams,* 20 Iowa, 98.

Contra, *King* v. *State,* 40 Ga. 244.

[12] Wharton, Crim. Pl. & Pr. § 238; *Russell* v. *State,* 50 Ind. 174; *Brutton* v. *State,* 4 Ind. 601.

[1] *Miles* v. *United States,* 103 U. S. 304, 26 L. ed. 481; *Kansas P. R. Co* v. *Miller,* 2 Colo. 442; *Caujolle* v *Ferrie,* 23 N. Y. 104; *State use of Charlotte Hall School* v. *Greenwell,* 4 Gill & J. 414.

[2] *Com.* v. *Jackson,* 11 Bush, 679, 21 Am. Rep. 225, 1 Am. Crim. Rep. 74; *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; *Harrod* v. *Harrod,* 1 Kay & J. 15, 18 Jur. 85, 2 Week. Rep. 612; *Rex* v. *Brampton,* 10 East, 302, 10 Revised Rep. 299; *Raynham* v. *Canton,* 3 Pick. 293; *Redgrave* v. *Redgrave,* 38 Md. 93; *Stackhouse* v. *Stotenbur,* 22 App. Div. 312, 47 N. Y. Supp. 940; *Perrine* v. *Kohr,* 20 Pa. Super. Ct. 36; *Womack* v. *Tankersley,* 78 Va. 242.

insufficient to sustain a conviction of a marital crime without other proof of the first marriage.[3]

After a consensual marriage, in a country where such marriages are invalid, if a man comes to a country where such marriages are valid and lives with his wife as her husband, this is a validation of the former invalid marriage. But if there is no such validation, as where he leaves her abroad, then, on a prosecution for a marital crime, our courts would logically refuse to be satisfied of the marriage by mere admissions or even by proof of prior cohabitation. To sustain the averment of the indictment in such case, there must be proof of the celebration of the first marriage,[4] for where it is made the basis of a criminal prosecution in our own land, it is necessary to prove that all the prescriptions of the *lex loci contractus* were complied with, and that such first marriage was a bona fide matrimonial contract, between parties capable of so contracting, followed by cohabitation.[5]

In such case, the foreign registry, sustained by proof of the foreign law, is the best evidence, where such foreign law requiring registry is proved.[6] In such prosecution there must

[3] *Reg.* v. *Flaherty,* 2 Car. & K. 782; Post § 623; *Ham's Case,* 11 Me. 391; *Com.* v. *Littlejohn,* 15 Mass. 163; *State* v. *Roswell,* 6 Conn. 446; *People* v. *Humphrey,* 7 Johns. 314; *Clayton* v. *Wardell,* 4 N. Y. 230; *Gahagan* v. *People,* 1 Park. Crim. Rep. 383; *State* v. *Armstrong,* 4 Minn. 335, Gil. 251; *People* v. *McCormack,* 4 Park. Crim. Rep. 17; *Green* v. *State,* 59 Ala. 68; *McReynolds* v. *State,* 5 Coldw. 18; Wharton, Crim. Law, 10th ed. 1686, notes.

[4] Post, §§ 623 et seq. 686, 827; *Com.* v. *Jackson,* 11 Bush, 679, 21 Am. Rep. 225, 1 Am. Crim. Rep. 74; *State* v. *Hilton,* 3 Rich. L. 434, 45 Am. Dec. 783; *Williams* v. *State,* 54 Ala. 131, 25 Am. Rep. 665; *Carotti* v. *State,* 42 Miss. 344, 97 Am. Dec. 465; *Senge* v. *Senge,* 106 Ill. App. 140; *Franklin* v. *Lee,* 30 Ind. App. 31, 62 N. E. 78.

[5] Post, § 530; *State* v. *Horn,* 43 Vt. 20; *People* v. *Humphrey,* 7 Johns. 314; *Weinberg* v. *State,* 25 Wis. 370; *Bird* v. *Com.* 21 Gratt. 800.

[6] *Bird* v. *Com.* 21 Gratt. 800; post, § 404; *State* v. *Looke,* 7 Or. 54. See *Reg.* v. *Griffin,* 14 Cox, C. C. 308, Ir. L. R. 4 C. L. 497.

be proof made of the second marriage during the life of the lawful spouse, and no presumption as to the prolongation of life can be invoked to aid the charge in lieu of proof.[7] So, where the question arose upon the presumption of death after an absence of seven years, and, as opposed to this, the presumption of innocence of the accused, the law prefers the presumption of innocence.[8]

The question is a question of fact to be determined by the jury from all the surrounding circumstances. As to such inferences it has been well said in an old English case, that "the existence of the party, at an antecedent period, may or may not afford a reasonable inference that he or she was living at the subsequent date. If, for example, it were proved that he was in good health on the day preceding the second marriage, the inference would be strong, almost irresistible, that he was living on the latter day, and the jury, in all probability, would find that he was so. If, on the other hand, it was proved that he was in a dying condition, and nothing further was shown, the jury would probably decline to draw that inference." Thus, the question is entirely for the jury. The law makes no presumption either way.[9]

[7] *Hull* v. *State,* 7 Tex. App. 593; *Gorman* v. *State,* 23 Tex. 646.

[8] *Kelly* v. *Drew,* 12 Allen, 107, 90 Am. Dec. 138; *Murchison* v. *Green,* 128 Ga. 339, 11 L.R.A.(N.S.) 702, 57 S. E. 709; *Johnson* v. *Johnson,* 114 Ill. 611, 55 Am. Rep. 883, 3 N. E. 232; *Hunter* v. *Hunter,* 111 Cal. 261, 31 L.R.A. 411, 52 Am. St. Rep. 180, 43 Pac. 756; Bishop, Marr. & Div. § 453; Bishop, Statutory Crimes, § 611; 1 Greenl. Ev. § 41; *Newman* v. *Jenkins.* 10 Pick. 515; *State* v. *Moore,* 33 N. C. (11 Ired. L.) 160, 53 Am. Dec. 401; *Lockhart* v. *White,* 18 Tex. 110.

[9] *Reg.* v. *Lumley* (1869) 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; *Turner* v. *Williams,* 202 Mass. 500, 24 L.R.A.(N.S.) 1199, 1201, 132 Am. St. Rep. 511, 89 N. E. 110.

"In some states it has been held where, on a criminal case, it was found necessary to prove a marriage in order to convict a defendant of the crime with which he was charged, that all essentials to a valid marriage must be strictly proved, as well as the law of the state or country where the marriage was

§ 173. Marriage; foreign; domestic; wife as a witness in.—Where the validity of the marriage is the question at issue, stricter proof is required than where it is collaterally involved.[1] In the absence of a statute requiring certain evidence, such stricter proof would be furnished by the testimony of a witness present at the marriage.[2] In the case of a foreign marriage, the testimony of the officiating clergyman not only may be adduced to prove the marriage, but the law under which it was solemnized.[3] In the case of a domestic marriage, likewise, the testimony of the officer who performed the marriage, which would also be prima facie proof of his authority,[4] and raise a presumption that in so acting he complied with the law.[5]

celebrated; and also that the admissions of the defendant's cohabitation and reputation were not sufficient evidence of such marriage. But experience has proven that such a rule in the United States amounts, in a large number of cases, to a denial of justice. Our people are migratory in their habits, and very many of our foreign-born citizens were married in the countries where they were born. To prove, in Missouri a marriage celebrated in Bavaria, or even in Canada, within the rule adopted in some cases, is ofttimes an impossible task. Doubtless, on account of this difficulty, the rule has been modified, and the better doctrine in this country now is that cohabitation, reputation, and admissions are sufficient evidence of a legal marriage to submit to a jury." *Taylor* v. *State,* 52 Miss. 84, 2 Am. Crim. Rep. 13.

[1] *Halbrook* v. *State,* 34 Ark. 511, 517, 36 Am. Rep. 17.

[2] *Crane* v. *State,* 94 Tenn. 86, 28 S. W. 317; *People* v. *Perriman,* 72 Mich. 184, 40 N. W. 425; *Reg.* v. *Mainwaring,* 7 Cox, C. C. 192, Dears. & B. C. C. 132, 26 L. J. Mag. Cas. N. S. 10, 40 N. W. 435, 2 Jur. N. S. 1236, 5 Week. Rep. 119; *State* v. *Kean,* 10 N. H. 347, 34 Am. Dec. 162; *State* v. *Clark,* 54 N. H. 456, 1 Am. Crim. Rep. 34; *Com.* v. *Putman,* 1 Pick, 136; *Warner* v. *Com.* 2 Va. Cas. 95; *Wolverton* v. *State,* 16 Ohio 176, 47 Am. Dec. 373; Wharton, Crim. Law, 10th ed. 1699, et seq.

[3] *Bird* v. *Com.* 21 Gratt. 800; *American Life Ins. & T. Co.* v. *Rosenagle,* 77 Pa. 507; *State* v. *Abbey,* 29 Vt. 60, 67 Am. Dec. 754; *State* v. *Goodrich,* 14 W. Va. 850; *Patterson* v. *Gaines,* 6 How. 550, 12 L. ed. 553; *Lanctot* v. *State,* 98 Wis. 136, 67 Am. St. Rep. 800, 73 N. W. 575.

[4] Post, § 827; *Bird* v. *Com.* 21 Gratt. 800; *State* v. *Abbey,* 29 Vt. 60, 67 Am. Dec. 754; *Jackson* v. *Jackson,* 80 Md. 176, 30 Atl. 752.

[5] Post, § 827; *Hanon* v. *State,* 63

Under the common law, the parties to a marriage could never be witnesses for or against each other in matters concerning the marriage relation, and even under the statute removing the ban of interest from witnesses to render them competent, the wife cannot testify to matters that would incriminate the husband.[6] So, in adultery, in the absence of statute, the testimony of either party would not be sufficient to prove the marriage.[7]

§ 173a. Foreign marriage certificate; proof of.—When the prosecution relies on a foreign certificate of marriage, such certificate will not be received in evidence unless it is shown, first, that the record has been kept in conformity with law; second, the authority and identity of the registrar; third, that the certificate was authorized by, and that it is in conformity with, the law of the place; and, fourth, the signature to the same must be duly proved.[1]

Md. 123; *Re Megginson,* 21 Or. 387, 14 L.R.A. 540, 28 Pac. 388; *People* v. *Schoonmaker,* 117 Mich. 190, 72 Am. St. Rep. 560, 75 N. W. 439; *State* v. *Davis,* 109 N. C. 780, 14 S. E. 55; *State* v. *Rood,* 12 Vt. 396; *State* v. *Winkley,* 14 N. H. 480; *Hayes* v. *People,* 25 N. Y. 390, 82 Am. Dec. 364.

[6] *Kusch* v. *Kusch,* 143 Ill. 353, 32 N. E. 267; *Young* v. *Gilman,* 46 N. H. 484; *Sutherland* v. *Ross,* 140 Pa. 379, 21 Atl. 354; *Banister* v. *Ovitt,* 64 Vt. 580, 24 Atl. 117; *De Farges* v. *Ryland,* 87 Va. 404, 24 Am. St. Rep. 659, 12 S. E. 805; *Keaton* v. *McGwier,* 24 Ga. 217.

[7] *State* v. *Bowe,* 61 Me. 171; *Moore* v. *State,* 45 Tex. Crim. Rep. 234, 237, 67 L.R.A. 499, 108 Am. St. Rep. 952, 75 S. W. 497, 2 A. & E. Ann. Cas. 878; *Hobbs* v. *State,* 53 Tex. Crim. Rep. 71, 112 S. W. 308; *Hill* v. *Pomelear,* 72 N. J. L. 528, 63 Atl. 269.

The subsequent dissolution of the marriage does not affect the principle nor remove the incompetency. *Owen* v. *State,* 78 Ala. 425, 56 Am. Rep. 40, 6 Am. Crim. Rep. 206.

But, under statute providing that the "party injured by the offense committed" is a competent witness, the parties may testify. *Jordan* v. *State,* 142 Ind. 422, 41 N. E. 817, 10 Am. Crim. Rep. 31.

[1] Post, §§ 530–533; *State* v. *Doorris,* 40 Conn. 145. See *State* v. *Wallace,* 9 N. H. 515; *State* v. *Horn,* 43 Vt. 20; *State* v. *Colby,* 51 Vt. 291.

III. Different Kinds of Copies

§ 174. Secondary evidence of documents admits of degrees.—Although the question is still regarded as open, the conclusion seems reasonable that a party who has in his power evidence of a higher degree throws much suspicion on his case if he withhold such higher evidence, and offer that which is not only lower, but necessarily inferior as a means of expressing truth, although such evidence may be technically of the same grade.[1] We may illustrate this principle by the circumstance that it has been held that if an exemplification of a lost record or deed be obtainable, a party will not be permitted to prove such deed or record by memory of witnesses.[2] Hence a party cannot prove a record by parol when he has an opportunity to obtain an exemplification.[3] The principle is that where a particular kind of copy is by law especially directed and guarded, such a copy is to be regarded as so far primary as to exclude, so long as it can be produced, mere recollections by unofficial persons of what is registered in the copy.[4] But unless a particular kind of copy, either by statute or common law, or by peculiar reasons of policy, is made primary, the fact that it is withheld, however much it may detract from the credit of a party,[5] does not preclude him from offering other secondary evidence. The testimony, also, of a deceased witness can be proved either by notes of a short-hand writer sworn to by him, or by the recollection of a witness, or by an official reporter, if such be appointed by statute;[6] and the validation of one of these modes of proof does not exclude the other. So it has been argued that

[1] Wharton, Ev. § 90.
[2] Wharton, Ev. § 90.
[3] Wharton, Ev. § 90. See post, § 202.
[4] See *Rex* v. *Wylde*, 6 Car. & P. 380.
[5] Wharton, Ev. § 1266. See *Shoenberger* v. *Hackman*, 37 Pa. 87.
[6] Post, § 231.

a party is not precluded from proving a lost document, by the fact that he has possession of a written copy of such document which could be verified.[7]

§ 175. Photographic copies secondary evidence.—Wherever the original can be produced, a photograph copy is inadmissible; though when the original is nonproducible, such copies are of high value.[1] And photographic copies are admissible for the purpose of distinguishing or identifying the original.[2]

§ 176. All printed impressions are of same grade.—When the object is to prove a manuscript (as distinguished from a printed publication), the original must be produced or accounted for.[1] But the several printed copies produced by a single impression, and issued in a single edition, come in *pari passu*. If the published sheet (as in prosecutions for libel) be the object of proof, all impressions are admissible. If they be offered as secondary evidence of the original, they are primary as to each other.[2]

§ 177. Press copies secondary evidence.—A press copy, also, is secondary to the original document from which it is taken,[1] and is receivable on the loss of the original.[2] Being secondary, a copy can be produced from a press copy of a lost writing, without producing the press copy.[3] But though a

[7] See Wharton, Ev. §§ 90, 177; post, §§ 227, 231.

[1] Post, §§ 544, 545, 805.

[2] Post, §§ 415, 545, 805.

[1] *Watson's Case*, 32 How. St. Tr. 82. See supra, § 162.

[2] *Rex* v. *Ellicombe*, 5 Car. & P. 522, 1 Moody & R. 260; *Reg.* v. *Kitson*, Dears. C. C. 187, 22 L. J. Mag. Cas. N. S. 118, 12 Jur. 122, 6, Cox, C. C. 159; *Rex* v. *Doran*, 1 Esp. 129. See supra, §§ 159, 160.

[1] Wharton, Ev. §§ 92, 133.

[2] *Cameron* v. *Peck*, 37 Conn. 555.

[3] *Goodrich* v. *Weston*, 102 Mass. 362, 3 Am. Rep. 469. See supra, § 160.

press copy is thus secondary, it may be used as a means of determining the identity and genuineness of an instrument.[4]

§ 178. Examined copies must be compared.—According to the English practice, an examined copy, to be admissible, must be verified by a witness, who will swear that he has compared the copy tendered with the original, either directly, or through a person employed to read the original.[1] A copy made by a witness, though without comparison, is undoubtedly evidence of a high grade, if he testifies to its accuracy; the more cautious course is to add comparison by another's aid.[2] The copy, to be admissible, must be complete; and it will be excluded if it give abbreviations of that which in the original is given at length.[3]

§ 179. Exemplification made admissible by Federal statute.—The act of Congress of May 24, 1790, provides that "the records and judicial proceedings of the courts of any state shall be proved or admitted in any other court within the United States, by the attestation of the clerk, together with a 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 the said records are or shall be taken." [1]

[4] *Com.* v. *Jeffries,* 7 Allen, 561, 83 Am. Dec. 712.

[1] See details of practice in Wharton, Ev. § 95.

[2] "The general rule of the law upon this subject requires that a copy, in order to be admitted as secondary evidence, should be proved by someone who has compared it with the original. 1 Starkie, 9th Am. ed. Ev. 270; *Kerns* v. *Swope,* 2 Watts, 75; Sharswood, J., *McGinniss* v. *Sawyer,* 63 Pa. 267.

[3] *Reg.* v. *Christian,* Car. & M. 388; *Com.* v. *Trout,* 76 Pa. 379.

[1] See, as to rulings as to the character of exemplifications under this statute, Wharton, Ev. § 824.

§ 180. Extension of the original act.—Although by the terms of the original statute it is limited to state courts, it is extended, by the act of March 27, 1804, to the "public acts, records, office books, judicial proceedings, courts, and officers of the respective territories of the United States," and it has been held that while the statute is not formally applicable to the Federal courts, yet exemplification of the records of such courts will be regarded as admissible when the prescriptions of the statute are followed.[1]

§ 181. Federal statute does not exclude other proof.—The Federal statute, while making it obligatory on state courts, under the Federal Constitution, to accept exemplifications proved in accordance with its provisions, does not preclude a state from authorizing records of other states to be received in evidence on proof of less stringency, or on common-law proof; it merely says that when verified by such proof they shall be received.[1] A Federal court sitting in a particular state will accept the proof prescribed in such state of intraterritorial records.[2] And it has been held that a state court may receive records of Federal courts upon an ordinary exemplification.[3]

§ 182. Only extends to courts of record.—Only courts of record are within the statute.[1] It does not, therefore, include the proceedings of municipal magistrates or justices of the peace who keep no records;[2] though it is otherwise when the justice of the peace holds a court of record, and is obliged by statute to keep a record of his proceedings;[3] or

[1] Wharton, Ev. § 98.
[1] Wharton, Ev. § 98.
[2] Wharton, Ev. § 98.
[3] *Womack* v. *Dearman*, 7 Port. (Ala.) 513.
[1] See Brightley's Fed. Dig. 265.
[2] Wharton, Ev. § 99.
[3] Wharton, Ev. § 99.

when his proceedings are certified by him to the county court, and there verified under the statute.

§ 183. Statute must be strictly followed.—It is essential that the clerk, who under the act is to attest the record, should be the chief clerk of the court or of its successor, to whom the care of its records, in case of its expiration, is committed. The certificate of an under clerk, or of a deputy or substitute, is inadequate.[1]

§ 184. Office copy admitted when authorized by law.—An "office copy" of a record is a copy made by an officer duly authorized for the purpose either by rule of court or by statute. Such copy, when the officer is authorized only by rule of court, is admissible as evidence in the same court and in the same cause; and at common law the copy must be proved to be correct, if it be produced either in another court or even in the same court in another cause.[1]

§ 185. Original records of court in which suit is pending are evidence in such court.—When on a pending trial the records of the court trying the case are relevant, they may be omitted without further proof than is given by their production by the clerk from the proper archives.[1] We have also authority to the effect that the original papers in an inferior court may be received in evidence in a superior court.[2] But the genuineness of the paper must be proved as a condition precedent to its reception.[3]

[1] Wharton, Ev. § 100.

[1] *Den ex dem. Lucas* v. *Fulford*, 2 Burr. 1179; *Jack ex dem. Boyle* v. *Kiernan*, 2 Jebb & S. 231. See also *Barron* v. *Daniel*, Craw. & D. (Ir.) 283.

[1] Wharton, Ev. § 106.

[2] *State* v. *Bartlett*, 47 Me. 396. And other cases cited Wharton, Ev. § 106.

[3] *Perry* v. *Mays*, 1 Hill, L. 76.

§ 186. Office copies admissible in same state.—A copy certified to be correct by the clerk or proper officer of the court where the record is deposited will usually be received in evidence as prima facie proof of the record in the state by which the court is constituted; nor is it necessary that the certificate of the judge should be appended.[1] The same decision has been reached where the copy and the certificate are by the judge, and not the clerk of the court.[2] But the certificate to the verity of the transcript must be explicit.[3]

§ 187. Statutory records; proof of.—Statutes authorizing the recording of deeds and other conveyances and instruments in most of the states ordinarily make the book in which the registry is made admissible as evidence, and further provide that all such deeds and instruments in writing purporting to have been executed, acknowledged, or proved out of the state before a notary public of any state or territory of the United States, shall be deemed prima facie to have been acknowledged or proved before proper officers, and in case of the loss of the originals, a copy of the record thereof with the certificate of acknowledgment or proof appertaining to the same shall be received as prima facie evidence of such execution and acknowledgment, anything in the statutes of the state to the contrary notwithstanding.[1]

It is also the case that by similar statutes in many instances the printed statute books of the United States and of the several states and territories printed under authority, the books and reports of decisions of the United States Supreme Court and of the several states and territories published by the authority of such courts, may be read as evidence in all courts

[1] *State* v. *Bartlett,* 47 Me. 396. And other cases cited in Wharton, Ev. § 107.

[2] *Brackett* v. *Hoitt,* 20 N. H. 257.

[3] *Lyon* v. *Bolling,* 14 Ala. 753, 48 Am. Dec. 122.

[1] *Quimby* v. *Boyd,* 8 Colo. 204, 207, 6 Pac. 462.

of the states of such acts and decisions. And generally it may be said that the reception of evidence of statutes and records, certificates of magistracy, official certificates of registers and receivers of land offices of the United States, exemplifications of laws of sister states, and copies of papers, books, or proceedings or parts thereof appertaining to transactions of cities and towns in their respective corporate capacities, are all regulated by statute, to which reference must be had. Such statutes also usually govern in respect to any notice or advertisement required by law or the order of any court to be published in a newspaper, as well as proof of any patent for land or mines. But such statutes never require proof beyond the fact that any original deed or instrument is not in the affiant's possession or power to produce in order that a certified copy may be introduced in evidence.[2]

Where a statute provides that "the certificate of any public officer of the state to any record, document, paper on file, or other matter or thing in his office, shall be admissible in any court in the state," it is competent on a prosecution for embezzlement by a tax collector, to introduce in evidence, on the part of the state, a statement of taxes collected by the defendant, taken from the books and certified by the comptroller general, and the constitutional right of the defendant to be confronted by the witnesses against him is not thereby invalid.[3]

§ 188. Seal of court essential to copy.—In ordinary practice, the seal of a court of record is an essential to the attestation of the court of the accuracy of copies from its

[2] *Coleman* v. *Davis*, 13 Colo. 102, 21 Pac. 1019; See, generally, *Terpenning* v. *Holton*, 9 Colo. 313, 12 Pac. 189; *Schott* v. *People*, 89 Ill. 195; *Louisville, N. A. & C. R. Co.* v. *Shires*, 108 Ill. 617; *Lindsay* v. *Chicago*, 115 Ill. 121, 3 N. E. 443; *Seely* v. *Wells*, 53 Ill. 120; *Golder* v. *Bressler*, 105 Ill. 419; *Lee* v. *Getty*, 26 Ill. 76.

[3] *Shivers* v. *State*, 53 Ga. 149, 1 Am. Crim. Rep. 206, 208.

records.[1] The seal proves itself.[2] In Massachusetts, however, it has been held that it is sufficient for the clerk of the court to attest a copy without attaching the seal of the court.[3] And in England, an ancient exemplification has been received without a seal.[4]

§ 189. Registry of deed admissible.—Statutes authorizing the recording of deeds or other instruments ordinarily make the book in which the registry is made admissible as evidence. Where it is not made so admissible, then, in order to enable such book to be put in evidence, the usual foundation accounting for the nonproduction of the original must be laid.[1]

§ 190. Ancient registries admissible without proof.—Proof of execution is not exacted in cases of ancient deeds when accompanied with thirty years' possession; of ancient registries, and of ancient maps, establishing boundaries, so as to cure irregularity of authentication.[1]

§ 191. Duplicate originals as evidence.—Where letters are produced by mechanical means and concurrently with the original duplicates are produced, as by placing carbon paper between sheets of writing paper and writing on the exposed surface at the same time, all are duplicate originals, and any one of them may be introduced in evidence without accounting for the nonproduction of the other.[1] The distinction between duplicate originals and letterpress or photographic copies is obvious, as the first are produced as parts of one

[1] Wharton, Ev. § 109.

[2] Wharton, Ev. §§ 318–321, 695.

[3] *Chamberlin* v. *Ball*, 15 Gray, 352.

[4] *Beverley* v. *Craven*, 2 Moody & R. 140.

[1] Wharton, Ev. § 111.

[1] See Wharton, Ev. § 113; post, § 547.

[1] *International Harvester Co.* v. *Elfstrom*, 12 L.R.A.(N.S.) 343, case note.

act, while copies are made by distinct acts and generally the intervention of another medium subsequent to the original execution.[2]

Where handwriting is photographed, and the photograph is sought to be introduced in evidence, its accuracy must be shown before it can be received.[3]

§ 192. Exemplifications of recorded deeds admissible.—Statutes authorizing the recording of deeds and other instruments usually provide that exemplifications of the instruments so recorded shall be admissible in evidence as prima facie proof of their contents. To make such copies evidence, however, the requisites of the statute prescribed for the recording and for exemplifications must be complied with.[1]

§ 193. Subscribing witness need not be called.—Of deeds duly acknowledged and certified, copies may be read in evidence, irrespective of the mode of attestation, in all cases where the statute does not prescribe a particular mode of attestation. In such case there is no necessity of calling subscribing witnesses.[1]

§ 194. Exemplifications of deeds in other states must be proved under act of Congress.—Exemplifications from registries of other states must be authenticated (unless there be local legislation or adjudications prescribing less stringent tests) according to the act of Congress.[1] When the act of Congress is substantially complied with, they may be received.[2]

[2] *International Harvester Co.* v. *Elfstrom,* 101 Minn. 263, 12 L.R.A. (N.S.) 343, 118 Am. St. Rep. 626, 112 N. W. 252, 11 A. & E. Ann. Cas. 107; Wigmore, Ev. § 1234; *Menasha Wooden Ware Co.* v. *Harmon,* 128 Wis. 177, 107 N. W. 299.

[3] *Corbett* v. *Union Dime Sav. Inst.* 67 Misc. 175, 122 N. Y. Supp. 268.

[1] See Wharton, Ev. § 115.

[1] See Wharton, Ev. § 115.

[1] Wharton, Ev. § 118.

[2] Wharton, Ev. § 118.

§ 195. Certificates of officers admissible when provided by statute.—By statutes existing in many jurisdictions, it is provided that the certificates of public officers shall, under certain conditions, be admissible to prove facts within the range of the officer's official duty. At common law, however, the certificate of a public officer, no matter how high and solemn his office, is inadmissible to prove any disputed fact. The officer, if living, must be produced to swear to the fact. If he be dead, his official entries, made in the discharge of his duties, may be evidence. If the object is to prove that a fact appears by record, the record itself must be exemplified or produced. His certificate, however, being of the nature of hearsay, and *ex parte,* is in itself inadmissible.[1] If the certificate states simply a conclusion or an inference from a record, then the record itself, or an exemplified copy, is the proper proof.[2] From the necessity of the case, however, an officer may be admitted to prove that a certain entry is not to be found in a registry or record.[3]

§ 196. Certificate cannot bind as to facts out of record.—A certificate of a public officer cannot cover facts out of the range of the officer's official cognizance nor facts which are but a summary of writings on file in the archives of such officer, nor facts collateral to the record. The certificate cannot be by an informal letter or memorandum; it must be formally verified, under the officer's seal, and it must be made by the officer himself or his legal deputy.[1]

§ 197. Notary's certificate admissible.—In England the execution of a foreign or colonial deed cannot be proved

[1] Wharton, Ev. § 120.
[2] Wharton, Ev. § 120.
[3] *McGrath* v. *Seagrave,* 2 Allen, 443, 79 Am. Dec. 797; *Com.* v. *Evans,* 101 Mass. 25. Cited supra, § 166; post, § 616.
[1] Wharton, Ev. § 122.

by a notary's certificate.[1] It is otherwise, however, by the law merchant, in respect to foreign negotiable paper; as to which the original protests or duly certified copies, when proved by the notarial seal, are prima facie evidence of demand and protest.[2] Such certificates, however, must be in conformity with the law of the place of execution, on the principle, *locus regit actum*.[3]

§ 198. Printed copies of public documents receivable.— Public documents, like statutes, may be proved by the printed volumes in which they are published by authority. In some cases this is provided by statute; in others, publications of this class fall within the range of matters of which courts take judicial notice.[1]

§ 198a. Official certification of public documents.— Where it is the duty of a public officer to certify to a document the certificate must be made by himself, or his legal deputy, for if made by a person without official character it is inoperative.[1] It cannot be by informal letter or memorandum; but must be formally certified under the officer's seal.[2] The authority to certify does not include authority to certify to facts explanatory of, or collateral to, the document,[3] nor

[1] *Nye* v. *Macdonald*, L. R. 3 P. C. 331, 39 L. J. P. C. N. S. 34, 23 L. T. N. S. 220, 18 Week. Rep. 1075; *Re Davis*, L. R. 8 Eq. 98; Wharton, Ev. §§ 120–123.

[2] 2 Dan. Neg. Inst. § 959; Wharton, Ev. § 123.

[3] Wharton, Ev. § 123.

[1] Wharton, Ev. §§ 108, 127, 317.

[1] *Bleecker* v. *Bond*, 3 Wash. C. C. 329, Fed. Cas. No. 1,534; *Runk* v. *Ten Eyck*, 24 N. J. L. 756; *Urket* v. *Coryell*, 5 Watts & S. 60.

[2] *Davis* v. *White*, 3 Yeates, 587; *M'Kenzie* v. *Crow*, 4 Yeates, 428. See *Brink* v. *Spaulding*, 41 Vt. 96.

[3] *Brown* v. *Galloway*, Pet. C. C. 291, Fed. Cas. No. 2,006; *Flanders* v. *Thompson*, 2 N. H. 421; *Stewart* v. *Allison*, 6 Serg. & R. 324, 9 Am. Dec. 433; *Martin* v. *Anderson*, 21 Ga. 301; *Littleton* v. *Christy*, 11 Mo. 390; *Brown* v. *The Independence*, Crabbe, 54, Fed. Cas. No. 2,014.

to facts out of range of his official cognizance,[4] nor to facts which are but a summary of the writings on file with such officer.[5]

§ 198b. What must first be shown to admit secondary evidence.—The fundamental rule underlying all legal proceedings is that the best evidence of which the case is capable must be produced.[1] When this is shown to be beyond the power of a party not at fault, the fundamental rule is satisfied with the best then obtainable.[2] Secondary evidence must first be shown to be relevant to the issue.[3] Its admissibility is always a question for the court.[4] The facts concerning the absence of the primary evidence may be shown by parol testimony,[5] or presented by affidavit.[6] When nothing appears to indicate that the absence of the primary evidence is wilful or culpable, and that it is not within the power of the party to produce other evidence better than parol, a prima

[4] *Garwood* v. *Dennis,* 4 Binn. 314; *Newman* v. *Doe,* 4 How. (Miss.) 522.

[5] *Armstrong* v. *Boylan,* 4 N. J. L. 76. But see Wharton, Ev. § 80.

[1] *United States* v. *Wood,* 14 Pet. 430, 10 L. ed. 527; *Dunn* v. *State,* 2 Ark. 229, 35 Am. Dec. 54; *State* v. *Caldwell,* 1 Marv. (Del.) 555, 41 Atl. 198; *State* v. *Penny,* 70 Iowa, 190, 30 N. W. 561; *Com.* v. *Kinison,* 4 Mass. 646; *Com.* v. *James,* 1 Pick. 375; *People* v. *Coffman,* 59 Mich. 1, 26 N. W. 207; *Bee Pub. Co.* v. *World Pub. Co.* 59 Neb. 713, 82 N. W. 28; *State* v. *Stalmaker,* 2 Brev. 1; *Porter* v. *State,* 1 Tex. App. 394; *Pendleton* v. *Com.* 4 Leigh, 694, 26 Am. Dec. 342; *Jackson* v. *Cullum,* 2 Blackf. 228, 18 Am. Dec. 158.

[2] *Jackson* v. *Cullum,* 2 Blackf. 228, 18 Am. Dec. 158; *Ford* v. *Hopkins,* 1 Salk. 283; *Goodrich* v. *Mott,* 9 Vt. 395; *Thomas* v. *Thomas,* 2 La. 166.

[3] *Berkowsky* v. *Cahill,* 72 Ill. App. 101; *Rye* v. *State,* 8 Tex. App. 153; *Hay* v. *Peterson,* 6 Wyo. 419, 34 L.R.A. 581, 45 Pac. 1073.

[4] *Herndon* v. *Givens,* 16 Ala. 261.

[5] *Hall* v. *York,* 16 Tex. 18; *Foster* v. *Mackay,* 7 Met. 531; *Hale* v. *Darter,* 10 Humph. 92.

[6] *Morgan* v. *Jones,* 24 Ga. 155. But see *Willard* v. *Germer,* 1 Sandf. 50; *Smith* v. *Cavitt,* 20 Tex. Civ. App. 558, 50 S. W. 167; *Scott* v. *Bassett,* 174 Ill. 390, 51 N. E. 577.

facie case is made for the admission of parol testimony of the contents of a nonproducible document.[7]

§ 199. Lost or destroyed documents may be proved by parol.—Parol evidence is admissible to prove the contents of documents that have been lost or destroyed, without the fault of the party tendering proof of the same, it first having been made to appear to the court that such documents existed and that efforts have been made in good faith to produce them in court;[1] where such documents are in duplicate or triplicate originals, the loss of such parts must be proved before secondary evidence of their contents is admissible.[2] Where an indictment avers the loss of a document essential to the charge, it may be proved before the grand jury according to its purport or substance, and proved likewise before the petit jury.[3] A volume of reports has been held admissible

[7] *State* v. *Spaulding,* 34 Minn. 361, 25 N. W. 793; *Stebbins* v. *Duncan,* 108 U. S. 32, 27 L. ed. 641, 2 Sup. Ct. Rep. 313; *Williams* v. *Conger,* 125 U. S. 397, 31 L. ed. 778, 8 Sup. Ct. Rep. 933; *Dunn* v. *State,* 2 Ark. 229, 35 Am. Dec. 54; *Illinois Land & Loan Co.* v. *Bonner,* 75 Ill. 315; *Higgins* v. *Reed,* 8 Iowa, 298, 74 Am. Dec. 305.

[1] *Reg.* v. *Vernon,* 12 Cox, C. C. 153; *Reg.* v. *Colucci,* 3 Fost. & F. 103; *Rex* v. *Johnson,* 7 East, 66; *Rex* v. *Haworth,* 4 Car. & P. 254; *Brewster* v. *Sewell,* 3 Barn. & Ald. 303, 22 Revised. Rep. 395; *United States* v. *Reyburn,* 6 Pet. 352, 8 L. ed. 424; *United States* v. *Britton,* 2 Mason, 468, Fed. Cas. No. 14,650; *Hedrick* v. *Hughes,* 15 Wall. 123, 21 L. ed. 52; *Augur Steel Axle & Gearing Co.* v. *Whittier,* 117 Mass. 451; *Chamberlin* v. *Huguenot Mfg. Co.* 118 Mass. 532; *People* v. *Badgley,* 16 Wend. 53; *People* v. *Kingsley,* 2 Cow, 522, 14 Am. Dec. 520; *Allen* v. *Parish,* 3 Ohio, 107; *Thompson* v. *State,* 30 Ala. 28; *Page* v. *State,* 59 Miss. 474; *Sager* v. *State,* 11 Tex. App. 110; *Haun* v. *State,* 13 Tex. App. 383, 44 Am. Rep. 706; Wharton, Ev. § 129.

So as to mutilated documents; *State* v. *Shinborn,* 46 N. H. 497, 88 Am. Dec. 224; *Thompson* v. State, 30 Ala. 28.

[2] *Rex* v. *Castleton,* 6 T. R. 236; *Alivon* v. *Furnival,* 1 Cromp. M. & R. 292, 4 Tyrw. 751, 3 L. J. Exch. N. S. 241; *White* v. *Herrman,* 62 Ill. 73.

[3] *Com.* v. *Sawtelle,* 11 Cush. 142; *People* v. *Bogart,* 36 Cal. 245; *Wallace* v. *People,* 27 Ill. 45; *Hart* v. *State,* 55 Ind. 599; *Munson* v. *State,* 79 Ind. 541; *Pendleton* v. *Com.* 4

as secondary evidence of certain facts stated in the papers of the case, when such papers were lost.[4] Where, however, the party can legitimately procure the document, a copy cannot be received.[5]

§ 200. So, of papers out of the power of the party to produce.—Upon a proper predicate, secondary evidence may be given of a document out of the power of the party to produce;[1] documents in the hands of an attorney not compelled to deliver them;[2] (though otherwise where delivery can be compelled);[3] papers fraudulently concealed by the opposing party;[4] papers beyond the jurisdiction of the court, provided effort has been made to obtain the evidence of the party holding them;[5] even where the alterations in a paper are not so material as to exclude it, secondary evidence is admissible;[6] and parol evidence of an insurance policy is ad-

Leigh, 694, 26 Am. Dec. 342; *State* v. *Davis,* 69 N. C. 313; *DuBois* v. *State,* 50 Ala. 139.

But mere allegation of loss will not supply the want of allegations essential to constitute the offense. *Com.* v. *Spilman,* 124 Mass. 327, 26 Am. Rep. 668.

[4] *Taylor* v. *Com.* 29 Gratt. 788.

[5] Wharton, Ev. § 129.

[1] *Dyer* v. *Smith,* 12 Conn. 384; *Denton* v. *Hill,* 4 Hayw. (Tenn.) 73; *Cooper* v. *Day,* 1 Rich. Eq. 26; *Riggs* v. *Tayloe,* 9 Wheat. 483, 6 L. ed. 140; *Reynolds* v. *Campling,* 23 Colo. 105, 46 Pac. 639; *Allen* v. *State,* 21 Ga. 217, 68 Am. Dec. 457; *State* v. *Penny,* 70 Iowa, 190, 30 N. W. 561; *Com.* v. *Jeffries,* 7 Allen, 548, 83 Am. Dec. 712; *State* v. *Taunt,* 16 Minn. 109, Gil. 99; *State* v. *Daly Min. Co.* 19 Utah, 271, 57 Pac. 295; *Cornish* v. *Territory,* 3 Wyo. 95, 3 Pac. 793; *New York Car Oil Co.* v. *Richmond,* 6 Bosw. 213.

[2] *Lynde* v. *Judd,* 3 Day, 499.

[3] *Bird* v. *Bird,* 40 Me. 392.

[4] *Marlow* v. *Marlow,* 77 Ill. 633; *Com.* v. *Snell,* 3 Mass. 82.

[5] *Burton* v. *Driggs,* 20 Wall. 133, 22 L. ed. 299; Wharton, Ev. § 130; *McGregor* v. *Montgomery,* 4 Pa. 237; *Dickinson* v. *Breeden,* 25 Ill. 186; *Wood* v. *Cullen,* 13 Minn. 394, Gil. 365.

But see *West* v. *Cameron,* 39 Kan. 736, 18 Pac. 894; also *Alabama G. S. R. Co.* v. *Mt. Vernon, Co.* 84 Ala. 173, 4 So. 356.

[6] *Medlin* v. *Platte County,* 8 Mo. 235, 40 Am. Dec. 135.

But see *Chesley* v. *Frost,* 1 N. H. 145.

missible where it has been shown to have been surrendered to an agent out of the court's jurisdiction before the trial.[7]

§ 201. Destruction of documents.—As we shall see later [1] the wilful destruction of a document subjects the party to a presumption that tells strongly against him, but where the paper is accidentally destroyed by the party, or negligently injured, there being no fraud attached to the party offering the parol evidence, it may be received.[2]

§ 202. Copies of documents; grades of authority.—Copies of documents, as secondary evidence, are of value in proportion to their accuracy. It is obvious that a compared copy is more accurate than one recited from memory.[1] Such a copy should be proved by the witness who compared it with the lost original [2] or by the copyist, when he is available,[3] but this is not an essential to its admission, as any evidence from which a reasonable inference can be drawn as to its correctness is sufficient.[4] A letter book duly authenticated by the owner or his clerk may be received to show the contents of a

[7] *State* v. *Watson*, 63 Me. 128.

[1] Post, §§ 741–748.

[2] Wharton, Ev. § 132; *People* v. *Dennis*, 4 Mich. 609, 69 Am. Dec. 338; *State* v. *Taunt*, 16 Minn. 109, Gil. 99.

[1] *Winn* v. *Patterson*, 9 Pet. 663, 9 L. ed. 266; *Evans* v. *Bolling*, 8 Port. (Ala.) 546; *Williams* v. *Waters*, 36 Ga. 454; Wharton, Ev. § 90; *Printup* v. *James*, 73 Ga. 583; *Nostrum* v. *Halliday*, 39 Neb. 828, 58 N. W. 429; *Re Gazett*, 35 Minn. 532, 29 N. W. 347.

But see *Fowler* v. *Hoffman*, 31 Mich. 215; and *Williamson* v. *Cambridge R. Co.* 144 Mass. 148, 10 N. E. 790.

[2] *McGinniss* v. *Sawyer*, 63 Pa. 259; *Kerns* v. *Swope*, 2 Watts, 75; *American Life Ins. & T. Co.* v. *Rosenagle*, 77 Pa. 507; *Ide* v. *Pierce*, 134 Mass. 260.

And where an officer certifies to a copy it seems that his certificate should recite that it has been compared with the original. *Doe ex dem. Martin* v. *King*, 3 How. (Miss.) 125.

[3] *Brewster* v. *Countryman*, 12 Wend. 446.

See *White* v. *Herrman*, 62 Ill. 73.

[4] *Baker* v. *Adams*, 99 Ga. 135, 25 S. E. 28; *Tenny* v. *Mulvaney*, 9 Or. 405.

lost letter;[5] not, however, as primary evidence of the letter,[6] but that such a letter was sent.[7] The general rule is that a copy of a copy is not admissible.[8] This is always true where the first copy is still available,[9] but where the first copy is shown to be correct, but not obtainable, and the second copy to have been correctly made, then the copy of a copy is competent.[10]

Where a party has obtained a copy, but withholds it, he cannot be permitted to prove portions of it or give orally its imperfect substance.[11]

§ 203. Use of memoranda; refreshing memory.—The use of memoranda, in evidence, falls under two heads: First, to refresh the memory of the witness; second, because of the

But see *Whitney Wagon Works* v. *Moore*, 61 Vt. 230, 17 Atl. 1007.

[5] *Cameron* v. *Peck*, 37 Conn. 555.

[6] *Chapin* v. *Siger*, 4 McLean, 379, Fed. Cas. No. 2,600; *Smith* v. *Brown*, 151 Mass. 338, 24 N. E. 31; *Traber* v. *Hicks*, 131 Mo. 180, 32 S. W. 1145; *Foot* v. *Bentley*, 44 N. Y. 166, 4 Am. Rep. 652; *Delaney* v. *Errickson*, 10 Neb. 492, 35 Am. Rep. 487, 6 N. W. 600.

[7] *Sturge* v. *Buchanan*, 10 Ad. & El. 598, 2 Perry & D. 573, 2 Moody & R. 90, 8 L. J. Q. B. N. S. 272; *Whitney Wagon Works* v. *Moore*, 61 Vt. 237, 17 Atl. 1007; *Rosenthal* v. *Walker*, 111 U. S. 185, 28 L. ed. 395, 4 Sup. Ct. Rep. 382; *Ford* v. *Cunningham*, 87 Cal. 209, 25 Pac. 403; *Huckestein* v. *Kelly*, 139 Pa. 201, 21 Atl. 78; *Bayer* v. *Rhinehart*, 44 N. Y. S. R. 370, 17 N. Y. Supp. 346.

[8] *Foot* v. *Bentley*, 44 N. Y. 171, 4 Am. Rep. 652; *Everingham* v. *Roundell*, 2 Moody & R. 138, 2 Lewin, C. C. 157; *Liebman* v. *Pooley*, 1 Starkie, 167, 18 Revised Rep. 756; *Winn* v. *Patterson*, 9 Pet. 663, 9 L. ed. 266; *Morris* v. *Vanderen*, 1 Dall. 64, 1 L. ed. 38; *Crim* v. *Fleming*, 123 Ind. 438, 24 N. E. 358; *Wallace* v. *Goodall*, 18 N. H. 439.

[9] Note 8 supra; *Mercier* v. *Harnan*, 39 La. Ann. 94, 1 So. 410; *Chambers* v. *Haney*, 45 La. Ann. 447, 12 So. 621.

[10] *United States* v. *Delespine*, 12 Pet. 654, 9 L. ed. 1232; *Cornett* v. *Williams* (*Nash* v. *Williams*), 20 Wall. 226, 22 L. ed. 254; *Howard* v. *Quattlebaum*, 46 S. C. 95, 24 S. E. 93; *Merritt* v. *Wright*, 19 La. Ann. 91.

[11] *Dennis* v. *Barber*, 6 Serg. & R. 420; *Merritt* v. *Wright*, 19 La. Ann. 91.

memoranda themselves, the witness is able to testify that certain facts existed.[1]

Preliminary to the use of such memoranda it should be made to appear to the court that the witness wrote the memoranda, or directed their writing, and at a time when the facts were fresh in his memory so that he knows them to be correct.[2] He may use those made by himself,[3] or by another where, after seeing it, he can state from his own recollection that it is correct,[4] or he must be so connected with the writing in such way that he is competent to make use of it.[5]

In the first case, when his memory has been refreshed he may give his testimony to the jury [6] and at the same time testify from the writing itself.[7] It is not necessary to the use

[1] *Acklen* v. *Hickman*, 63 Ala. 494, 35 Am. Rep. 54.

[2] *Jones* v. *Johns*, 2 Cranch, C. C. 426, Fed. Cas. No. 7,471; *Putnam* v. *United States*, 162 U. S. 687, 40 L. ed, 1118, 16 Sup. Ct. Rep. 923.

[3] *United States* v. *Tenney*, 2 Ariz. 29, 8 Pac. 295; *Woodruff* v. *State*, 61 Ark. 157, 171, 32 S. W. 102; *People* v. *Vann*, 129 Cal. 118, 61 Pac. 776; *People* v. *Westlake*, 134 Cal. 505, 66 Pac. 731; *Johnson* v. *State*, 125 Ga. 243, 54 S. E. 184; *State* v. *Kennedy*, 154 Mo. 268, 55 S. W. 293; *People* v. *Wilmarth*, 29 App. Div. 612, 51 N. Y. Supp. 688; *Luttrell* v. *State*, 40 Tex. Crim. Rep. 651, 51 S. W. 930, 11 Am. Crim. Rep. 226; *Smith* v. *State*, 46 Tex. Crim. Rep. 267, 108 Am. St. Rep. 991, 81 S. W. 712, 936; *State* v. *Haworth*, 24 Utah, 398, 68 Pac. 155.

[4] *Breese* v. *United States*, 45 C. C. A. 535, 106 Fed. 680; *Shrouder* v. *State*, 121 Ga. 615, 49 S. E. 702; *State* v. *Aspara*, 113 La. 940, 37 So. 883; *Com.* v. *Burton*, 183 Mass. 461, 67 N. E. 419; *State* v. *Moran*, 15 Or. 262, 275, 14 Pac. 419; *State* v. *Magers*, 35 Or. 520, 57 Pac. 197; *State* v. *Collins*, 15 S. C. 373, 40 Am. Rep. 697; *Henry* v. *Lee*, 2 Chitty, 124; *Hill* v. *State*, 17 Wis. 676, 86 Am. Dec. 736; *Card* v. *Foot*, 56 Conn. 369, 7 Am. St. Rep. 311, 15 Atl. 371; *State* v. *Lull*, 37 Me. 246.

But contra, see the following cases: *Massey* v. *Hackett*, 12 La. Ann. 54; *Manchester Assur. Co.* v. *Oregon R. & Nav. Co.* 46 Or. 162, 69 L.R.A. 475, 114 Am. St. Rep. 863, 79 Pac. 60; *Printup* v. *James*, 73 Ga. 583.

[5] *Putnam* v. *United States*, 162 U. S. 687, 40 L. ed. 1118, 16 Sup. Ct. Rep. 923.

[6] *Brotton* v. *Langert*, 1 Wash. 227, 23 Pac. 803; *Harrison* v. *Middleton*, 11 Gratt. 527.

[7] *State* v. *Cardoza*, 11 S. C. 195, 238; *Myers* v. *Weger*, 62 N. J. L. 432, 42 Atl. 280; *Moynahan* v. *Perkins*, 17 Colo. App. 450, 68 Pac. 1062.

of it that the writing itself should be admissible in evidence,[8] nor does the fact that it is so used make it admissible where he testifies independently of it.[9]

Under the second head, where the witness cannot refresh his memory as to the facts, he must be able to state that because of such memoranda he knows the facts therein referred to existed,[10] in which case it appears that both the memoranda and the testimony of the witness are both competent.[11] But the rulings are not harmonious as to the admissibility of such writing in the latter case.[12]

So a witness may speak to the contents of a lost document from a memory refreshed by memoranda which he can verify as correct,[13] and he may also testify as to an aggregate, where he has an independent recollection of the facts.[14]

§ 204. Copies of lost or destroyed records; when admissible.—Upon a proper preliminary showing as to the loss or destruction of records,[1] they may be proved by copy

[8] *People* v. *Vann,* 129 Cal. 118, 61 Pac. 776; *Wilson* v. *Com.* 21 Ky. L. Rep. 1333, 54 S. W. 946; *Com.* v. *Kennedy,* 170 Mass. 18, 48 N. E. 770; *State* v. *Costa,* 78 Vt. 198, 62 Atl. 38.

[9] *Palmer* v. *Hartford Dredging Co.* 73 Conn. 182, 47 Atl. 125; *Com.* v. *Jeffs,* 132 Mass. 5; *State* v. *Legg,* 59 W. Va. 315, 3 L.R.A.(N.S.) 1152, 53 S. E. 545.

[10] *Acklen* v. *Hickman,* 63 Ala. 494, 35 Am. Rep. 54.

[11] *Owens* v. *State,* 67 Md. 307, 10 Atl. 210, 302; *Haven* v. *Wendell,* 11 N. H. 112; *Halsey* v. *Sinsebaugh,* 15 N. Y. 485; *Russell* v. *Hudson River R. Co.* 17 N. Y. 134; *Lewis* v. *Ingersoll,* 1 Keyes, 357; *Curtis* v. *Bradley,* 65 Conn. 99, 28 L.R.A. 143, 48 Am. St. Rep. 177, 31 Atl. 591.

[12] See *Bates* v. *Preble,* 151 U. S. 149, 38 L. ed. 106, 14 Sup. Ct. Rep. 277; Russell, Crimes, 7th Eng. ed. pp. 2303 et seq.; *People* v. *Elyea,* 14 Cal. 144.

[13] *Burton* v. *Driggs,* 20 Wall. 133, 22 L. ed. 299; *Sizer* v. *Burt,* 4 Denio, 426; *Ætna Ins. Co.* v. *Weide,* 9 Wall. 677, 19 L. ed. 810; *Mayson* v. *Beazley,* 27 Miss. 106; *State* v. *Collins,* 15 S. C. 373, 40 Am. Rep. 697.

[14] *Stephan* v. *Metzger,* 95 Mo. App. 609, 69 S. W. 625.

[1] Supra, § 203.

or by the recollection of the witness.[2] Where such record has become illegible, a witness who examined and copied it when legible may be called to supply the defects.[3] Where only a portion is lost, that which is still in existence must be produced or exemplified,[4] and secondary evidence as to the lost portion is available in connection with the portion produced.[5] Oral evidence will not be received where a copy is attainable, unless it be shown not only that the record is lost, but the copy unattainable.[6] Where the nonproduction is caused by the misconduct of the opposing party, a copy is admissible.[7]

§ 205. Proof of lost document from memory.—A witness, to give proof from memory of a lost document, must show that he has read it or heard its contents from the author, and be able to give the substance of such contents.[1] The admissions of the party himself are sufficient to sustain the accuracy of a copy.[2] To prove the contents of a lost writing, it is not necessary to call the writer, but the testimony of any witness familiar with the contents is equally admissible.[3]

§ 206. Admissibility of secondary evidence; question for the court.—The admissibility of evidence to prove a lost document is a question exclusively for the court; as a preliminary to such admission, the prior existence and genuine-

[2] Wharton, Ev. § 135; *State* v. *Hare,* 70 N. C. 658; *Allen* v. *State,* 21 Ga. 217, 68 Am. Dec. 457; *Davis* v. *State,* 58 Ga. 170.

[3] *Little* v. *Downing,* 37 N. H. 355. See *Coffeen* v. *Hammond,* 3 G. Greene, 241.

[4] *Nims* v. *Johnson,* 7 Cal. 110.

[5] *Miltimore* v. *Miltimore,* 40 Pa. 151; *Higgins* v. *Reed,* 8 Iowa, 298, 74 Am. Dec. 305; *Clifton* v. *Fort,* 98 N. C. 173, 3 S. E. 726.

[6] *New York Car Oil Co.* v. *Richmond,* 6 Bosw. 213; *Edwards* v. *Edwards,* 11 Rich. L. 537.

[7] Wharton, Ev. §§ 137, 1264 et

[1] Wharton, Ev. § 205, post, § 461.

[2] Wharton, Ev. 1091.

[3] *Reg.* v. *Hurley,* 2 Moody & R. 473; *Rex* v. *Benson,* 2 Campb. 508; *Re Bank Prosecutions,* Russ. & R. C. C. 378; supra, § 174.

ness of the lost document must be established, and that it cannot be produced by the party seeking to prove its contents.[1]

§ 207. Degree of proof to permit secondary evidence.—It is not necessary to prove exhaustively that the document exists nowhere. It is sufficient if the party offering the proof shows such diligence as is usual with good business men under the circumstances.[1] The belief of a party that the document is lost is not sufficient,[2] nor will the court adopt the conclusions of the party,[3] but the facts and circumstances should be shown.[4]

§ 208. Proof dispensed with on admissions of loss.—Proof of loss may be dispensed with by the admissions of the opposing party.[1]

§ 209. Duty of last custodian.—The custodian of a document alleged to be lost, unless he be a defendant in the case and set up a privilege, must make due search, and its fruitlessness must be shown before secondary evidence can be let

[1] Wharton, Ev. § 141, note 1; *Diehl* v. *Emig*, 65 Pa. 326; *McReynolds* v. *McCord*, 6 Wright (Pa.) 288.

[1] *Minor* v. *Tillotson*, 7 Pet. 99, 8 L. ed. 621; *Bouldin* v. *Massie*, 7 Wheat. 122, 5 L. ed. 414; *United States* v. *Sutter*, 21 How. 170, 16 L. ed. 119; *Longstreth* v. *Korb*, 64 N. J. L. 112, 44 Atl. 934; *Mayfield* v. *Turner*, 180 Ill. 332, 54 N. E. 418.

[2] *Ratteree* v. *Nelson*, 10 Ga. 439; *Meakim* v. *Anderson*, 11 Barb. 215. But see *Riggs* v. *Tayloe*, 9 Wheat. 483, 6 L. ed. 140, and *Meyers* v. *Russell*, 52 Mo. 26.

[3] *Anglo-American Packing & Provision Co.* v. *Cannon*, 31 Fed. 313.

[4] *Juzan* v. *Toulmin*, 9 Ala. 662, 44 Am. Dec. 448; *Stevens* v. *State*, 50 Kan. 712, 32 Pac. 350; *Jernigan* v. *State*, 81 Ala. 58, 1 So. 72; *Shouler* v. *Bonander*, 80 Mich. 531, 45 N. W. 487.

[1] *Rex* v. *Haworth*, 4 Car. & P. 254; *Shortz* v. *Unangst*, 3 Watts & S. 45; *Cooper* v. *Maddan*, 6 Ala. 431; Wharton, Ev. 1091; *Rhode* v. *McLean*, 101 Ill. 467; *Pentecost* v. *State*, 107 Ala. 81, 18 So. 146.

See *Culver* v. *Culver*, 31 N. J. Eq. 448.

in. Where such person is dead, inquiry should be made of his legal representatives, if the matter concerns personalty, or of his heirs, if it concerns his realty.[1]

§ 210. Character of search.—It is not enough for the party offering secondary evidence to swear that he made a general search.[1] Search in probable places of deposit must be proved, the parties last in possession, if possible, must be examined, and the search made by persons having access to places of probable deposit must have been recent.[2]

§ 211. Party shown to have document desired, must be subpœnaed.—When a document has been traced into the hands of a third party he should be summoned by a subpœna duces tecum to bring it into court. If living, and within reach of process, his declarations as to the fate of the paper are inadmissible.[1]

[1] *Hart* v. *Hart,* 1 Hare, 1, 11 L. J. Ch. N. S. 9, 5 Jur. 1007; *Rex* v. *Piddlehinton,* 3 Barn. & Ad. 460, 1 L. J. Mag. Cas. N. S. 43; *Taylor* Ev. § 404; *Ransdale* v. *Grove,* 4 McLean, 282, Fed. Cas. No. 11,570; *Norris* v. *Russell,* 5 Cal. 249; *Mullanphy Sav. Bank* v. *Schott,* 135 Ill. 655, 25 Am. St. Rep. 401, 26 N. E. 640; *Fletcher* v. *Jackson,* 23 Vt. 581, 56 Am. Dec. 98; *Chicago & N. W. R. Co.* v. *Ingersoll,* 65 Ill. 399.

But see *Morton* v. *State,* 30 Ala. 527; *Boulden* v. *State,* 102 Ala. 78, 15 So. 341, and *Johnson* v. *Armwine,* 42 N. J. L. 451, 36 Am. Rep. 527.

As to taking deposition of last custodian beyond the jurisdiction of the trial court, see *Vaughn* v. *Biggers,* 6 Ga. 188.

[1] *Reg.* v. *Vernon,* 12 Cox, C. C. 153; *Stow* v. *People,* 25 Ill. 81; Wharton, Ev. § 147.

[2] *Folsom* v. *Scott,* 6 Cal. 460; *Perez* v. *State,* 10 Tex. App. 327; *Boulden* v. *State,* 102 Ala. 78, 15 So. 341; *Holbrook* v. *School Trustees,* 28 Ill. 187; *Green* v. *State,* 41 Ala. 419; *Haun* v. *State,* 13 Tex. App. 383, 44 Am. Rep. 706.

[1] *Auten* v. *Jacobus,* 21 Misc. 632, 47 N. Y. Supp. 1119; *Wooldridge* v. *Wilkins,* 3 How. (Miss.) 360; *Greenough* v. *Shelden,* 9 Iowa, 503; *Walker* v. *Beauchamp,* 6 Car. & P. 552; *Rex* v. *Denio,* 7 Barn. & C. 620, 1 Moody & R. 294; *Rex* v. *Castleton,* 6 T. R. 236; *Reg.* v. *Saffron-Hill,* 1 El. & Bl. 93, 22 L. J. Mag. Cas. N. S. 22. See *Rex* v. *Morton,* 4 Maule & S. 48; *Reg.* v. *Fordingbridge,* El. Bl. & El. 678, 27

§ 212. Notice to produce documents; exception in criminal cases.—In criminal cases, where such notice is necessary, where it is desired to offer secondary evidence of a document in the possession of the opposing party, it is necessary to give such party timely and sufficient notice to produce the same.[1]

But, even under statutes, where the rules of evidence are made to apply alike to civil and criminal cases, it is doubtful if a defendant can be compelled to produce documents in his possession.

In England it is said that there is no distinction between civil and criminal cases with respect to secondary evidence in the possession of the defendant, except such as flows from the fact that a defendant in a criminal case cannot be compelled to give discovery and inspection of documents in his possession or under his control, relevant to the matters in issue.[2]

And it has been held in this country that the rule requiring notice to produce to be given does not apply to criminal prosecutions in any case.[3]

L. J. Mag. Cas. N. S. 290, 4 Jur. N. S. 951, 6 Week. Rep. 649; *Rusk* v. *Sowerwine,* 3 Harr. & J. 97; Wharton, Ev. 376, 378.

[1] *Atty. Gen.* v. *La Marchant,* 2 T. R. 201; *Rex* v. *Haworth,* 4 Car. & P. 254; *Rex* v. *Hunter,* 4 Car. & P. 128; *Williams* v. *State,* 16 Ind. 461; *State* v. *Kimbrough,* 14 N. C. (2 Dev. L.) 431; *Henderson* v. *State,* 14 Tex. 503.

[2] Russell, Crimes, 7th Eng. ed. pp. 2072, 2073.

[3] *McGinnis* v. *State,* 24 Ind. 500.

In this case the court says: "It is well settled in criminal cases that the court cannot compel the defendant to produce an instrument in writing, in his possession, to be used in evidence against himself, as to do so would be to compel the defendant to furnish evidence against himself, which the law prohibits. It is difficult to perceive what benefit could result, either to the state or to the defendant, from the giving of such a notice, while to the defendant it is liable to work a positive injury by producing an unfavorable impression against him in the minds of the jury upon his refusal to produce it after notice." *Ex parte Wilson,* 39 Tex. Crim. Rep. 630, 47 S. W. 996; *State* v. *Hanscom,* 28 Or. 427, 432, 43 Pac.

§ 213. After refusal secondary evidence can be introduced.—After refusal of the party having the instrument to produce it, the party calling for it may produce secondary evidence of its contents. If the secondary evidence so offered is vague and indistinct, this, it must be remembered, is to be imputed not to negligence on the part of the party offering it, but to the refusal of the party holding the superior evidence to produce such evidence.[1]

§ 214. Documents; examination of a witness from.—A witness may be cross-examined as to his written or record testimony, without such writing being shown to him, but if it is proposed to contradict him by the writing,[1] his attention must be called to those parts of the writing which are to be used against him.

Where a document is put into the hands of a witness, and after he is asked whether or not it is in his handwriting, and counsel proceed to found questions on such document, his counsel has the right to inspect it before such use of it. The

167; *State* v. *Gurnee*, 14 Kan. 111, 120.

See *Boyd* v. *United States*, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524.

While it is unquestioned that secondary evidence is equally applicable to both criminal and civil cases, yet the point turns upon the forcible, or at least the mandatory, production by the defendant, and the cases above cited seems to determine that issue in favor of the defendant.

In a criminal case it is not enough to show that the primary evidence is not in possession of the prosecution, to let in secondary evidence. *State* v. *Penny*, 70 Iowa, 190, 30 N. W. 561.

But when it appears that the primary evidence is out of possession of the party, and no exertion of the party and no process of the court would enable him to produce it, then secondary evidence is properly received. *United States* v. *Reyburn*, 6 Pet. 354, 8 L. ed. 425.

[1] *Rex* v. *Watson*, 2 T. R. 201, 1 Revised Rep. 461; *Com.* v. *Goldstein*, 114 Mass. 272; *State* v. *Davis*, 69 N. C. 313. See Wharton, Ev. § 153.

[1] *Reg.* v. *Riley*, 4 Fost. & F. 964; *Reg.* v. *Wright*, 4 Fost. & F. 967.

See *Simmans* v. *McCarthy*, 128 Cal. 455, 60 Pac. 1037.

only case in which he has not this right is where the document is merely identified and goes no further.[2]

§ 215. When witness's answers are conclusive.—Where a question that is wholly irrelevant and improperly asked on cross-examination, is answered by the witness, witnesses cannot be called by the party cross-examining to impeach or contradict such witness, as impeaching testimony is confined to matters going to his credit and relevant to the issue. So, where a witness is asked concerning a matter irrelevant to the issue, such as, "How long since you lived with your wife?" in a case where such question has no bearing, or any other question tending only to disgrace and humiliate him, his answer to such question is conclusive, and the cross-examining party is bound by it.[1]

But this does not modify the rule that the bias, prejudices, and relationships of the witness are not collateral, but are

[2] *Cope* v. *Thames-Haven Dock Co.* 2 Car. & K. 757; Taylor, Ev. 10th ed. § 1452. See *Noble* v. *White*, 103 Iowa, 352, 72 N. W. 556. Also *Queen's Case*, 2 Brod. & B. 286, 22 Revised Rep. 662, 11 Eng. Rul. Cas. 183.

[1] 3 Greenl. Ev. § 449; *Crittenden* v. *Com.* 82 Ky. 164, 6 Am. Crim. Rep. 202; *Welch* v. *State*, 104 Ind. 347, 3 N. E. 850, 5 Am. Crim. Rep. 450; *People* v. *Tiley*, 84 Cal. 651, 24 Pac. 290; *Moore* v. *People*, 108 Ill. 484; *People* v. *UnDong*, 106 Cal. 83, 39 Pac. 12; *Com.* v. *Hourigan*, 89 Ky. 305, 12 S. W. 550; *State* v. *Carson*, 66 Me. 116, 2 Am. Crim. Rep. 58; *Brandon* v. *People*, 42 N. Y. 265; *People* v. *Hillhouse*, 80 Mich. 580, 45 N. W. 484; *Com.* v. *Bonner*, 97 Mass. 587; *Gale* v. *People*, 26 Mich. 159; *State* v. *Ellwood*, 17 R. I. 763, 24 Atl. 782.

On charge of assault and battery, with intent to commit murder, one of the defendants was asked on cross-examination, if she had not rented houses for the purposes of prostitution at various places in Montana; if she had not been a kind of backer for the prostitution of female persons in Missoula and Hamilton; if she had not had a fight with a priest; if she had not hugged and kissed one of the jurymen who acquitted her on a previous trial; and if her picture was not in the rogues' gallery in New York. Held oppressive, unjust, and censurable. *State* v. *Gleim*, 17 Mont. 17, 31 L.R.A. 294, 52 Am. St. Rep. 655, 41 Pac. 998, 10 Am. Crim. Rep. 46.

proper subjects of inquiry, where confined to ascertaining the previous relationships, feeling, and conduct of the witness.[2]

§ 216. Indictment as notice.—In criminal issues, the fact that the indictment charges the defendant with stealing, or in other ways misappropriating, a particular document, is sufficient notice to produce the document[1] if so disposed; nor is it necessary to aver the loss or destruction of such document.[2] The same rule has been applied under an indictment for administering an unlawful oath, so as to enable the prosecution to prove by parol the paper from which the oath was read, without notice to produce the paper.[3] But an indictment for arson, with intent to defraud an insurance office, does not convey such a notice that the policy will be required as to dispense with formal notice to produce.[4] But the rule has been held not to extend to an indictment for forging a deed.[5]

§ 217. Notice; proof of.—Where a party is served with a notice to produce, it is not necessary, in order to prove such

[2] Underhill, Crim. Ev. § 248.

[1] *Rex* v. *Aickles,* 1 Leach, C. L. 294, 2 East, P. C. 675; *Rex* v. *Hunter,* 4 Car. & P. 128; *Reg.* v. *Downham,* 1 Fost. & F. 386; *Reg.* v. *Elworthy,* L. R. 1 C. C. 103, 37 L. J. Mag. Cas. N. S. 3, 17 L. T. N. S. 293, 16 Week. Rep. 207, 10 Cox, C. C. 579, 11 Eng. Rul. Cas. 442; *State* v. *Mayberry,* 48 Me. 218; *People* v. *Holbrook,* 13 Johns. 90; *People* v. *Kingsley,* 2 Cow. 522, 14 Am. Dec. 520; *People* v. *Badgley,* 16 Wend. 53; *State* v. *Potts,* 9 N. J. L. 26, 17 Am. Dec. 449; *Com.* v. *Messinger,* 1 Binn. 274, 2 Am. Dec. 441; *Pendleton* v. *Com.* 4 Leigh, 694, 26 Am. Dec. 342; *McGinnis* v. *State,* 24 Ind. 500; *State* v. *Davis,* 69 N. C. 313; *Gray* v. *Kernahan,* 2 Mill, Const. 65; *Morgan* v. *Jones,* 24 Ga. 155.

[2] *State* v. *Potts,* 9 N. J. L. 26, 17 Am. Dec. 449.

[3] *Rex* v. *Moors,* 6 East, 421, note.

[4] *Rex* v. *Ellicombe,* 5 Car. & P. 522, 1 Moody & R. 260; *Reg.* v. *Kitson,* 22 L. J. Mag. Cas. N. S. 118, 6 Cox, C. C. 159, Dears. C. C. 187, 17 Jur. 122; Russell, Crimes, 7th ed. p. 2076.

[5] *Rex* v. *Haworth,* 4 Car. & P. 254; *Reg.* v. *Elworthy,* L. R. 1 C. C. 103, 37 L. J. Mag. Cas. N. S. 3, 17 L. T. N. S. 293, 16 Week. Rep.

notice, that the party served should be called on to produce it in court.[1]

§ 218. Facts collateral to a document.—Facts collateral to a document can be proved without notice; and this includes a fact that a letter was sent, and the existence and execution of a document when its contents are not involved.[1]

§ 218a. Limitation of the rule as to production by defendant.—The rule of criminal evidence, protecting a defendant against the production of writings or documents in his possession, does not extend to the exclusion of books for the correct keeping of which the defendant is responsible; and this is equally true where such entries are made by subordinates, as such entries are also regarded as the acts of the defendant for which he is liable.[1]

In prosecutions for fraud and cheating, entries made in their books by defendants are admissible in evidence where such books are legally in the possession of others.[2]

§ 218b. Proof by documents does not contravene constitutional rights; limiting purpose of.—It is not a valid objection to proof through documents, that it contravenes the right of the defendant to be confronted with the witnesses against him. Such guaranty does not preclude docu-

207, 10 Cox, C. C. 579, 11 Eng. Rul. Cas. 442, as cited in Roscoe, Crim. Ev. 8th ed. 10.

[1] Wharton, Ev. § 162.

When the document is itself a notice, such as to quit or to forbear trespassing, a duplicate original may be introduced in evidence. *Eisenhart* v. *Slaymaker,* 14 Serg. & R. 156; *Watson* v. *State,* 63 Ala. 19.

[1] *Webster* v. *Clark,* 30 N. H. 245; *Gist* v. *McJunkin,* 2 Rich. L. 154; *Lott* v. *Macon,* 2 Strobh. L. 178.

[1] *Secor* v. *State,* 118 Wis. 621, 95 N. W. 942; *Zang* v. *Wyatt,* 25 Colo. 551, 563, 71 Am. St. Rep. 145, 56 Pac. 565.

[2] *State* v. *Mallett,* 125 N. C. 718, 34 S. E. 651.

mentary evidence, particularly where it tends to establish collateral facts such as would be admissible by the rules of the common or statutory law.[1]

Where documents are offered and admitted for a particular purpose only, it is the proper province of the court, at the time of admitting such evidence or subsequently, by instructions, to instruct the jury as to the extent to which they are authorized to consider the same. All such evidence is only prima facie evidence of the facts sought to be shown by it.[2]

[1] "We do not think the provision of the Constitution securing to the defendant in a criminal prosecution the right to be confronted with the witnesses against him can apply to the proof of facts in their nature essentially and purely documentary, and which can only be proved by the original or by a copy officially authenticated in some way, especially when the fact to be proved comes up collaterally. *People* v. *Jones,* 24 Mich. 215; *May* v. *State,* 15 Tex. App. 430, 439; *United States* v. *Benner,* Baldw. 240, Fed. Cas. No. 14,568; *United States* v. *Liddle,* 2 Wash. C. C. 205, Fed. Cas. No. 15,598; *United States* v. *Ortega,* 4 Wash. C. C. 531, Fed. Cas. No. 15,971; Cooley, Const. Lim. 3d ed. p. 318, and note; 1 Bishop, Crim. Proc. § 1134; *Rogers* v. *State,* 11 Tex. App. 608, 621; *State* v. *Reeder,* 79 S. C. 139, 60 S. E. 434, 14 A. & E. Ann. Cas. 968; *People* v. *Molins,* 7 N. Y. Crim. Rep. 51, 10 N. Y. Supp. 130; *Tucker* v. *People,* 122 Ill. 583, 13 N. E. 809; *Sokel* v. *People,* 212 Ill. 238, 72 N. E. 382; *People* v. *Goodrode,* 132 Mich. 542, 94 N. W. 14; *State* v. *Matlock,* 70 Iowa, 229, 30 N. W. 498.

[2] *United States* v. *Hutcheson,* 2 L.R.A. 805, 807, 39 Fed. 540.

Books and documents tending only to prove collateral facts need not be authenticated. *State* v. *Waldrop,* 73 S. C. 60, 52 S. E. 793; *Barber's Appeal,* 63 Conn. 393, 22 L.R.A. 90, 27 Atl. 973.

CHAPTER V.

HEARSAY, RES GESTÆ, DECLARATIONS, ETC.

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I. Hearsay Generally Inadmissible.

§ 220. Hearsay testimony convertible with nonoriginal.—According to Mr. Bentham,[1] hearsay evidence is divisible as follows:

1. Supposed oral through oral; which he defines to be "supposed orally delivered evidence of a supposed extrajudicially narrating witness, judicially delivered *viva voce* by the judicially deposing witness;" which he declares to be the only species of unoriginal evidence to which the term "hearsay" is strictly applicable.
2. Supposed oral through "scriptitious" or written.
3. Supposed scriptitious through oral.
4. Supposed scriptitious through scriptitious.

To which may be added:

5. Supposed material through oral or scriptitious.

The third and fourth of these modifications have been already partially considered under the general head of secondary evidence. The fifth, as of comparatively infrequent occurrence, may be noticed at the outset.[2]

[1] Rationale of Judicial Ev. London, 1827, Mill's ed. 439.

See discussion, 69 L. T. N. S. 440.

[2] It is important as to these several classes to keep in mind the general qualification that no primary evidence is rejected because of its faintness, such as a series of forged notes, some of which are so faint as to be hardly legible; the same kind.

"Hearsay evidence in its legal sense denotes that kind of evidence which does not derive its value solely from the credit to be given to the witness himself, but rests also in part on the veracity and competency of some other person." 1 Greenl. Ev. 16th ed. § 99; 1 Phillipps, Ev. 1st Am. ed. Cowen & Hill's notes, *169; *Morell* v. *Morell,* 157 Ind. 179, 60 N. E. 1092; *Queen* v. *Hepburn,* 7 Cranch, 295, 3 L. ed. 349; *Hopt* v. *People,* 110 U. S. 574, 28 L. ed. 262, 4 Sup. Ct. Rep. 202, 4 Am. Crim. Rep. 417; *State* v. *Ah Lee,* 18 Or. 540, 23 Pac. 424.

"Literally, what the witness says he heard another say." 1 Starkie, Ev. 229.

"The general rule subject to certain well-established exceptions as old as the rule itself, applicable in civil cases, and therefore to be rig-

§ 221. Nonoriginal evidence inadmissible.—Suppose, for instance, after a post mortem examination in a case where poisoning is charged, portions of the remains are given by E., the examining physician (an extrajudicial witness, as Mr. Bentham would call him), to J., and J. produces these remains on trial, where, under the direction of the court, they are subjected to a chemical analysis. This is hearsay, because E. is not examined on trial to prove the identity of the remains with those which J. produces. Or, after a murder, the deceased clothes are taken off by E. and handed to J., who brings them into court and testifies that they are the clothes given him by E., as having been taken from the body of the deceased. The articles thus produced are hearsay, in the wide sense of the term, and should be rejected.[1] The ques-

idly enforced where life or liberty are at stake, is that hearsay evidence is incompetent to establish any specific fact, which fact is in its nature susceptible of being proved by witnesses who speak from their own knowledge. Its intrinsic weakness, its incompetency to satisfy the mind of the existence of the fact, and the frauds which might be practised under its cover, combine to support the rule that hearsay evidence is inadmissible." *Hopt* v. *People,* 110 U. S. 574, 28 L. ed. 262, 4 Sup. Ct. Rep. 202, 4 Am. Crim. Rep. 417.

"To justify the reception of this kind of evidence, it must be shown to fall within some one of the exceptions recognized by the adjudged cases on that subject. These are divided by Mr. Greenleaf into four classes; 1, Those relating to matters of public and general interest; 2, those relating to ancient possession; 3, declarations against interest; 4, dying declarations, and some others of a miscellaneous nature." *Stockton* v. *Williams,* 1 Dougl. (Mich.) 546.

"Fame," says Crable, "has reference to the thing which gives birth to it. Hearsay refers to the receivers of that which is said, and hence it is limited to a small number of reporters or speakers. While 'fame' serves to establish a character either to a person or thing, and is made up of the testimony and sense of many, hearsay, on the other hand, is confined to the few. There is a distinction therefore between hearsay and evidence of repute." *Com.* v. *Murr,* 42 W. N. C. 263.

[1] In *Smith* v. *State,* 13 Tex. App. 507, it was held that the best evidence of nonconsent of the owner of goods to their taking was to be obtained by examining the owner,

tion of terms is comparatively unimportant. With Mr. Bentham, we may call such evidence simply "unoriginal;" with Mr. Best, "secondhand;" or we may fall back, as is here done, upon the general title of hearsay as designating all testimony from a nonoriginal source. It is in this sense that the term "hearsay" is to be used in the following sections.

§ 222. Grounds of objection to hearsay testimony.— Nor can this class of testimony ever be received as part of the affirmative evidence for the prosecution in a criminal case on the ground that it is designed to corroborate the statement of another, which has been or may be the subject of impeachment.[1]

The objections to hearsay testimony are:

1. The depreciation of truth, arising from its passing through one or more fallible media.

2. The abuses likely to arise from nondiscrimination by juries between primary and secondary testimony.

3. Its irresponsibility.[2]

and if this examination could be had, other evidence was secondary.

[1] Wharton, Ev. §§ 172 et seq.; *State* v. *Guillory*, 45 La. Ann. 31, 12 So. 314.

So, an accomplice cannot be corroborated by proving statements he made to a third party in the absence of the party against whom he is testifying. *Clay* v. *State*, 40 Tex. Crim. Rep. 556, 51 S. W. 212; *Com.* v. *Bosworth*, 22 Pick. 397; *Com.* v. *Holmes*, 127 Mass. 424, 34 Am. Rep. 391.

Also, testimony of an accomplice in adultery, that sometime before the prosecution she stated, in the presence of the defendant, that she was married, should have been rejected as hearsay, as at that time the defendant was not called on to deny the statement, as there was no charge against him, and a failure to deny it did not prove the statement. *Wiley* v. *State*, 33 Tex. Crim. Rep. 406, 26 S. W. 723.

In conspiracy to commit murder, testimony of a convicted accomplice cannot be corroborated by his own declarations made to others, not in the presence of the defendant. *Combs* v. *Com.* 15 Ky. L. Rep. 660, 25 S. W. 590.

[2] *Bryce* v. *Chicago, M. & St. P. R. Co.* 129 Iowa, 342, 105 N. W. 497.

And error in admitting hearsay evidence is not cured by evidence to the same effect which was given by a witness who spoke of his own knowledge.[3]

§ 223. Acts as well as words may be hearsay.—Acts as well as words may be hearsay, just as acts as well as words may be primary evidence.[1] An impostor dresses as an officer of the army, and obtains credit on the basis of his being such an officer. If so, his dress and style are as much a declaration on his part as would be the words, "I am an officer of the army." In such case these acts, when put in evidence against him, bind him as much as would verbal statements to the same effect.[2] On the other hand, when we can get primary and immediate evidence of a particular condition, it is as much hearsay to put in evidence what third persons did in consequence of such condition, as what third persons said.[3]

§ 224. Evidence through an interpreter not hearsay.—The evidence of a sworn interpreter as given in court is not hearsay, the transmission being immediate, and the witness interpreted being sworn in court.[1] An illustration of this same principle may be found in the fact that a witness may interpret for himself, without the intervention of an interpreter.[2] So, we may receive in evidence the rendering in the

[3] *State* v. *Guillory,* 45 La. Ann. 31, 12 So. 314.

[1] *Porter* v. *State,* 1 Tex. App. 394.

[2] *Reg.* v. *Giles,* Leigh & C. C. C. 502, 34 L. J. Mag. Cas. N. S. 50, 11 Jur. N. S. 119, 11 L. T. N. S. 643, 13 Week. Rep. 327, 10 Cox, C. C. 44; *Rex* v. *Story,* Russ. & R. C. C. 81; *Rex* v. *Barnard,* 7 Car. & P. 784; *Reg.* v. *Hunter,* 10 Cox, C. C. 642, 17 L. T. N. S. 321, 16 Week. Rep. 342. See *Wright* v. *Doe,* 7 Ad. & El. 313, 2 Nev. & P. 305, 7 L. J. Exch. N. S. 340; post, § 683.

[3] 1 Wharton, Ev. § 173.

[1] *Swift* v. *Appelbone,* 23 Mich. 252; *People* v. *Ah Wee,* 48 Cal. 236; *Schearer* v. *Harber,* 36 Ind. 536; *State* v. *Hamilton,* 42 La. Ann. 1204, 8 So. 304.

[2] *Com.* v. *Kepper,* 114 Mass. 278; *People* v. *Ramirez,* 56 Cal. 533, 38 Am. Rep. 73.

vernacular by a witness of a confession heard by him in a foreign tongue.[3]

The accuracy of the interpretation is a question of fact for the jury,[4] and it may be impeached by cross-examination or by producing another claimed to be more accurate.[5]

§ 224a. Appointment of interpreter.—The testimony given through a sworn interpreter not being hearsay, the court will appoint an interpreter in its discretion, and such appointment or refusal to appoint, in the absence of the abuse of the discretion, is not error.[1]

Even where such power of appointment is given by statute, such statute is merely declaratory of the inherent power vested in the court independent of legislative action on the question, for under the common law the court has full authority so to appoint.[2]

So, a juror may act as interpreter. *People* v. *Thiede,* 11 Utah, 241, 39 Pac. 837, 159 U. S. 510, 40 L. ed. 237, 16 Sup. Ct. Rep. 62.

So, a deaf mute is not disqualified, but may testify through an interpreter. *State* v. *Howard,* 118 Mo. 127, 24 S. W. 41; *Kirk* v. *State,* 35 Tex. Crim. Rep. 224, 32 S. W. 1045; *Kirk* v. *State,* — Tex. Crim. Rep. —, 37 S. W. 440; *State* v. *Smith,* 203 Mo. 695, 102 S. W. 526.

[3] *People* v. *Ah Wee,* 48 Cal. 236.

[4] *Schnier* v. *People,* 23 Ill. 17, 23, 24.

[5] *Skagos* v. *State,* 108 Ind. 53, 8 N. E. 695; Underhill, Crim. Ev. § 227.

[1] *Trinidod* v. *Simpson,* 5 Colo. 65; *Gannon* v. *Fritz,* 79 Pa. 303; *State* v. *Weldon,* 39 S. C. 318, 24 L.R.A. 126, 17 S. E. 688; *Perovich* v. *United States,* 205 U. S. 86, 51 L. ed. 722, 27 Sup. Ct. Rep. 456.

And the court may also in its discretion appoint an interpreter to act before the grand jury notwithstanding the inhibition of the Code that "no person except the attorney for the commonwealth and the witnesses under examination shall be present during the deliberations." *Lyon* v. *Com.* 29 Ky. L. Rep. 1020, 96 S. W. 857; *People* v. *Lem Deo,* 132 Cal. 199, 64 Pac. 265.

As to the presence of an unauthorized person in the grand jury room during the investigation of a case resulting in an indictment, see *United States* v. *Kilpatrick,* 16 Fed. 765; *Com.* v. *Vose,* 157 Mass. 393, 17 L.R.A. 813, 32 N. E. 355.

[2] *Schall* v. *Eisner,* 58 Ga. 190.

§ 225. Repeated testimony of nonwitness generally not admissible.—Extrajudicial statements of third persons cannot be proved by hearsay, unless such statements were part of the *res gestæ*,[1] or made by a deceased person in the course of business,[2] or as admissions against interest,[3] or are material for the purpose of determining the state of mind of a party who cannot be examined in court.[4] In this sense, as hearsay,

[1] *Munsey* v. *Hanly*, 102 Me. 423, 13 L.R.A.(N.S.) 209, 67 Atl. 217; *Willner* v. *Silverman*, 109 Md. 341, 24 L.R.A.(N.S.) 895, 71 Atl. 962; *Cochran* v. *Cochran*, 196 N. Y. 86, 24 L.R.A.(N.S.) 160, 89 N. E. 470, 17 A. & E. Ann. Cas. 782; *McCord* v. *Seattle Electric Co.* 46 Wash. 145, 13 L.R.A.(N.S.) 349, 89 Pac. 491; *Louisville R. Co.* v. *Johnson*, 131 Ky. 277, 20 L.R.A.(N.S.) 133, 115 S. W. 207; *Tinker* v. *New York, O. & W. R. Co.* 92 Hun, 269, 36 N. Y. Supp. 672, 157 N. Y. 312, 51 N. E. 1031.

[2] *Drawdy* v. *Hesters*, 130 Ga. 161, 15 L.R.A.(N.S.) 190, 60 S. E. 451; *Kuykendall* v *Fisher*, 61 W. Va. 87, 8 L.R.A.(N.S.) 94, 56 S. E. 48, 11 A. & E. Ann. Cas. 700; *Beechley* v. *Beechley*, 134 Iowa, 75, 9 L.R.A.(N.S.) 955, 120 Am. St. Rep. 412, 108 N. W. 762, 13 A. & E. Ann. Cas. 101; *Smith* v. *Moore*, 142 N. C. 277, 7 L.R.A.(N.S.) 684, 55 S. E. 275; *State ex rel. Phelps* v. *Jackson*, 79 Vt. 504, 8 L.R.A.(N.S.) 1245, 65 Atl. 657; *Taylor* v. *Grand Lodge, A. O. U. W.* 101 Minn. 72, 11 L.R.A.(N.S.) 92, 118 Am. St. Rep. 606, 111 N. W. 919, 11 A. & E. Ann. Cas. 260; *Smith* v. *Hanson*, 34 Utah, 171, 18 L.R.A.(N.S.) 520, 96 Pac. 1087; *Starr* v. *Ætna L. Ins. Co.* 41 Wash. 199, 4 L.R.A.(N.S.) 636, 83 Pac. 113; *Lewis* v. *Bowling Green Gaslight Co.* 135 Ky. 611, 22 L.R.A.(N.S.) 1169, 117 S. W. 278.

[3] *McCord* v. *Seattle Electric Co.* 46 Wash. 145, 13 L.R.A.(N.S.) 349, 89 Pac. 491; *Tufts* v. *Charlestown*, 4 Gray, 537; *People* v. *Koerner*, 154 N. Y. 355, 48 N. E. 730; *Territory* v. *Big Knot on Head*, 6 Mont. 242, 11 Pac. 670; *State* v. *Epstein*, 25 R. I. 131, 55 Atl. 204, 15 Am. Crim. Rep. 10; *Lanergan* v. *People*, 39 N. Y. 39; *Dean* v. *State*, 105 Ala. 21, 17 So. 28; *Lallande* v. *Brown*, 121 Ala. 513, 25 So. 997; *Schilling* v. *Union R. Co.* 77 App. Div. 74, 78 N. Y. Supp. 1015; *Eisenlord* v. *Clum*, 126 N. Y. 552, 12 L.R.A. 836, 27 N. E. 1024; *State* v. *Foley*, 144 Mo. 600, 46 S. W. 733.

[4] 1 Wharton, Ev. § 175; *Com.* v. *Ricker*, 131 Mass. 581; *State* v. *Boyle*, 13 R. I. 537; *Thomas* v. *People*, 67 N. Y. 218; *People* v. *Beach*, 87 N. Y. 508; *Wiggins* v. *People*, 4 Hun, 540; *People* v. *Lyons*, 49 Mich. 78, 13 N. W. 365; *People* v. *Mead*, 50 Mich. 228, 15 N. W. 95; *Cheek* v. *State*, 35 Ind. 492; *Mershon* v. *State*, 51 Ind. 14; *Bergen* v. *People*, 17 Ill. 426, 65 Am. Dec. 672; *State* v. *Stubbs*, 49 Iowa, 203; *State* v. *Weaver*, 57 Iowa, 730,

are to be considered the opinions of others as to the wealth and status of an individual;[5] letters from third parties, though nonresidents;[6] information derived from others as to contemporaneous historical events;[7] recitals in deeds as against strangers;[8] declarations of relations (living at the trial) as to the mental condition of a person whose sanity is questioned;[9] and opinions of a neighborhood as to such sanity.[10] Hence on an indictment for murder, admissions of other persons that they killed the deceased or committed the crime in controversy are not evidence;[11] evidence of threats by other persons are inadmissible;[12] declarations of deceased before his death that he was about to disappear;[13] or that he expected violence;[14] or of deceased witnesses to a homicide;[15] also, on indictment for larceny, declarations of third parties

11 N. W. 675; *State* v. *Haynes,* 71 N. C. 79; *State* v. *Davis,* 77 N. C. 483; *Hall* v. *State,* 51 Ala. 9; *State* v. *Newland,* 27 Kan. 764; *State* v. *Umfried,* 76 Mo. 404; *Hunter* v. *State,* 13 Tex. App. 16; *Munshower* v. *State,* 55 Md. 11, 39 Am. Rep. 414; *Grigsby* v. *State,* 4 Baxt. 19.

[5] *Caswell* v. *Howard,* 16 Pick. 567,

[6] *United States* v. *Barker,* 4 Wash. C. C. 464, Fed. Cas. No. 14,520; 1 Wharton, Ev. § 175.

[7] *Swinnerton Ins. Co.* v. *Columbian Ins. Co.* 9 Bosw. 361; *Milbank* v. *Dennistoun,* 10 Bosw. 382.

[8] *Spaulding* v. *Knight,* 116 Mass. 148; *Rose* v. *Taunton,* 119 Mass. 99; *Hardenburgh* v. *Lakin,* 47 N. Y. 111; *Yahoola R. & C. C. Hydraulic Hose Min. Co.* v. *Irby,* 40 Ga. 479, 14 Mor. Min. Rep. 460; 2 Wharton, Ev. §§ 1034, 1042.

[9] *Heald* v. *Thing,* 45 Me. 392.

[10] *Lancaster County Bank Nat.* v. *Moore,* 78 Pa. 407, 21 Am. Rep. 24.

[11] *Thomas* v. *People,* 67 N. Y. 218; *Greenfield* v. *People,* 85 N. Y. 75, 39 Am. Rep. 636; *Snow* v. *State,* 54 Ala. 138; *Sharp* v. *State,* 6 Tex App. 650; *Holt* v. *State,* 9 Tex. App. 571.

[12] *Thomas* v. *People,* 67 N. Y. 218; *State* v. *Duncan,* 28 N. C. (6 Ired. L.) 236; *State* v. *Haynes,* 71 N. C. 79; *State* v. *Davis,* 77 N. C. 483; *People* v. *Murphy,* 45 Cal. 137; *Walker* v. *State,* 6 Tex. App. 576.

[13] *State* v. *Vincent,* 24 Iowa, 570, 95 Am. Dec. 753; *Crookham* v. *State,* 5 W. Va. 510.

[14] The declarations of a husband to others, sometime before his death, but not communicated to his wife, cannot be given in evidence against her on trial for his alleged murder. *Weyrich* v. *People,* 89 Ill. 90; post, § 264; *Reg.* v. *Edwards,* 12 Cox, C. C. 230; post, § 281.

[15] *Potcete* v. *State,* 9 Baxt. 261, 40 Am. Rep. 90.

that they committed the theft are inadmissible;[16] nor is the opinion of counsel as to a litigated act admissible, unless it is proved that the party acted on such opinion.[17] But it has been held admissible for a witness to state that he was induced by information derived from a negro, to waylay a party suspected of a design to commit a felony,[18] and also for a party charged with receiving stolen goods, to put in evidence the declarations of his vendor made at the time of sale to the defendant.[19]

There is no reason to receive hearsay statements because the person making them is dead[20] (save under the limitations hereafter noticed), or because he was called as a witness and, being taken suddenly ill, was unable to attend the trial,[21] or because he is legally incompetent as a witness.[22]

Evidence of hearsay may be given to prove a pedigree through declarations of persons interested, though dead,[23] but these are confined to the declarations of kindred.[24]

[16] *Rhea* v. *State,* 10 Yerg. 258. But see *Davis* v. *State,* 37 Tex. 227; *Smith* v. *State,* 9 Ala. 990; *Daniel* v. *State,* 65 Ga. 199.

[17] *People* v. *Long,* 50 Mich. 249; 15 N. W. 105.

[18] *Wholey* v. *State,* 11 Ga. 123, *sed quære.* See *Com.* v. *James,* 99 Mass. 438; post, § 492.

[19] *People* v. *Dowling,* 84 N. Y. 478; *Leggett* v. *State,* 15 Ohio, 283; *Lander* v. *People,* 104 Ill. 248.

[20] *Crump* v. *Starke,* 23 Ark. 131.

[21] *Gaither* v. *Martin,* 3 Md. 146.

[22] *Churchill* v. *Smith,* 16 Vt. 560; *Nettles* v. *Harrison,* 2 M'Cord, L. 230; *Smith* v. *State,* 41 Tex. 352.

[23] *Strickland* v. *Poole,* 1 Dall. 14, 1 L. ed. 17.

[24] *Johnson* v. *Lawson,* 2 Bing. 86, 9 J. B. Moore, 183, 27 Revised Rep. 558, 2 L. J. C. P. 136.

The facts of family history which may be proved from hearsay from proper sources are the following:

Birth.—*North Brookfield* v. *Warren,* 16 Gray, 174.

Living or survival.—*Doe ex dem. Johnson* v. *Pembroke,* 11 East, 504, 11 Revised Rep. 260.

Marriage.—*Caujolle* v. *Ferrie,* 23 N. Y. 90; *Cunningham* v. *Cunningham,* 2 Dowl. P. C. 482, 511; *Com.* v. *Stump,* 53 Pa. 132, 91 Am. Dec. 198; *Hill* v. *Burger,* 3 Bradf. 432; *Lyle* v. *Ellwood,* L. R. 19 Eq. 98, 11 Moak, Eng. Rep. 702, 44 L. J. Ch. N. S. 164, 23 Week. Rep. 157.

Issue or want of issue.—*People* v. *Fulton F. Ins. Co.* 25 Wend. 205; *King* v. *Fowler,* 11 Pick. 302, 22 Am. Dec. 370.

§ 226. **Hearsay; acts between strangers.**—Adjudications between strangers, public acts affecting strangers or in which strangers are concerned, are to be regarded as hearsay [1] except under limitations noticed. Such evidence is also inadmissible as *res inter alios acta*.[2]

II. Exception as to Witness on Former Trial.

§ 227. **Evidence of deceased witness; when admissible.**—To the rule excluding hearsay, the first exception is what a deceased witness testified to on a former proceeding against the same defendant for the same offense as that under trial, or for an offense substantially the same, and it may be proved by witnesses who heard the testimony of such witness; nor is such oral evidence excluded by the fact that the original testimony was reduced to writing; nor, in criminal cases, by the constitutional provision as to confrontation by witnesses.[1]

Death.—*Mason* v. *Fuller*, 45 Vt. 29.

Time, either definite or relative, of these facts.—*Roe ex dem. Brune* v. *Rawlings*, 7 East, 290, 3 Smith, 254, 8 Revised Rep. 632; *Webb* v. *Richardson*, 42 Vt. 465; *Bridger* v. *Huett*, 2 Fost. & F. 35.

Relative age.—*Doe ex dem. Johnson* v. *Pembroke*, 11 East, 504, 11 Revised Rep. 260.

Name.—*Monkton* v. *Atty. Gen.* 2 Russ. & M. 147.

Relationship generally, and the degrees thereof.—*Doe ex dem. Futter* v. *Randall*, 2 Moore & P. 20; *Vowles* v. *Young*, 13 Ves. Jr. 147, 9 Revised Rep. 154; *Chapman* v. *Chapman*, 2 Conn. 350, 7 Am. Dec. 277.

General repute in the family.—*Doe ex dem. Banning* v. *Griffin*, 15 East, 293, 13 Revised Rep. 474, 8 Eng. Rul. Cas. 554.

[1] 1 Wharton, Ev. § 176; post, § 595.

[2] 1 Co. Litt. 152 b.

[1] Roscoe, Crim. Ev. 67; *United States* v. *White*, 5 Cranch, C. C. 457, Fed. Cas. No. 16,679; *United States* v. *Macomb*, 5 McLean, 286, Fed. Cas. No. 15,702; *State* v. *Hooker*, 17 Vt. 658; *Com.* v. *Richards*, 18 Pick. 434, 29 Am. Dec. 608; *Summons* v. *State*, 5 Ohio St. 325; *O'Brian* v. *Com.* 6 Bush, 563; *Roberts* v. *State*, 68 Ala. 515; *State* v. *Cook*, 23 La. Ann. 347; *State* v. *Baker*, 24 Mo. 437; *State* v. *Houser*, 26 Mo. 431; *People* v. *Brotherton*, 47 Cal. 388; *People* v. *Qurise*, 59 Cal. 343; *Johnson* v. *State*, 1 Tex.

The deposition of a witness taken in defendant's presence is admissible;[2] what a deceased witness swore to on a preliminary hearing before the committing magistrate is evidence at the trial in chief,[3] if taken in the presence of the defendant; otherwise not.[4]

Where the testimony offered on the subsequent trial was *non coram judice,* or the witness was not sworn,[5] or cross-examination was precluded or restricted,[6] or the witness was

App. 333; *Dunlap* v. *State,* 9 Tex. App. 179, 35 Am. Rep. 736; *State* v. *Wilson,* 24 Kan. 189, 36 Am. Rep. 257.

The deposition of a party may be used, and so may notes of his testimony. *Rhine* v. *Robinson,* 27 Pa. 30; *Jones* v. *Ward,* 48 N. C. (3 Jones, L.) 24, 64 Am. Dec. 590; 1 Wharton, Ev. § 227; *Kean* v. *Com.* 1 Am. Crim. Rep. 199, note, 10 Bush, 190, 19 Am. Rep. 63; *Pope* v. *State,* 22 Ark. 372; *People* v. *Murphy,* 45 Cal. 137; *Brown* v. *Com.* 73 Pa. 321, 13 Am. Rep. 740; *State* v. *McO'Blenis,* 24 Mo. 402, 69 Am. Dec. 435; *State* v. *Johnson,* 12 Nev. 121; *Hair* v. *State,* 16 Neb. 601, 21 N. W. 464, 4 Am. Crim. Rep. 127; *People* v. *Elliott,* 172 N. Y. 146, 60 L.R.A. 318, 64 N. E. 837, 15 Am. Crim. Rep. 627; *Dukes* v. *State,* 80 Miss. 353, 31 So. 744, 15 Am. Crim. Rep. 644.

[2] *State* v. *Bowker,* 26 Or. 309, 38 Pac. 124, 9 Am. Crim. Rep. 365; *People* v. *Guidici,* 100 N. Y. 503, 3 N. E. 493, 5 Am. Crim. Rep. 455; *People* v. *Riley,* 75 Cal. 98, 16 Pac. 544, 7 Am. Crim. Rep. 600; *Webster* v. *People,* 92 N. Y. 422.

[3] *Rex* v. *Edmunds,* 6 Car. & P. 164; *Robinson* v. *State,* 68 Ga. 833; *State* v. *Jefferson,* 77 Mo. 136. Contra, *State* v. *Campbell,* 1 Rich. L. 124.

As to statement at coroner's inquest, see *State* v. *McNeil,* 33 La. Ann. 1332.

Otherwise, where the evidence is offered by the prosecution and there was no specific issue as to the defendant at the inquest. *McLain* v. *Com.* 99 Pa. 86; post, § 280; *Sylvester* v. *State,* 71 Ala. 17; *Motes* v. *United States,* 178 U. S. 458, 44 L. ed. 1150, 20 Sup. Ct. Rep. 993; *People* v. *Sierp,* 116 Cal. 249, 48 Pac. 88; *State* v. *George,* 60 Minn. 503, 63 N. W. 100; *State* v. *Fitzgerald,* 63 Iowa, 268, 19 N. W. 202.

[4] *State* v. *Hill,* 2 Hill, L. 607, 27 Am. Dec. 407.

[5] *Reg.* v. *Eriswell,* 3 T. R. 721.

[6] *Steinkeller* v. *Newton,* 1 Scott, N. R. 148, 9 Car. & P. 313, 8 Dowl. P. C. 579, 6 Mann. & G. 30, note, 9 L. J. C. P. N. S. 262; *Reg.* v. *Ledbetter,* 3 Car. & K. 108; *Bebee* v. *People,* 5 Hill, 32; *Barron* v. *People,* 1 N. Y. 386; *Summons* v. *State,* 5 Ohio St. 325; *State* v. *Campbell,* 1 Rich. L. 124; *McNamara* v. *State,* 60 Ark. 400, 30 S. W. 762.

incompetent,[7] the ground for the admissibility of such evidence fails.

It is not necessary, however, that there should be an actual cross-examination where the opportunity for such was provided, and there was liberty to cross-examine.[8]

§ 228. Testimony given on former trial; grounds of admissibility.—Testimony taken at a trial cannot be read at a subsequent trial, if the witness is obtainable. But where former testimony is admissible, it is admissible in criminal cases, on the same ground as in civil cases.[1] In some states, testimony given on a former trial is not admissible on a subsequent trial in criminal issues, on the ground that it contravenes the right of the defendant to be confronted by the witnesses against him.[2]

[7] *Schell* v. *State,* 2 Tex. App. 30.

[8] *M'Combie* v. *Anton,* 6 Mann. & G. 27, 6 Scott, N. R. 923; *Cazenove* v. *Vaughan,* 1 Maule & S. 4, 14 Revised Rep. 377; *Bradley* v. *Mirick,* 25 Hun, 272.

In Texas, under Code provisions, articles 772, 773, and 774, it has been held that the testimony, though taken in writing and duly authenticated, given before a court or judge on a habeas corpus hearing, is not admissible on the trial in chief, for the reason that it is not taken before an "examining court," and the statutory provisions relating to testimony taken before an "examining court" are not applicable to testimony taken on such hearing. *Evans* v. *State,* 12 Tex. App. 383; *Childers* v. *State,* 30 Tex. App. 160, 28 Am. St. Rep. 899, 16 S. W. 903. In this case, see dissenting opinion of Justice White, holding that the word "deposition" as used in the article of the Code is a mistake for the word "testimony" or "evidence." *Kerry* v. *State,* 17 Tex. App. 178, 50 Am. Rep. 122.

[1] *United States* v. *Macomb,* 5 McLean, 286, Fed. Cas. No. 15,702; *Marler* v. *State,* 67 Ala. 55, 42 Am. Rep. 95; *Harris* v. *State,* 73 Ala. 495; *Lowe* v. *State,* 86 Ala. 47, 5 So. 435; *Mitchell* v. *State,* 114 Ala. 1, 22 So. 71; *Vaughan* v. *State,* 58 Ark. 353, 24 S. W. 885; *Thompson* v. *State,* 106 Ala. 67, 17 So. 512, 9 Am. Crim. Rep. 199; *Davis* v. *State,* 17 Ala. 354; *Horton* v. *State,* 53 Ala. 488; *People* v. *Murphy,* 45 Cal. 137; *Barnett* v. *People,* 54 Ill. 325; *O'Brian* v. *Com.* 6 Bush, 563; *People* v. *Elliott,* 172 N. Y. 146, 60 L.R.A. 318, 64 N. E. 837, 15 Am. Crim. Rep. 627.

[2] *People* v. *Bird,* 132 Cal. 261, 64 Pac. 259; Kentucky Statutes, 1899,

Former testimony is generally admissible upon the following grounds:

First. *Death.*—Proof of this fact shows absolutely the unavailability of the witness. It is to be inferred from the circumstances of each particular case.[3] It is a sufficient ground for admitting former testimony,[4] except where the witness has been convicted of a crime.[5] Hearsay evidence of the death of a witness at a former trial is not admissible to

§ 4643; *Cline* v. *State,* 36 Tex. Crim. Rep. 320, 61 Am. St. Rep. 850, 36 S. W. 1099, 37 S. W. 722; *State* v. *Lee,* 13 Mont. 248, 33 Pac. 690; *Motes* v. *United States,* 178 U. S. 458, 44 L. ed. 1150, 20 Sup. Ct. Rep. 993; *United States* v. *Angell,* 11 Fed. 34; *State* v. *Woods,* 71 Kan. 658, 81 Pac. 184; *State* v. *Houser,* 26 Mo. 431; *Kirby* v. *United States,* 174 U. S. 47, 43 L. ed. 890, 19 Sup. Ct. Rep. 574, 11 Am. Crim. Rep. 330; *People* v. *Gordon,* 99 Cal. 227, 33 Pac. 901; *People* v. *Lee Fat,* 54 Cal. 527.

[3] 2 Wharton, Ev. § 1274; 14 Cent. L. J. 287, 302, 345.

[4] *United States* v. *White,* 5 Cranch, C. C. 457, Fed. Cas. No. 16,679; *United States* v. *Macomb,* 5 McLean, 286, Fed. Cas. No. 15,702.

But see *United States* v. *Sterland,* Fed. Cas. No. 16,387; *Tharp* v. *State,* 15 Ala. 749; *Lett* v. *State,* 124 Ala. 64, 27 So. 256; *Vaughan* v. *State,* 58 Ark. 353, 24 S. W. 885; *Woodworth* v. *Gorsline,* 30 Colo. 186, 58 L.R.A. 417, 69 Pac. 705; *Sage* v. *State,* 127 Ind. 15, 26 N. E. 667; *State* v. *Porter,* 74 Iowa, 623, 38 N. W. 514; *Kean* v. *Com.* 10 Bush, 190, 19 Am. Rep. 63, 1 Am. Crim. Rep. 199; *Collins* v. *Com.* 12 Bush, 271, 2 Am. Crim. Rep. 282; *Walkup* v. *Com.* 14 Ky. L. Rep. 337, 20 S. W. 221; *Com* v. *McKenna,* 158 Mass. 207, 33 N. E. 389; *People* v. *Sligh,* 48 Mich. 54, 11 N. W. 782; *State* v. *George,* 60 Minn. 503, 63 N. W. 100; *Owens* v. *State,* 63 Miss. 450; *Lipscomb* v. *State,* 76 Miss. 223, 25 So. 158; *Dukes* v. *State,* 80 Miss. 353, 31 So. 744, 15 Am. Crim. Rep. 644; *State* v. *Able,* 65 Mo. 357; *State* v. *Hudspeth,* 159 Mo. 178, 60 S. W. 136; *State* v. *Johnson,* 12 Nev. 121; *State* v. *Wing,* 66 Ohio St. 407, 64 N. E. 514, 15 Am. Crim. Rep. 634; *Finn* v. *Com.* 5 Rand. (Va.) 701; *Thomas* v. *Com.* 14 Ky. L. Rep. 288, 20 S. W. 226; *Johnson* v. *Com.* 24 Ky. L. Rep. 842, 70 S. W. 44; *State* v. *Thompson,* 109 La. 296, 33 So. 320; *Nordan* v. *State,* 143 Ala. 13, 39 So. 406; *Fuqua* v. *Com.* 118 Ky. 578, 81 S. W. 923; *State* v. *Shadwell,* 26 Mont. 52, 66 Pac. 508; *People* v. *Elliott,* 172 N. Y. 146, 60 L.R.A. 318, 64 N. E. 837, 15 Am. Crim. Rep. 627.

[5] *St. Louis, I. M. & S. R. Co.* v. *Harper,* 50 Ark. 157, 6 S. W. 720, 7 Am. St. Rep. 86; *State* v. *Conway,* 56 Kan. 682, 44 Pac. 627.

prove his death.[6] There must be a showing that the witness is dead.[7]

Second. *Absence.*—Mere absence,[8] or a reliance on the witness's promise or promise of adverse party that witness will be present,[9] is not sufficient, but to be sufficient to admit former testimony, absence from the state must be shown.[10]

Third. *Insanity.*—A witness who has become insane is no longer qualified;[11] "there is no real or practical difference between the death of the mind and the death of the body."[12]

The incompetency of a witness is not ground for admit-

[6] *State* v. *Wright,* 70 Iowa, 152, 30 N. W. 388; *People* v. *Plyler,* 126 Cal. 379, 58 Pac. 904; *Johnson* v. *Com.* 24 Ky. L. Rep. 842, 70 S. W. 44.

[7] *State* v. *Rose,* 92 Mo. 201, 4 S. W. 733; *State* v. *Staples,* 47 N. H. 113, 90 Am. Dec. 565; *State* v. *Taylor,* 61 N. C. 508; *Caldwell* v. *State,* 28 Tex. App. 566, 14 S. W. 122; *Mendum* v. *Com.* 6 Rand. (Va.) 704.

[8] *Fresh* v. *Gilson,* 16 Pet. 327, 10 L. ed. 982; *M. Heminway & Sons Silk Co.* v. *Porter,* 94 Ill. App. 609, 611.

[9] *Provo* v. *Shurtliff,* 4 Utah, 15, 5 Pac. 302.

[10] *Lowe* v. *State,* 86 Ala. 47, 5 So. 435; *South* v. *State,* 86 Ala. 617, 6 So. 52; *Pruitt* v. *State,* 92 Ala. 41, 9 So. 406; *Thompson* v. *State,* 106 Ala. 67, 17 So. 512, 9 Am. Crim. Rep. 199; *Lett* v. *State,* 124 Ala. 64, 27 So. 256; *Jacobi* v. *State,* 133 Ala. 1, 32 So. 158; *Jacobi* v. *Alabama,* 187 U. S. 133, 47 L. ed. 107, 23 Sup. Ct. Rep. 48; *Wilkins* v. *State,* 68 Ark. 441, 60 S. W. 30; *People* v. *Devine,* 46 Cal. 48; *Pittman* v. *State,* 92 Ga. 480, 17 S. E. 856; *State* v. *Maddison,* 50 La. Ann. 679, 23 So. 622; *State* v. *Banks,* 106 La. 480, 31 So. 53; *State* v. *Kline,* 109 La. 603, 33 So. 618, 194 U. S. 258, 48 L. ed. 965, 24 Sup. Ct. Rep. 650; *State* v. *Flannery,* 3 Cal. App. 41, 84 Pac. 461; *State* v. *Nelson,* 68 Kan. 566, 75 Pac. 505, 1 A. & E. Ann. Cas. 468; *People* v. *Gilhooley,* 19 N. Y. Crim. Rep. 541. But see *Collins* v. *Com.* 12 Bush, 271, 2 Am. Crim. Rep. 282; *State* v. *Wheat,* 111 La. 860, 35 So. 955; *State* v. *Wing,* 66 Ohio St. 407, 64 N. E. 514, 15 Am. Crim. Rep. 634; *Smith* v. *State,* 48 Tex. Crim. Rep. 65, 85 S. W. 1153.

[11] *Marler* v. *State,* 67 Ala. 55, 42 Am. Rep. 95; *Lett* v. *State,* 124 Ala. 64, 27 So. 256; *Walkup* v. *Com.* 14 Ky. L. Rep. 337, 20 S. W. 221.

See statutes of various states. *Reg.* v. *Cockburn,* 7 Cox, C. C. 265, Dears. & B. C. C. 203, 26 L. J. Mag. Cas. N. S. 136, 3 Jur. N. S. 447; *Reg.* v. *Wilson,* 8 Cox, C. C. 453; *State* v. *King,* 86 N. C. 603; *State* v. *Laque,* 41 La. Ann. 1070, 6 So. 787.

[12] *Marler* v. *State,* 67 Ala. 55, 42 Am. Rep. 95.

ting his testimony, unless controlled by statute; but where a witness is rendered incompetent by reason of a conviction of an infamous crime, that is not ground for admitting his former testimony;[13] nor where he asserts his claim of privilege on the ground that the testimony might incriminate him.[14]

Fourth. *Official duty.*—Whether absence on, or by reason of, official duty, is a sufficient ground for the nonproduction of the witness to admit his former testimony, is generally a matter within the discretion of the trial court.[15]

Fifth. *Absence by procurement.*—Where a party procures the absence of a witness, he cannot prove his former testimony,[16] and where such absence is unlawfully procured by the adverse party, it is sufficient ground for admitting proof of the former testimony.[17]

§ 229. Diligence in procuring attendance of witness.—While it is difficult to frame a rule stating the kind and degree of proof that should be made as to the absence of a witness, inasmuch as such proof is addressed to the court, on principle, the fact of and the cause of the absence of the witness may be shown, like any other fact, by any evidence sat-

[13] *State* v. *Valentine,* 29 N. C. (7 Ired. L.) 225, 227; *State* v. *Conway,* 56 Kan. 682, 44 Pac. 627; *Berney* v. *Mitchell,* 34 N. J. L. 337.

[14] *Hayward* v. *Barron,* 38 N. H. 366.

[15] Wigmore, Ev. § 1407; *Noble* v. *Martin,* 7 Mart. N. S. 282.

[16] *State* v. *Nelson,* 68 Kan. 566, 75 Pac. 505, 1 A. & E. Ann. Cas. 468; *Golden* v. *State,* 22 Tex. App. 1, 2 S. W. 531; *Peddy* v. *State,* 31 Tex. Crim. Rep. 547, 21 S. W. 542; *United States* v. *Reynolds,* 1 Utah, 320, 98 U. S. 158, 25 L. ed. 247; *Morley's Trial,* 6 How. St. Tr. 770.

Procurement by codefendant not held sufficient as to defendant not so procuring. *Reg.* v. *Scaife,* 2 *Den.* C. C. 281, 17 Q. B. 238, 20 L. J. Mag. Cas. N. S. 229, 15 Jur. 607, 5 Cox, C. C. 243; *Reg.* v. *Guttridge,* 9 Car. & P. 471; *Williams* v. *State,* 19 Ga. 402; *State* v. *Houser,* 26 Mo. 431.

[17] *United States* v. *Reynolds,* 1 Utah, 322, 98 U. S. 145, 25 L. ed. 244.

As to punishment for interfering with witnesses, see Russell, Crimes, 7th Eng. ed. p. 541.

isfactory to the court, and the nature of the diligence used should be judged from the circumstances of each case.

Mere absence from the jurisdiction of the court, in a criminal case, is not a sufficient ground for the admission of former testimony,[1] nor even where a subpœna has been returned "not found," where the search was made by hasty inquiries,[2] nor a general rumor in the neighborhood that the witness has left the state,[3] but where the sheriff had made unsuccessful search, and two months before the witness was seen outside of the state, it was held sufficient.[4]

§ 230. Deposition of sick witness.—Whether the deposition of a sick witness can be taken in a criminal case depends upon local statutes; but when a deposition has been taken in a preliminary proceeding, it can be used in the subsequent proceedings against the same defendant, where the witness is shown to be unobtainable.[1]

[1] *Bergen* v. *People,* 17 Ill. 426, 65 Am. Dec. 672; *State* v. *Oliver,* 43 La. Ann. 1003, 10 So. 201.

[2] *McMunn* v. *State,* 113 Ala. 86, 21 So. 418.

[3] *Mitchell* v. *State,* 114 Ala. 1, 22 So. 71.

[4] *Lett* v. *State,* 124 Ala. 64, 27 So. 256.

In the following cases under various circumstances the predicate laid for the introduction of the former testimony was held insufficient: *State* v. *Riddle,* 179 Mo. 287, 78 S. W. 606; *Smith* v. *State,* 48 Tex. Crim. Rep. 65, 85 S. W. 1153; *People* v. *Moran,* 144 Cal. 48, 77 Pac. 777; *People* v. *McFarlane,* 138 Cal. 481, 61 L.R.A. 245, 71 Pac. 568, 72 Pac. 48; *Harwood* v. *State,* 63 Ark. 130, 37 S. W. 304; *Watkins* v. *State,* 133 Ala. 88, 32 So. 627; *People* v. *Ballard,* 1 Cal. App. 222, 81 Pac. 1040.

In the following cases the search was held sufficient: *Jacobi* v. *State,* 133 Ala. 1, 32 So. 158; *Wilson* v. *State,* 140 Ala. 43, 37 So. 93; *Shirley* v. *State,* 144 Ala. 35, 40 So. 269; *People* v. *McIntyre,* 127 Cal. 423, 59 Pac. 779; *People* v. *Witty,* 138 Cal. 576, 72 Pac. 771; *People* v. *Lewandowski,* 143 Cal. 574, 77 Pac. 467; *State* v. *Bolden,* 109 La. 484, 33 So. 571; *State* v. *Bollero,* 112 La 850, 36 So. 754; *State* v. *Aspara,* 113 La. 940, 37 So. 883; *State* v. *King,* 24 Utah, 482, 91 Am. St. Rep. 808, 68 Pac. 418; *Putnal* v. *State,* 56 Fla. 86, 47 So. 864; *Somers* v. *State,* 54 Tex. Crim. Rep. 475, 130 Am. St. Rep. 901, 113 S. W. 533.

[1] 1 Wharton, Ev. § 178; *McLain* v. *Com.* 99 Pa. 86; *Sylvester* v.

§ 231. Method of proof of former testimony.—The evidence of the original witness may be proved by the notes of counsel, or of the judge, or of a shorthand reporter sworn to by the reproducing witness; nor is it necessary that the notes should purport to give more than the substance of the language of the original witness.[1] In such cases the notes are not evidence *per se;* their only value being as a means of refreshing the memory of the witness.[2] The testimony of the reproducing witness is not excluded by the fact that he does not recollect the testimony independent of his notes.[3] But the whole relevant part of the testimony as remembered must, if required, be given,[4] and mere notes of a judge unsworn to, or unproved cannot be received.[5] If the judge is living he

State, 71 Ala. 17. See *State* v. *McNeil,* 33 La. Ann. 1332. See also *State* v. *Kring,* 74 Mo. 612.

[1] 1 Wharton, Ev. § 514; *Reg.* v. *Christopher,* 1 Den. C. C. 536; *United States* v. *Macomb,* 5 McLean, 286, Fed. Cas. No. 15,702; *United States* v. *White,* 5 Cranch, C. C. 457, Fed. Cas. No. 16,679; *Brown* v. *Com.* 73 Pa. 321, 13 Am. Rep. 740; *Summons* v. *State,* 5 Ohio St. 325; *People* v. *Murphy,* 45 Cal. 137.

For a more stringent rule, see *United States* v. *Wood,* 3 Wash. C. C. 440, Fed. Cas. No. 16,756; *Com.* v. *Richards,* 18 Pick. 434, 29 Am. Dec. 608; Contra, *People* v. *Ah Yute,* 56 Cal. 119; see *People* v. *Chung Ah Chue,* 57 Cal. 567; *Stern* v. *People,* 102 Ill. 540; *Kean* v. *Com.* 10 Bush, 190, 19 Am. Rep. 63, 1 Am. Crim. Rep. 199.

Defendant's counsel called, *State* v. *Cook,* 23 La. Ann. 347; *Com.* v. *Goddard,* 14 Gray, 402; *People* v. *Sligh,* 48 Mich. 54, 11 N. W. 782. But see *Adams* v. *Com.* 2 Ky. L. Rep. 388; *State* v. *Fitzgerold,* 63 *Iowa,* 268, 19 N. W. 202; *State* v. *Able,* 65 Mo. 357; *State* v. *Hammond,* 77 Mo. 157; *State* v. *Jones,* 29 S. C. 201, 7 S. E. 296; *Kendrick* v. *State,* 10 Humph. 479; *State* v. *Hooker,* 17 Vt. 658. Contra, see *Com.* v. *Richards,* 18 Pick. 434, 29 Am. Dec. 608; *State* v. *O'Brien,* 81 Iowa, 88, 46 N. W. 752; *Bush* v. *Com.* 80 Ky. 244.

[2] 1 Wharton Ev. § 514; *Wilson* v. *Com.* 21 Ky. L. Rep. 1333, 54 S. W. 964; *Hair* v. *State,* 16 Neb. 601, 21 N. W. 464, 4 Am. Crim. Rep. 127; *Rounds* v. *State,* 57 Wis. 45, 14 N. W. 865.

[3] *Brown* v. *Com.* 73 Pa. 321, 13 Am. Rep. 740; *Puryear* v. *State,* 63 Ga. 692.

[4] *Com.* v. *Richards,* 18 Pick. 434, 29 Am. Dec. 608.

[5] *State* v. *M'Leod,* 8 N. C. (1 Hawks) 344; 1 Wharton, Ev. § 180; *State* v. *DeWitt,* 2 Hill, L. 282, 27 Am. Dec. 371.

must be called as a witness, the notes being receivable to refresh his memory.[6]

Where a statute provides for the admission, as testimony, of the notes of the sworn court stenographer, or a transcript of the same, such notes or transcript must be taken and certified to as required by the statute.[7]

Parol testimony is admissible to prove the former testimony,[8] and this is true even where there was written testimony, but such writing was proved to be irregular;[9] and parol

[6] *Grimm* v. *Hamel,* 2 Hilt. 434; *Conradi* v. *Conradi,* L. R. 1 Prob. & Div. 514.

[7] *State* v. *Frederic,* 69 Me. 400, 3 Am. Crim. Rep. 78; *Burnett* v. *State,* 87 Ga. 622, 13 S. E. 552; *Sage* v. *State,* 127 Ind. 15, 26 N. E. 667; *Bass* v. *State,* 136 Ind. 165, 36 N. E. 124.

But see, as to testimony taken through an interpreter, *People* v. *Lee Fat,* 54 Cal. 527; *People* v. *Ah Yute,* 56 Cal. 119; *People* v. *Cunningham,* 66 Cal. 668, 6 Pac. 700, 846, 4 Pac. 1144; *People* v. *Ward,* 105 Cal. 652, 39 Pac. 33.

As to testimony through an interpreter taken under the requirements of the Code, see *People* v. *Lewandowski,* 143 Cal. 574, 77 Pac. 467. See also *State* v. *Bolden,* 109 La. 484, 33 So. 571; *People* v. *Buckley,* 143 Cal. 375, 77 Pac. 169; *Smith* v. *State,* — Tex. Crim. Rep. —, 73 S. W. 401; *Mackmasters* v. *State,* 83 Miss. 1, 35 So. 302; *Morawitz* v. *State,* 49 Tex. Crim. Rep. 366, 91 S. W. 227. But see *Flohr* v. *Territory,* 14 Okla. 477, 78 Pac. 565; *People* v. *Eslabe,* 127 Cal. 243, 59 Pac. 577.

So, where the testimony was in writing, but unsigned or unverified, it was error to admit it. *State* v. *Thompson,* 116 La. 829, 41 So. 107; *Cunning* v. *State,* 79 Miss. 284, 30 So. 658; *Gamblin* v. *State,* 82 Miss. 73, 33 So. 724.

[8] *Davis* v. *State,* 17 Ala. 354; *Marler* v. *State,* 67 Ala. 55, 42 Am. Rep. 95; *Thompson* v. *State,* 106 Ala. 67, 17 So. 512, 9 Am. Crim. Rep. 199; *Robinson* v. *State,* 68 Ga. 833; *People* v. *Coffman,* 59 Mich. 1, 26 N. W. 207; *State* v. *Howard,* 32 S. C. 91, 10 S. E. 831; *Wade* v. *State,* 7 Baxt. 80; *Byrd* v. *State,* 26 Tex. App. 374, 9 S. W. 759; *Potts* v. *State,* 26 Tex. App. 663, 14 S. W. 456. But see *Leggett* v. *State,* 97 Ga. 426, 24 S. E. 165; and *People* v. *Johnson,* 2 Wheeler, C. C. 361; *Harris* v. *State,* 73 Ala. 495; *State* v. *Adair,* 66 N. C. 298; *Brown* v. *Com.* 76 Pa. 319; *Gilbreath* v. *State,* 26 Tex. App. 315, 9 S. W. 618.

So, a juror's testimony may be received as being no more hearsay or secondary than the reporter's notes. *State* v. *Mushrush,* 97 Iowa, 444, 66 N. W. 746. See *Sanford* v. *State,* 143 Ala. 78, 39 So. 370; *Stevens* v. *State,* — Tex. Crim. Rep. —, 38 S. W. 167.

[9] *State* v. *Simien,* 30 La. Ann. 296;

testimony may also be given to supplement the written testimony.[10] It is necessary, however, that in all cases the substance of the former testimony should be stated by the witness.[11] Parts of the former testimony may be omitted where such parts are not material.[12] But former testimony gains no value from its reproduction, and its weight and value are to be determined by the jury,[13] and the fact that the witness is not present, so that the court and jury can judge from his personal presence, his manner of testifying, and his appearance on the stand, is a circumstance for the jury.[14]

III. Matters of General Interest.

§ 232. Reputation; public interest.—In quasi criminal matters, such as indictment for nuisance or obstruction of highway, etc., it is often important to prove certain matters of general interest outside of the personal knowledge of the witness. Where there is no ground to suspect fraud, interest in the pending litigation, or bias, the statements of persons deceased, who were cognizant of such facts, may be received.[1] And, likewise, negative declarations are admissible in pursuance of the same rule.[2]

Dunlap v. *State*, 9 Tex. App. 179, 35 Am. Rep. 736.

[10] *State* v. *Depoister*, 21 Nev. 107, 25 Pac. 1000. But contra, *Irving* v. *State*, 9 Tex. App. 66.

[11] *Gildersleeve* v. *Caraway*, 10 Ala. 260, 44 Am. Dec. 485; *Tharp* v. *State*, 15 Ala. 749; *Vaughan* v. *State*, 58 Ark. 353, 24 S. W. 885; *Puryear* v. *State*, 63 Ga. 692; *Mitchell* v. *State*, 71 Ga. 128; *Pound* v. *State*, 43 Ga. 89; *Burnett* v. *State*, 87 Ga. 622, 13 S. E. 552; *Bass* v. *State*, 136 Ind. 165, 36 N. E. 124; *Bennett* v. *State*, 32 Tex. Crim. Rep. 216, 22 S. W. 684.

[12] *State* v. *Sorter*, 52 Kan. 531, 34 Pac. 1036; *Summons* v. *State*, 5 Ohio St. 325.

[13] *People* v. *Leyshon*, 108 Cal. 440, 41 Pac. 480; *State* v. *Hull*, 26 Iowa, 292; *Redd* v. *State*, 65 Ark. 475, 47 S. W. 119.

[14] *State* v. *Summons*, 1 Ohio Dec. Reprint, 381.

[1] 1 Wharton, Ev. § 185.

That this is the case with regard to boundary lines between counties, see *People* v. *Velarde*, 59 Cal. 457; *Cox* v. *State*, 41 Tex. 1; *Nelson* v. *State*, 1 Tex. App. 42; *Birmingham* v. *Anderson*, 40 Pa. 506; *Long* v. *Colton*, 116 Mass. 414.

Establishment of highways. *Wooster* v. *Butler*, 13 Conn. 309; 1 Phillipps, Ev. 5th Am. ed. Cowen & Hill's notes, p. 179; *Weld* v. *Brooks*, 152 Mass. 297, 25 N. E. 719.

[2] *Bow* v. *Allenstown*, 34 N. H. 351,

IV. Exception as to Pedigree and Relationship; Birth, Marriage, and Death.

§ 233. Admissible as to pedigree.—To establish pedigree, it is essential to admit family hearsay; otherwise pedigree could not be proved in most cases.[1] But the utterances and declarations on this subject cannot be sworn to by others, if the declarant is living and can be produced as a witness.[2] Also, hearsay evidence as to pedigree is confined to legitimate relationship, and cannot be admitted to establish an unlawful one.[3]

§ 234. Prosecutions for bigamy; hearsay admissible.—In prosecutions for bigamy, hearsay is a necessary incident of cohabitation.[1] The parties, it is alleged in the accusation, lived together as man and wife. "They were known as man and wife in the neighborhood; they were addressed as such; they answered as such; by their own acts they accepted the

69 Am. Dec. 489; *Drinkwater* v. *Porter,* 7 Car. & P. 181.

[1] 1 Wharton, Ev. § 201; *Comstock* v. *State,* 14 Neb. 205, 15 N. W. 355.

In *Sturla* v. *Freccia,* 43 L. T. N. S. 209, L. R. 5 App. Cas. 623, 29 Week. Rep. 217, 44 J. P. 812, 21 Eng. Rul. Cas. 672, however, it was held that the foreign official report of the place and time of deceased's birth made in a collateral proceeding was inadmissible. *Vowles* v. *Young,* 13 Ves. Jr. 140, 9 Revised Rep. 154; *Eisenlord* v. *Clum,* 126 N. Y. 552, 12 L.R.A. 836, 27 N. E. 1024; *Fulkerson* v. *Holmes,* 117 U. S. 389, 29 L. ed. 915, 6 Sup. Ct. Rep. 780; *Ellicott* v. *Pearl,* 10 Pet. 434, 9 L. ed. 484; *Berkeley Peerage Case,* 4 Campb. 409, 14 Revised Rep. 782, 11 Eng. Rul. Cas. 310.

[2] *Champion* v. *McCarthy,* 228 Ill. 87, 11 L.R.A.(N.S.) 1052, 81 N. E. 808, 10 A. & E. Ann. Cas. 517; *Young* v. *Shulenberg,* 165 N. Y. 385, 80 Am. St. Rep. 730, 59 N. E. 135; *Thompson* v. *Woolf,* 8 Or. 454; *Elder* v. *State,* 123 Ala. 35, 26 So. 213; *Lamoreaux* v. *Ellis,* 89 Mich. 146, 50 N. W. 812; *People* v. *Mayne,* 118 Cal. 516, 62 Am. St. Rep. 256, 50 Pac. 654; *Northrop* v. *Hale,* 76 Me. 306, 310, 49 Am. Rep. 615.

[3] *Flora* v. *Anderson,* 75 Fed. 217; *Re Garr,* 31 Utah, 57, 86 Pac. 757; *Hoyt* v. *Lightbody,* 98 Minn. 189, 116 Am. St. Rep. 358, 108 N. W. 843, 8 A. & E. Ann. Cas. 984.

[1] Supra, § 172; *Dumas* v. *State,* 14 Tex. App. 464, 46 Am. Rep. 241.

status given them; they were talked of in the neighborhood, as well as in their family, as married," testifies a witness.

Now, all of this may be hearsay, yet in many cases it is the highest and best evidence that can be obtained.

And in many issues in which pedigree is involved, it is the only proof obtainable.[2] So, evidence of general repute, in the neighborhood is admissible on the trial of a suit involving the issue of marriage *vel non*.[3]

§ 235. Relationship essential.—In a question of title, when such declarations are offered to prove legitimacy, it is essential to their admissibility that they should be made by lawful relatives.[1] Statements by illegitimate members of the family, or those related by affinity, will not be received.[2] Sufficiency of proof of the relationship to admit the declarations is a question for the court.[3]

[2] *United States* v. *Higgerson*, 46 Fed. 750; *Miner* v. *People*, 58 Ill. 59; *Carotti* v. *State*, 42 Miss. 334, 97 Am. Dec. 465; *People* v. *Gates*, 46 Cal. 52; *Com.* v. *Jackson*, 11 Bush, 679, 21 Am. Rep. 225, 1 Am. Crim. Rep. 74; *Cook* v. *State*, 11 Ga. 53 56 Am. Dec. 410; *Cameron* v. *State*, 14 Ala. 546, 48 Am. Dec. 111; *Wolverton* v. *State*, 16 Ohio, 173, 47 Am. Dec. 373.

[3] *Drawdy* v. *Hesters*, 130 Ga. 161, 15 L.R.A.(N.S.) 190, 60 S. E. 451.

But it was held in a prosecution for bigamy, that proof of cohabitation and reputation as man and wife was not sufficient to establish an alleged former marriage, in the absence of any admissions of the fact by the defendant. *Lowery* v. *People*, 172 Ill. 466, 64 Am. St. Rep. 50, 50 N. E. 165, 11 Am. Crim. Rep. 169.

[1] Wharton, Ev. § 202; *Doe ex dem. Sutton* v. *Ridgeway*, 4 Barn. & Ald. 53; *Doe ex dem. Bamford* v. *Barton*, 2 Moody & R. 28; *Crispin* v. *Doglinoni*, 3 Swabey & T. 44, 32 L. J. Prob. N. S. 109, 8 L. T. N. S. 91, 11 Week. Rep. 500; *Lowenfeld* v. *Ditchett*, 114 App. Div. 56, 99 N. Y. Supp. 724.

Relationship is necessary where recital stands alone, but not when made credible by supporting testimony. *Rollins* v. *Atlantic City R. Co.* 73 N. J. L. 64, 62 Atl. 929; *Layton* v. *Kraft*, 111 App. Div. 842, 98 N. Y. Supp. 72; 22 Am. & Eng. Enc. Law, 2d ed. p. 644.

[2] 1 Wharton, Ev. §§ 234 et seq.

Where there is no kindred left, the rule is relaxed from necessity. *Scott* v. *Ratliffe*, 5 Pet. 81, 8 L. ed. 54; *Ringhouse* v. *Keever*, 49 Ill. 470.

[3] *Northrop* v. *Hale*, 76 Me. 309, 49

Family conduct, tacit recognition, disposition and devolution of property, is admissible, from which the opinion and belief of the family as to the fact in question may be inferred;[4] and if the father is shown to have brought up the party as his legitimate son, this amounts to a daily assertion that the son is legitimate.[5]

§ 236. Admissible to prove birth and death.—The same reason requires the reception of duly authenticated family reputation to prove time of birth, and place and time of death of the family members.[1] A party may prove his age by his own testimony based on family reputation.[2] The duly authenticated correspondence of deceased members of the family is admissible in proof of pedigree.[3]

§ 237. Writings of deceased relative admissible to prove pedigree.—Written declarations of deceased relatives, when not self-serving, are admissible for the same purposes. Among such writings we may notice a provision in a will by a deceased person recognizing or ignoring certain persons as his children; descriptions in a will; an acknowledgment of a deed by certain persons styling themselves heirs

Am. Rep. 615; *Re Robb,* 37 S. C. 19, 16 S. E. 241.

[4] *Metheny* v. *Bohn,* 160 Ill. 263, 43 N. E. 380; *Denoyer* v. *Ryan,* 24 Fed. 77.

[5] *Re Garr,* 31 Utah, 57, 86 Pac. 757.

See *Re Heaton,* 135 Cal. 385, 67 Pac. 321, 139 Cal. 237, 73 Pac. 186; *Alston* v. *Alston,* 114 Iowa, 29, 86 N. W. 55; *Barnum* v. *Barnum,* 42 Md. 251; *Jackson* v. *Jackson,* 80 Md. 176, 30 Atl. 752.

[1] Wharton, Ev. § 208; *Dupont* v. *Davis,* 30 Wis. 170.

[2] *Hill* v. *Eldridge,* 126 Mass. 234; *Cherry* v. *State,* 68 Ala. 29.

Testimony as to the age of a witness based on statements made by his mother is admissible, though no reason is given for not summoning her. *Bain* v. *State,* 61 Ala. 75.

[3] *Elliott* v. *Peirsol,* 1 Pet. 328, 7 L. ed. 164; *Reaves* v. *Reaves,* 15 Okla. 240, 2 L.R.A.(N.S.) 353, 82 Pac. 490.

at law; recitals in family settlements; recitals of consistent antecedent deeds and wills; and, generally, recitals in a deed executed by a member of the family.[1]

§ 237a. Declarations of feeling and intention admissible.—*Ex parte* declarations of a deceased person as to his physical or mental condition, purpose, and intent are called "natural evidence," and are admissible as original evidence.

So, declarations of an intention to commit suicide are admissible upon the trial of one charged with murdering deceased.[1]

Likewise as to existing bodily sensations.[2] Statements made by a person on leaving home, on a train, are admissible to show purpose to leave.[3]

§ 238. Conduct of deceased relatives.—Conduct of deceased relatives as to their attitude to and recognition of persons claiming to be in the same family is receivable on issues involving family history, and the manner in which a person has been brought up and treated is of peculiar weight.[1]

[1] See Wharton, Ev. § 210.

[1] *Com.* v. *Trefethen,* 157 Mass. 180, 24 L.R.A. 235, 31 N. E. 961; 3 Bentham, Judical Ev. 70; *Woodbury* v. *Obear,* 7, Gray, 467.

[2] *Wilson* v. *Granby,* 47 Conn. 59, 36 Am. Rep. 51; *Travellers' Ins. Co.* v. *Mosley,* 8 Wall. 397, 19 L. ed. 437.

[3] *Bateman* v. *Bailey,* 5 T. R. 512; *Rawson* v. *Haigh,* 9 J. B. Moore, 217, 2 Bing. 99, 1 Car. & P. 77; *Lake Shore & M. S. R. Co.* v. *Herrick,* 49 Ohio St. 25, 29 N. E. 1052.

As to the admission of such evidence in criminal cases, see *Howard* v. *State,* 23 Tex. App. 266, 5 S. W. 231; *Com.* v. *Austin,* 97 Mass. 595; *Com.* v. *Abbott,* 130 Mass. 472; *Com.* v. *Cotton,* 138 Mass. 500; *Mize* v. *State,* 36 Ark. 653; *Hunter* v. *State,* 40 N. J. L. 495; *Schlemmer* v. *State,* 51 N. J. L. 23, 15 Atl. 836; *Cluverius* v. *Com.* 81 Va. 787; *State* v. *Howard,* 32 Vt. 380; *State* v. *Dickinson,* 41 Wis. 299, 2 Am. Crim. Rep. 1; *State* v. *Beaudet,* 53 Conn. 536, 5 Am. Rep. 155, 4 Atl. 237, 7 Am. Crim. Rep. 84; *Walker* v. *State,* 63 Ala. 105.

Declarations of workmen on quitting work on silk that a physician told them contained arsenic, in an action against the physician for slander, brought by their employer. *Elmer* v. *Fessenden,* 151 Mass. 359, 5 L.R.A. 724, 22 N. E. 635, 24 N. E. 208.

[1] *Re Garr,* 31 Utah, 57, 86 Pac. 757; 1 Wharton, Ev. § 201.

§ 239. Declarations from which relationship may be inferred.—In order to prove relationship, it is admissible to introduce declarations of deceased relatives as to marriages and deaths.[1] Family incidents tending to fix points of pedigree, are in like manner admissible.[2]

§ 240. Declarations; ante et post litem motam.—The general rule as to the declarations of deceased relatives is that they must have been made *ante litem motam.*[1] But this limitation has been doubted [2] on the ground of the serious mischief of excluding the only species of evidence which circumstances beyond the control of the parties have left to them. However, this limitation is recognized in the great majority of cases,[3] but to some it has been limited "to the very point in respect of which the declarations are sought to be used." [4]

[1] *Moffit* v. *Witherspoon,* 32 N. C. (10 Ired. L.) 192; *Berkeley Peerage Case,* 4 Camp. 409, 420, 14 Revised Rep. 782, 11 Eng. Rul. Cas. 310; Taylor, Ev. § 580; *Henderson* v. *Cargill,* 31 Miss. 367; *Pickens's Estate,* 163 Pa. 14, 25 L.R.A. 477, 29 Atl. 875.

Declarations of a decedent, contained in letters written by him, are competent to show marriage. *Kansas P. R. Co.* v. *Miller,* 2 Colo. 442; *Chambers* v. *Morris,* 159 Ala. 606, 48 So. 687; *Kirby* v. *Boaz,* — Tex. Civ. App. —, 121 S. W. 223; *Taylor* v. *McCowen,* 154 Cal. 798, 99 Pac. 351; *Fearnley* v. *Fearnley,* 44 Colo. 417, 98 Pac. 819; *Morse* v. *Whitcomb,* 54 Or. 412, 135 Am. St. Rep. 832, 102 Pac. 788, 103 Pac. 775.

[2] *Sullivan* v. *Solis,* 52 Tex. Civ. App. 464, 114 S. W. 456; *Wall* v. *Lubbock,* 52 Tex. Civ. App. 405, 118 S. W. 886.

[1] *Monkton* v. *Atty. Gen.* 2 Russ. & M. 160.

[2] *Berkeley Peerage Case,* 4 Campb. 408, 14 Revised Rep. 782, 11 Eng. Rul. Cas. 310; *Boudereau* v. *Montgomery,* 4 Wash. C. C. 190, Fed. Cas. No. 1,694.

[3] *Freeman* v. *Phillips,* 4 Maule & S. 486, 16 Revised Rep. 524; *Dysart Peerage Case,* L. R. 6 App. Cas. 489, 503; *Stein* v. *Bowman,* 13 Pet. 209, 220, 10 L. ed. 129, 134; *Collins* v. *Grantham,* 12 Ind. 440; *DeHaven* v. *DeHaven,* 77 Ind. 236; *People* v. *Fulton F. Ins. Co.* 28 Wend. 204; 210; *Nehring* v. *McMurrian,* 94 Tex. 45, 57 S. W. 943.

[4] *Shedden* v. *Patrick,* 2 Swabey & T. 170, 188, 30 L. J. Prob. N. S. 217, 6 Jur. N. S. 1163, 3 L. T. N. S. 592, 9 Week. Rep. 285; *Elliott* v. *Peirsol,* 1 Pet. 328, 7 L. ed. 164.

It should be held in mind that even where the declaration is itself *ante litem motam,* the repetition of it in court is always *post litem motam,* so that the evidence takes shape under the influences which are declared fatal to its reception.[5]

It is to be observed that the evidentiary value of such declarations is their natural, spontaneous character, under the usual, normal conditions of family existence. The element to be avoided is bias on the part of the declarant. There can, therefore, be no objection to allowing the question to rest in the discretion of the trial court, according to the circumstances of each case as it may arise. As preliminary the trial judge would inquire as to the nature of the controversy threatened or existing; if bias was shown, the court would undoubtedly reject the declaration or limit it in his charge to the jury. Where no bias is shown, then the parties should not be deprived of the value of the only evidence that they may have upon the question.

§ 241. Declarant must be dead; qualifications of declarant.—As the declaration is only admissible because there is no better evidence of the fact sought to be proved, it is obvious that the declarant must be dead, for if living he must be produced; for if within the process of the court, his declarations, like the declarations of persons against interest, are inadmissible;[1] but it must also be observed that if he is deceased, the fact that there are living members of the same family who could be examined on the same point does not exclude his declarations.[2]

It is also obvious that the declarant must be shown to have possessed testimonial qualifications; hence his relationship, or

[5] 1 Wharton, Ev. § 213.

[1] *Pendrell* v. *Pendrell,* 2 Strange, 925; *Butler* v. *Mountgarret,* 6 Ir. C. L. Rep. 77, 7 H. L. Cas. 633, 11 Eng. Rul. Cas. 335; *Stegall* v. *Stegall,* 2 Brock 256, Fed. Cas. No. 13,351; *White* v. *Strother,* 11 Ala. 720.

[2] 1 Taylor, Ev. § 577.

the fact relied upon as giving him special knowledge, must be shown preliminary to the admission of the declarations.[3] Where the question arises between two families, it is sufficient if the declarant be shown to be related to one or the other, but not necessarily to both.[4]

§ 242. Ancient family records and memorials admissible.—Ancient family records or memorials are admissible to prove pedigree, provided always that the family treated them as authoritative and the parties making them are dead.[1]

§ 243. Inscriptions on tombstones, rings, etc., admissible.—For the same purpose it is competent to put in evidence inscriptions on tombstones,[1] on rings,[2] and on portraits, which, if preserved in a family, may be regarded as giving a family tradition to be received for what it is worth.[3]

§ 244. Charts of pedigree.—Charts of pedigree are likewise admissible under this exception, rather as showing the claims of the family, than what it was.[1] It also follows that where a family record that is admissible is lost, secondary evidence of the same is admissible.[2]

[3] *Fulkerson* v. *Holmes,* 117 U. S. 389, 29 L. ed. 915, 6 Sup. Ct. Rep. 780; *Thompson* v. *Woolf,* 8 Or. 454; *Young* v. *Shulenberg,* 165 N. Y. 385, 80 Am. St. Rep. 730, 59 N. E. 135; *Harland* v. *Eastman,* 107 Ill. 535; *Elder* v. *State,* 124 Ala. 69, 27 So. 305.

[4] *Monkton* v. *Atty. Gen.* 2 Russ. & M. 147; *Mann* v. *Cavanaugh,* 110 Ky. 776, 62 S. W. 854; *Sitler* v. *Gehr,* 105 Pa. 577, 592, 51 Am. Rep. 207.

[1] *Greenleaf* v. *Dubuque & S. C. R. Co.* 30 Iowa, 301; *Hood* v. *Beauchamp,* 8 Sim. 26.

[1] *Haslan* v. *Cron,* 19 Week. Rep. 969; *Davies* v. *Lowdes,* 6 Mann. & G. 525, 7 Scott, N. R. 193.

[2] *Vowles* v. *Young,* 13 Ves. Jr. 144, 9 Revised Rep. 154.

[3] *Vowles* v. *Young,* 13 Ves. Jr. 144, 9 Revised Rep. 154; *Davies* v. *Lowndes,* 6 Mann. & G. 525, 7 Scott, N. R. 193.

[1] *Hervey* v. *Hervey,* 2 W. Bl. 877.

[2] *Holmes* v. *Marden,* 12 Pick. 169; *Whitcher* v. *McLaughlin,* 115 Mass. 167.

§ 245. Proof of death; reputation.—The presumptions as to death will be discussed in later sections.[1] Death may also be shown by the continuous and abiding general reputation in the community to which the party belongs, no kindred being left,[2] and also by general belief in the family.[3]

But where reputation is offered as testimony, it must be general, and not limited or special with reference to the particular fact sought to be proved.[4]

§ 246. Reputation of marriage insufficient to sustain penal charge.—Reputation in a community, when accompanied by cohabitation, is one of the facts by which marriage may be proved. But of itself it is not sufficient proof of marriage to sustain a penal charge.[1] Hence, marriage must be shown to be actual as distinguished from reputation of mar-

[1] Post, §§ 809–814.

[2] *Doe ex dem. Banning* v. *Griffin*, 15 East, 293, 13 Revised Rep. 474; *Jackson ex dem. People* v. *Etz*, 5 Cow. 314; *Pancoast* v. *Addison*, 1 Harr. & J. 350, 2 Am. Dec. 520; *Raborg* v. *Hammond*, 2 Harr. & G. 42; *Ringhouse* v. *Keever*, 49 Ill. 470; *Scheel* v. *Eidman*, 77 Ill. 301; *Buntin* v. *Doe*, 1 Blackf. 26; *Anderson* v. *Parker*, 6 Cal. 197; *Eaton* v. *Tallmadge*, 24 Wis. 217; *Ewing* v. *Savary*, 3 Bibb. 235. See *Re Hall*, 1 Wall. Jr. 85, Fed. Cas. No. 5,924; *Re Benham*, L. R. 4 Eq. 416, 36 L. J. Ch. N. S. 502, 16 L. T. N. S. 349, 15 Week. Rep. 741; *Secrist* v. *Green*, 3 Wall. 744, 18 L. ed. 153. See also *Scott* v. *Ratliffe*, 5 Pet. 81, 8 L. ed. 54; *Matthews* v. *Simmons*, 49 Ark. 468, 5 S. W. 797; *Re Williams*, 128 Cal. 552, 79 Am. St. Rep. 67, 61 Pac. 670; *Welch* v. *New York, N. H. & H. R. Co.* 182 Mass. 84, 64 N. E. 695; *Arents* v. *Long Island R. Co.* 156 N. Y. 1, 50 N. E. 422; *Flowers* v. *Haralson*, 6 Yerg. 496; *Carter* v. *Montgomery*, 2 Tenn. Ch. 216.

[3] *Doe ex dem. Banning* v. *Griffin*, 15 East, 293, 13 Revised Rep. 474.

[4] *Shutte* v. *Thompson*, 15 Wall. 161, 21 L. ed. 123; *Stein* v. *Bowman*, 13 Pet. 209, 10 L. ed. 129; *Ellicott* v. *Pearl*, 10 Pet. 435, 9 L. ed. 485; *Northrop* v. *Hale*, 76 Me. 311, 49 Am. Rep. 615; 1 Greenl. Ev. § 103; *Clark* v. *Owens*, 18 N. Y. 434.

[1] *Wood* v. *State*, 62 Ga. 406; *Forney* v. *Hallacher*, 8 Serg. & R. 159, 11 Am. Dec. 590; *Bates* v. *State*, 9 Ohio, C. C. N. S. 273, 29 Ohio, C. C. 189; *Hearne* v. *State*, 50 Tex. Crim. Rep. 431, 97 S. W. 1050; *Morris* v. *Miller*, 4 Burr. 2057.

riage, in prosecutions for bigamy and polygamy,[2] adultery,[3] criminal conversation;[4] and some courts apply the matter broadly to all criminal matters.[5]

[2] *Johnson* v. *State,* 60 Ark. 308, 30 S. W. 31; *State* v. *Dooris,* 40 Conn. 145; *State* v. *Matlock,* 70 Iowa, 229, 30 N. W. 495; *State* v. *White,* 19 Kan. 445, 27 Am. Rep. 137; *Rice* v. *State,* 7 Humph. 14; *State* v. *Edmiston,* 160 Mo. 500, 61 S. W. 193.

It should be noted that admissions of marriage are sufficient in bigamy and polygamy. *Miles* v. *United States,* 103 U. S. 304, 26 L. ed. 481; *Williams* v. *State,* 54 Ala. 131, 25 Am. Rep. 665; *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; *Wolverton* v. *State,* 16 Ohio, 173, 47 Am. Dec. 373.

Also some cases hold that admission or reputation, when accompanied by cohabitation and holding out, is sufficient to sustain the charge. *Com.* v. *Murtagh,* 1 Ashm. (Pa.) 272; *Warner* v. *Com.* 2 Va. Cas. 95; *Cayford's Case,* 7 Me. 57.

But other cases hold that proof of cohabitation and holding out must also be accompanied by admissions, and are not sufficient in themselves. *Dumas* v. *State,* 14 Tex. App. 464, 46 Am. Rep. 241; *People* v. *Imes,* 110 Mich. 250, 68 N. W. 157; *State* v. *Johnson,* 12 Minn. 476, Gil. 378, 93 Am. Dec. 241; *State* v. *Cooper,* 103 Mo. 266, 15 S. W. 327; *McCombs* v. *State,* 50 Tex. Crim. Rep. 490, 9 L.R.A. (N.S.) 1036, 123 Am. St. Rep. 855, 99 S. W. 1017, 14 A. & E. Ann. Cas. 72; *State* v. *Gonce,* 79 Mo. 600, 4 Am. Crim. Rep. 68; *State* v. *Hughes,* 35 Kan. 626, 57 Am. Rep. 195, 12 Pac. 28; *Bates* v. *State,* 9 Ohio, C. C. N. S. 273, 29 Ohio, C. C. 189.

[3] *State* v. *Winkley,* 14 N. H. 480; *State* v. *Annice,* N. Chip. (Vt.) 9; *Ham's Case,* 11 Me. 391. But see *Com.* v. *Holt,* 121 Mass. 61.

[4] *Birt* v. *Barlow,* 1 Dougl. K. B. 171, 174; *Hemmings* v. *Smith,* 4 Dougl. K. B. 33.

In criminal conversation admissions are sufficient. *Rigg* v. *Curgenven,* 2 Wils. 395, 399; *Thorndell* v. *Morrison,* 25 Pa. 326, 328; *Hallett* v. *Collins,* 10 How. 174, 13 L. ed. 376; *Catherwood* v. *Caslon,* 13 Mees. & W. 261, Car. & M. 431, 13 L. J. Exch. N. S. 334, 8 Jur. 1076; *People* v. *Anderson,* 26 Cal. 130; *Dumaresly* v. *Fishly,* 3 A. K. Marsh. 368; *Perry* v. *Lovejoy,* 49 Mich. 529, 14 N. W. 485; *State* v. *Winkley,* 14 N. H. 480; *Keppler* v. *Elser,* 23 Ill. App. 643; *Snowman* v. *Mason,* 99 Me. 490, 59 Atl. 1019; *Hill* v. *Pomelear,* 72 N. J. L. 528, 63 Atl. 269; *Stark* v. *Johnson,* 43 Colo. 243, 16 L.R.A.(N.S.) 674, 127 Am. St. Rep. 114, 95 Pac. 930, 15 A. & E. Ann. Cas. 868.

[5] *Cook* v. *State,* 11 Ga. 53, 61, 56 Am. Dec. 410; *West* v. *State,* 1 Wis. 209, 218; *Dove* v. *State,* 3 Heisk. 348, 355.

The substantive reason for this rule is that courts interpret all acts in favor of innocence, and will not presume that a cohabitation is illicit, if, by presuming marriage, it would be lawful; yet, in prosecutions for adultery and other marital crimes, such presumption would conflict with the general presumption of innocence of the crime charged. The essentials of a valid marriage are in all cases the same, the distinction being in the mode of proof only.[6]

§ 247. Correspondence showing relation of parties; adultery.—Reasoning from the analogy for suits for damages arising to the husband against third parties, for adultery with the wife, it would seem, in criminal prosecutions for adultery, admissible, in order to show the relations of the husband and wife prior to the alleged adultery, not only to give in evidence their correspondence with each other, but with third parties.[1] As a preliminary, however, it should be shown, independent of the date of the letters, that they were written before there existed any suspicion of misconduct.[2] Likewise, letters written by the paramour, and read by the accused, are admissible to show opportunity or desire,[3] but letters not so read, even though written, are not admissible.[4]

[6] *Bailey* v. *State,* 36 Neb. 808, 55 N. W. 241.

[1] *Trelawney* v. *Colman,* 2 Starkie, 191, 1 Barn. & Ald. 90, 18 Revised Rep. 438; *Willis* v. *Bernard,* 8 Bing. 376, 1 Moore & S. 584, 5 Car. & P. 342, 1 L. J. C. P. N. S. 118; *Winter* v. *Wroot,* 1 Moody & R. 404; 1 Taylor, Ev. § 520; *Long* v. *Booe,* 106 Ala. 570, 17 So. 716; *Horner* v. *Vance,* 93 Wis. 352, 67 N. W. 720.

[2] *Houliston* v. *Smyth,* 2 Car. & P. 24, 3 Bing. 127, 10 J. B. Moore, 482, 3 L. J. C. P. 200, 28 Revised Rep. 609. See *Wilton* v. *Webster,* 7 Car. & P. 198; *Trelowney* v. *Coleman,* 1 Barn. & Ald. 90, 2 Starkie, 191, 18 Revised Rep. 438; 2 Wharton, Ev. § 1154.

[3] *Razor* v. *Razor,* 149 Ill. 621, 36 N. E. 963; *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; *State* v. *Thompson,* 133 Iowa, 741, 111 N. W. 319; *United States* v. *Griego,* 11 N. M. 392, 72 Pac. 20; *State* v. *Eggleston,* 45 Or. 346, 77 Pac. 738.

[4] *People* v. *Montague,* 71 Mich. 447, 39 N. W. 585.

V. Disserving Declarations of Deceased Persons.

§ 248. Disserving declarations.—Disserving declarations of deceased persons are admissible at common law, even in suits in which neither such deceased persons nor those claiming under them were or are parties.[1]

This is another of the exceptions to the hearsay rule, arising, as all such exceptions do, out of the necessity of the case. Death is always the conceded sufficiency.[2] Being against interest seems to supply that sanction which, after death, is accepted as a substitute for an oath.[3] But this does not dispense with the requirement that, as a preliminary to its in-

[1] *Higham* v. *Ridgway,* 10 East, 109, 10 Revised Rep. 235, 11 Eng. Rul. Cas. 266; *Middleton* v. *Melton,* 10 Barn. & C. 317; *Reg.* v. *Birmingham,* 1 Best & S. 768; *Reg.* v. *Exeter,* 10 Best & S. 433, 38 L. J. Mag. Cas. N. S. 126, L. R. 4 Q. B. 341, 20 L. T. N. S. 693, 17 Week. Rep. 850; *Davies* v. *Humphreys,* 6 Mees. & W. 153, 9 L. J. Exch. N. S. 263, 4 Jur. 250, 21 Eng. Rul. Cas. 632; *Doe ex dem. Shirreff* v. *Coulthred,* 7 Ad. & El. 235, 2 Nev. & P. 165, W. W. & D. 477, 7 L. J. Q. B. N. S. 52; *DeBode's Case,* 8 Q. B. 208; *Short* v. *Lee,* 2 Jac. & W. 464; *Sussex Peerage Case,* 11 Clark & F. 103; *Prescott* v. *Hayes,* 43 N. H. 593; *Hicks* v. *Cram,* 17 Vt. 449; *Litchfield Iron Co.* v. *Bennett,* 7 Cow. 234; *White* v. *Chouteau,* 1 E. D. Smith, 498; *Livingston* v. *Arnoux,* 56 N. Y. 518; *St. Clair* v. *Shale,* 20 Pa. 108; *Stair* v. *York Nat. Bank,* 55 Pa. 364, 93 Am. Dec. 759; *Taylor* v. *Gould,* 57 Pa. 152; *Bird* v. *Hueston,* 10 Ohio St. 418; *Blattner* v. *Weis,* 19 Ill. 246; *Peace* v. *Jenkins,* 32 N. C. (10 Ired. L.) 355; *Coleman* v. *Frazier,* 4 Rich. L. 146, 53 Am. Dec. 727; *Foster* v. *Brooks,* 6 Ga. 287; *Ringo* v. *Richardson,* 53 Mo. 385; *Rulofson* v. *Billings,* 140 Cal. 452, 74 Pac. 35; *Luke* v. *Koenen,* 120 Iowa, 103, 94 N. W. 278; *Royal* v. *Chandler,* 79 Me. 265, 1 Am. St. Rep. 305, 9 Atl. 615; *Osgood* v. *Coates,* 1 Allen, 77; *Baker* v. *Taylor,* 54 Minn. 71, 55 N. W. 823; *Whitfield* v. *Whitfield,* 40 Miss. 352; *Jones* v. *Henry,* 84 N. C. 320, 37 Am. Rep. 624; *Putnam* v. *Fisher,* 52 Vt. 191, 36 Am. Rep. 746; *Bollinger* v. *Wright,* 143 Cal. 292, 76 Pac. 1108; *Smith* v. *Moore,* 142 N. C. 277, 7 L.R.A. (N.S.) 684, 55 S. E. 275; *Lyon* v. *Ricker,* 141 N. Y. 225, 36 N. E. 189. See *Allegheny* v. *Nelson,* 25 Pa. 332.

[2] *Fitch* v. *Chapman,* 10 Conn. 11.

[3] *Lalor* v. *Lalor,* Ir. L. R. 4 C. L. 681; *Addams* v. *Seitzinger,* 1 Watts & S. 243; *Humes* v. *O'Bryan,* 74 Ala. 64.

troduction, the disserving interest of such declaration must be shown by independent evidence.[4]

§ 249. Declarations based on hearsay.—Such declarations against interest are admissible against third parties, even though the declarant received the facts on hearsay, provided the person from whom the hearsay comes was competent to speak.[1]

§ 250. Declarations against pecuniary interest; criminal cases.—It is essential that such declarations when made should have been self-disserving,[1] and against the pecuniary interest of the declarant.[2]

While it has always been declared that the interest must be pecuniary,[3] yet late cases imply that such declarations may be admitted in criminal cases. Thus, declarations which would be adverse to the social standing of the party have been held sufficient,[4] and even where it would subject the declarant, if living, to a penalty.[5]

[4] *Davies* v. *Morgan*, 1 Cromp. & J. 591, 1 Tyrw. 457, 9 L. J. Exch. 153; *Hunnicutt* v. *Peyton*, 102 U. S. 333, 26 L. ed. 113; *Kilburn* v. *Ritchie*, 2 Cal. 145, 56 Am. Dec. 326; *Vrooman* v. *King*, 36 N. Y. 477.

The declarant should be identified. *Smith* v. *Williams*, 89 Ga. 9, 32 Am. St. Rep. 67, 15 S. E. 130; *Arthur* v. *Arthur*, 38 Kan. 691, 17 Pac. 187. See *Putnam* v. *Harris*, 193 Mass. 58, 78 N. E. 747.

[1] *Beard* v. *Talbot*, Cooke (Tenn.) 142; *Crease* v. *Barrett*, 1 Cromp. M. & R. 919, 5 Tyrw. 458, 4 L. J. Exch. N. S. 297. See also *Hueni* v. *Freehill*, 125 Ill. App. 345.

[1] See note to § 249, supra.

[2] *Reg.* v. *Worth*, 4 Q. B. 132, 3 Gale & D. 376; *Reg.* v. *Birmingham*, 1 Best & S. 768; *Smith* v. *Blakey*, L. R. 2 Q. B. 326, 8 Best & S. 157, 36 L. J. Q. B. N. S. 156, 15 Week. Rep. 492; *Orrett* v. *Corser*, 21 Beav. 52, 1 Jur. N. S. 882, 3 Week. Rep. 604; *Richards* v. *Gogarty*, Ir. Rep. 4 C. L. 300; *Allegheny* v. *Nelson*, 25 Pa. 332; *Cruger* v. *Daniel*, McMull. Eq. 157; *Poorman* v. *Miller*, 44 Cal. 269; *Sussex Peerage Case*, 11 Clark & F. 85, 8 Jur. 793; Powell, Ev. 4th ed. 196; *Davis* v. *Lloyd*, 1 Car. & K. 276.

[3] *Davis* v. *Lloyd*, 1 Car. & K. 276; *Mahaska County* v. *Ingalls*, 16 Iowa, 81.

[4] *State* v. *Alcorn*, 7 Idaho, 599, 97 Am. St. Rep. 252, 64 Pac. 1014.

[5] *Coleman* v. *Frazier*, 4 Rich. L.

One author [6] argues very ingeniously for the admission of such declarations in criminal cases, and says that in the Sussex Peerage Case, "a backward step was taken, and an arbitrary limit put upon the rule."

The basis of the rule is the death of the declarant, and such declarations could only be evidence against the declarant.[7] The author by no means convinces against the reason in Lyon v. State, 22 Ga. 399, and that is a sufficient answer to the observation that if we should refuse to admit an authenticated confession (which is admitted by the French courts, as seen in the Dreyfus trial), we might not allow an innocent man to prove his innocence. Allowing proof of innocence by the self-assumed blame of one beyond the reach of the law would soon disorganize criminal procedure. And to admit declarations as affirmative proof of the guilt of some one other than the declarant would be subversive of constitutional principles. The learned author seems to have overlooked the fact that a removal of the limit as to penal interest would result in the manufacture of evidence both for and against the accused.

VI. Exception as to Business Entries of Deceased Persons.

§ 251. Entries by deceased or absent persons in the course of business may be evidence.—It is settled that the memoranda or book entries of an officer, agent, or business man, made when in the due performance of his duties, are evidence, after his death, or after he has passed out of the range of process, of the truth of such entries, subject always to be excluded if it appear that in making the entries he was not registering, but manufacturing current facts; and provided

146, 53 Am. Dec. 727; *Scott County*, v. *Fluke*, 34 Iowa, 317.

[6] 2 Wigmore, Ev. § 1476.

[7] *Tong's Case*, J. Kelyng, 18.

such entries were original, contemporaneous, and in the lines of the writer's duty.[1]

They are admitted from necessity,[2] owing to the unavailability of the witness. It is error to admit such testimony until a proper foundation has been laid.[3]

Generally, such evidence is admitted by statutory requirements. When this is the case, such entries cannot be received until the statutory requirements concerning their admission have been complied with.[4]

Where the party or his clerk who made the entry is dead, after proper preliminary proof, the books are admitted on proof of the handwriting of the entrant.[5]

[1] 2 Best, Ev. § 501; *Webster* v. *Webster,* 1 Fost. & F. 401; *Price* v. *Torrington,* 1 Salk. 285; *Doe ex dem. Patteshall* v. *Turford,* 3 Barn. & Ad. 890, 1 L. J. K. B. N. S. 262; *Rawlins* v. *Rickards,* 28 Beav. 370; *Bright* v. *Legerton,* 2 De G. F. & J. 606, 30 L. J. Ch. N. S. 338, 7 Jur. N. S. 559, 3 L. T. N. S. 713, 9 Week. Rep. 239; *Nicholls* v. *Webb,* 8 Wheat. 326, 5 L. ed. 628; *James* v. *Wharton,* 3 McLean, 492, Fed. Cas. No. 7,187; *Beale* v. *Pettit,* 1 Wash. C. C. 241, Fed. Cas. No. 1,158; *Cass* v. *Bellows,* 31 N. H. 501, 64 Am. Dec. 347; *Welsh* v. *Barrett,* 15 Mass. 380; *Union Bank* v. *Knapp,* 3 Pick. 96, 15 Am. Dec. 182; *Porter* v. *Judson,* 1 Gray, 175; *Walker* v. *Curtis,* 116 Mass. 98; *Chenango Bridge Co.* v. *Lewis,* 63 Barb. 111; *Livingston* v. *Arnoux,* 56 N. Y. 518; *Philadelphia Bank* v. *Officer,* 12 Serg. & R. 49; *Ridgway* v. *Farmer's Bank,* 12 Serg. & R. 256, 14 Am. Dec. 681; *Bland* v. *Warren,* 65 N. C. 372; *Field* v. *Boynton,* 33 Ga. 239; *Clemens* v. *Patton,* 9 Port. (Ala.) 289; *Stewart* v. *Conner,* 9 Ala. 803; *Mayson* v. *Beazley,* 27 Miss. 106.

[2] *Livingston* v. *Arnoux,* 56 N. Y. 507.

[3] *Norberg* v. *Plummer,* 58 Neb. 410, 78 N. W. 708; *Atkinson* v. *Burt,* 65 Ark. 316, 45 S. W. 987, 53 S. W. 404; *Talbotton R. Co.* v. *Gibson,* 106 Ga. 229, 32 S. E. 150.

[4] *Byerts* v. *Robinson,* 9 N. M. 427, 54 Pac. 932; *Brown* v. *Warner,* 116 Wis. 358, 93 N. W. 17.

[5] *State Bank* v. *Brown,* 184 N. Y. 517, 76 N. E. 1109; *Owens* v. *Adams,* 1 Brock. 72, Fed. Cas. No. 10,633; *Everly* v. *Bradford,* 4 Ala. 371; *Grant* v. *Cole,* 8 Ala. 519; *Hunter* v. *Smith,* 6 Mart. N. S. 351; *Leighton* v. *Manson,* 14 Me. 208; *King* v. *Maddux,* 7 Harr. & J. 467; *Union Bank* v. *Knapp,* 3 Pick. 96, 15 Am. Dec. 181; *Odell* v. *Culbert,* 9 Watts & S. 66, 42 Am. Dec. 317.

§ 252. So of counsel and other officers.—Notes of deceased counsel of a former trial, and of counsel or other officers who are out of the reach of the process of the court,[1] are admissible to prove any relevant fact.[2] Courts have admitted a bank messenger's entries in his book, recording notices given him as messenger, where he has absconded, or is, from any cause, out of the reach of process.[3]

§ 253. Entries of deceased notaries.—Where statutes require notaries public to make certain entries, they also generally provide as to the weight of such entries as evidence. However, even in the absence of a statute, entries in the books of deceased notaries, when made in the course of their business, and similar entries made in their books by deceased clerks, are admissible.[1]

VII. Exception as to General Reputation When Such is Material.

§ 254. General reputation, when admissible.—Whenever it is material to bring home to a party cognizance of a particular fact, it has been held admissible, under circum-

[1] 1 Wharton, Ev. § 249.

[2] *Alter* v. *Berghaus,* 8 Watts, 77; *Hay* v. *Kramer,* 2 Watts & S. 137; *Flanagin* v. *Leibert,* Brightly (Pa.) 61. But see *Love* v. *Payton,* 1 Overt. 255; *Union Bank* v. *Knapp,* 3 Pick. 96, 15 Am. Dec. 182; *Moffat* v. *Moffat,* 10 Bosw. 468.

[3] *Welsh* v. *Barrett,* 15 Mass. 380; *North Bank* v. *Abbot,* 13 Pick. 465, 25 Am. Dec. 334; *Shove* v. *Wiley,* 18 Pick. 558; *Washington Bank* v. *Prescott,* 20 Pick. 339; *State Bank* v. *Brown,* 184 N. Y. 517, 76 N. E. 1109.

[1] *Poole* v. *Dicas,* 1 Bing. N. C. 649, 1 Scott, 600, 1 Hodges, 162, 7 Car. & P. 79, 4 L. J. C. P. N. S. 196; *Homes* v. *Smith,* 16 Me. 181; *Halliday* v. *McDougall,* 20 Wend. 81; *Gawtry* v. *Doane,* 51 N. Y. 90; *Bank of Wilmington* v. *Cooper,* 1 Harr. (Del.) 10; *Wetherall* v. *Claggett,* 28 Md. 465; *Bodley* v. *Scarborough,* 5 How. 729; *Duncan* v. *Watson,* 2 Smedes & M. 121. But see *Williamson* v. *Patterson,* 2 M'Cord, L. 132; *Welsh* v. *Barrett,* 15 Mass. 380.

stances to be presently noticed, to show that such fact was at the time generally known and talked about in the neighborhood where the party in question resided, or was a matter of common reputation in the business community to which both parties belonged.[1] It is on this ground that proof of notorious usage has been received,[2] as well as evidence of character, when character is introduced as charging another with notice.[3] Notoriety of a man's intemperance, therefore, is admissible to impute knowledge of such intemperance to a person selling him liquor.[4] Hence, when the issue was whether a person to whom spirituous liquors was sold was an habitual drunkard, evidence of his reputation in this respect was held admissible.[5] And when *scienter* is in issue, as in a trial for receiving stolen goods, the reputation of the alleged thief is admissible; and he may be shown by the defense to have the

[1] *Sheen* v. *Bumpstead,* 2 Hurlst. & C. 193, 32 L. J. Exch. N. S. 271, 10 Jur. N. S. 242, 8 L. T. N. S. 832, 11 Week. Rep. 734; *Lee* v. *Kilburn,* 3 Gray, 594; *Benoist* v. *Darby,* 12 Mo. 196; *Ward* v. *Herndon,* 5 Port. (Ala.) 382; *Jones* v. *Hatchett,* 14 Ala. 743; *Stallings* v. *State,* 33 Ala. 425; 1 Wharton, Ev. § 254. See, however, *Bradbury* v. *Bardin,* 34 Conn. 452; and *Lockhart* v. *Jelly,* 19 L. T. N. S. 659. See also *Walker* v. *Moors,* 122 Mass. 504; *Reg.* v. *Rowton,* Leigh & C C. C. 520, 34 L. J. Mag. Cas. N. S. 57, 11 Jur. N. S. 325, 11 L. T. N. S. 745, 13 Week. Rep. 436, 10 Cox, C. C. 25; *Pickens* v. *State,* 61 Miss. 566; *Jackson* v. *Jackson,* 82 Md. 17, 34 L.R.A. 773, 33 Atl. 317; *State* v. *Turner,* 36 S. C. 534, 539, 15 S. E. 602; *State* v. *Marks,* 16 Utah, 204, 51 Pac. 1089.

[2] The question of notorious usage generally arises in quasi criminal matters, such as indictments for obstructing a highway, or highway boundaries in dispute, where the defense offers usage and reputation as a defense. 1 Wharton, Ev. § 252. See *State* v. *Fitzsimon,* 18 R. I. 236, 49 Am. St. Rep. 766, 27 Atl. 446, 9 Am. Crim. Rep. 343; *Daniels* v. *People,* 21 Ill. 439; *Dimon* v. *People,* 17 Ill. 416; *State* v. *Kendall,* 54 S. C. 192, 32 S. E. 300; *Dobson* v. *State,* — Tex. Crim. Rep. —, 49 S. W. 78; *Com.* v. *Noxon,* 121 Mass. 42.

[3] Supra, § 58.

[4] *Atkins* v. *State,* 60 Ala. 45.

And on a question of damages for death of deceased caused by intoxication, as to admissibility of proof of habits of intoxication, see *Brockway* v. *Patterson,* 72 Mich. 122, 1 L.R.A. 708, 40 N. W. 192.

[5] *Adams* v. *State,* 25 Ohio St. 584, 2 Am. Crim. Rep. 584.

reputation of being a regular and fair dealer in the article received.[6] And common rumor that a party is guilty of a crime is held admissible, in connection with other criminatory evidence, as part of the evidence for the defense in actions of malicious prosecution.[7] It has been allowed on a trial for attempting to produce a miscarriage by administering ergot, to prove that ergot was popularly believed to produce miscarriage, the object being to explain the intent.[8]

And it has been allowed as a prima facie case, to prove the existence of a corporation by general reputation.[9] So, in rape, it has been held that the bad reputation in the community of the prosecutrix for chastity is competent as tending to show that the evidence of one of consent is insufficient.[10]

[6] *Com.* v. *Gazzolo,* 123 Mass. 220, 25 Am. Rep. 79.

In all criminal prosecutions, it is now the general rule that proof of good character may be given in evidence for the defense. *People* v. *Casey,* 53 Cal. 360; *State* v. *Deuel,* 63 Kan. 811, 66 Pac. 1037.

[7] *Pullen* v. *Glidden,* 68 Me. 559, *McIntire* v. *Levering,* 148 Mass. 546, 2 L.R.A. 517, 12 Am. St. Rep. 594, 20 N. E. 191; *Rosenkrans* v. *Barker,* 115 Ill. 331, 56 Am. Rep. 169, 3 N. E. 93; *Bacon* v. *Towne,* 4 Cush. 217; 3 Sutherland, Damages, p. 708; *Israel* v. *Brooks,* 23 Ill. 575.

[8] *Carter* v. *State,* 2 Ind. 617.

[9] See statutes of the various states providing that in criminal matters, such as forging a bank bill, or crimes against a corporation, general reputation is sufficient to prove the existence of a corporation. *Lakeside Ditch Co.* v. *Crane,* 80 Cal. 181, 22 Pac. 76; *Tipton Fire Co.* v. *Barnheisel,* 92 Ind. 88; *Swartwout* v. *Michigan Air Line R. Co.* 24 Mich. 389.

[10] *Shields* v. *State,* 32 Tex. Crim. Rep. 498, 23 S. W. 893.

"What good purpose could such proof subserve? Explain the conduct of appellant towards prosecutrix. Men take liberties with fallen women without intending rape, while they would not with chaste ladies." *Shields* v. *State,* 32 Tex. Crim. Rep. 498, 502, 23 S. W. 893; *Coates* v. *State,* 7 Am. Crim. Rep. 585, and note, 50 Ark. 330, 7 S. W. 304; *McQuirk* v. *State,* 84 Ala. 435, 5 Am. St. Rep. 381, 4 So. 775; *Shirwin* v. *People,* 69 Ill. 55, 1 Am. Crim. Rep. 650; *State* v. *Hollenbeck,* 67 Vt. 34, 30 Atl. 696; *People* v. *Shea,* 125 Cal. 151, 57 Pac. 885; *Rice* v. *State,* 35 Fla. 236, 48 Am. St. Rep. 245, 17 So. 286; *Horbach* v. *State,* 43 Tex. 242, 1 Am. Crim. Rep. 330; *Com.* v. *Harris,* 131 Mass. 336; *State* v. *Daniel,* 87 N. C. 507; *Woods* v. *People,* 55 N. Y. 515, 14 Am. Rep. 309.

§ 255. General reputation not admissible to prove facts.—Evidence of general reputation, in the cases cited in illustration in the preceding section, is received only as a mode of proving the condition of a particular person's mind toward or as to a certain issue.

General reputation is inadmissible to prove any objective fact,[1] unless general reputation is, in itself, an issue, because general reputation arising from the constant assertion of a number of persons in the same community, in itself, is merely

In rebuttal, the prosecution may show the good reputation of prosecutrix for chastity. *People* v. *Tyler,* 36 Cal. 522.

But where there is no element of force or want of consent involved, no such evidence of reputation is admissible. *Steinke* v. *State,* 33 Tex. Crim. Rep. 65, 66, 24 S. W. 909, 25 S. W. 287; *Wilson* v. *State,* 17 Tex. App. 525. Contra, *People* v. *Johnson,* 106 Cal. 289, 39 Pac. 622; *Brown* v. *State,* 72 Miss. 997, 17 So. 278; *Rice* v. *State,* 35 Fla. 236, 48 Am. St. Rep. 245, 17 So. 286.

[1] In the case of *Walker* v. *Moors,* 122 Mass. 501, Lord, J., obscures an otherwise valuable opinion by a misuse of the word "fact" in speaking of reputation. He says: "Was his (the witness) the statement of a fact, or was it simply what is ordinarily designated as hearsay evidence?" (p. 504.)

The witness would not be allowed to state as a fact that the reputation was one way or the other. He could state the received opinion of the community, from which the jury might infer the fact. Again the learned justice says: "Has the subject been so much discussed and considered that there is in the public mind a uniform and concurrent sentiment which can be stated as a fact?" The court is here asking if the objective thing to be proved can be stated as a fact. Surely not by the witness, for the witness cannot deliver to the jury an ultimate fact or an objective fact. From his testimony the jury may find an ultimate or an objective fact. Hence, the query of the learned justice would have been nearer his own meaning, had he clothed it substantially as follows: Has the subject been so much discussed and considered that there is in the public mind a uniform and concurrent sentiment from which a fact may be inferred? *Heath* v. *West,* 26 N. H. 191; *Hicks* v. *Cram,* 17 Vt. 449; *Goddard* v. *Pratt,* 16 Pick. 412; *Trowbridge* v. *Wheeler,* 1 Allen, 162; *Baldwin* v. *Western R. Corp.* 4 Gray, 333; *Dunbar* v. *Mulry,* 8 Gray, 163; *Martin* v. *Good,* 14 Md. 398, 74 Am. Dec. 545; *Molyneaux* v. *Collier,* 13 Ga. 406; *Blevins* v. *Pope,* 7 Ala. 371; *Walker* v. *Forbes,* 25 Ala. 139, 60 Am. Dec. 498; *Mosser* v. *Mosser,* 32 Ala. 551; *Vaughan* v. *Warnell,* 28 Tex. 119.

a basis on which to found the truth of a fact.[2] Thus, when the question is, Are certain places or structures nuisances, general reputation cannot be admitted in proof or in disproof.[3] When, however, reputation is a part of the issue, as in actions for defamation of character, or when it is a constituent of the offense, then it may be proved, for in such case it becomes fact, and not repute.[4]

As a general rule, evidence of a rumor is inadmissible to justify a libel,[5] nor can the general bad character of the party libeled be given in evidence,[6] nor evidence that the matters referred to in the libel were rumored about the neighborhood, and accepted as truth by the persons who knew the party libeled.[7] Nor can defendant, in mitigation of damages, show plaintiff's general character as an insulting, provoking, and quarrelsome man; nor that he was generally reputed to be a dangerous man.[8]

[2] See note 1, supra.

[3] *State* v. *Foley,* 45 N. H. 466; *Com.* v. *Stewart,* 1 Serg. & R. 342; *Overstreet* v. *State,* 3 How. (Miss.) 328; post, 261; *Com.* v. *Hopkins,* 2 Dana, 418.

[4] Post, § 261, note 4; *Cadwell* v. *State,* 17 Conn. 467, 472; *State* v. *Buckley,* 40 Conn. 246; *State* v. *Thomas,* 47 Conn. 546, 36 Am. Rep. 98; *King* v. *State,* 17 Fla. 183; *State* v. *West,* 46 La. Ann. 1009, 1015, 15 So. 418; *State* v. *Hull,* 18 R. I. 207, 20 L.R.A. 609, 26 Atl. 191, 10 Am. Crim. Rep. 427; *Morris* v. *State,* 38 Tex. 604

[5] *Lockhardt* v. *Jelly,* 19 L. T. N. S. 659; *Com.* v. *Place,* 153 Pa. 314, 26 Atl. 620; *People* v. *Jackman,* 96 Mich. 269, 55 N. W. 809; *State* v. *Hinson,* 103 N. C. 374, 9 S. E. 552; *Haley* v. *State,* 63 Ala. 83; *Pleasant* v. *State,* 15 Ark. 624, 653; *State* v. *Laxton,* 76 N. C. 216; *Harrison* v. *Garrett,* 132 N. C. 172, 43 S. E. 594; *People* v. *Stokes,* 30 Abb. N. C. 200, 24 N. Y. Supp. 727.

[6] *Conroe* v. *Conroe,* 47 Pa. 198; *Wilson* v. *Nonnan,* 27 Wis. 598; *People* v. *Stokes,* 30 Abb. N. C. 200, 24 N. Y. Supp. 727.

Courts are divided on this question. The cases above hold that evidence can be received as to the particular trait only. That the general character may be given in evidence, see *Steinman* v. *McWilliams,* 6 Pa. 175.

[7] *Com.* v. *Place,* 153 Pa. 314, 26 Atl. 620; *People* v. *Jackman,* 96 Mich. 269, 55 N. W. 809; *State* v. *Hinson,* 103 N. C. 374, 9 S. E. 552. But see *Humbard* v. *State,* 21 Tex. App. 200, 17 S. W. 126.

[8] *M'Alexander* v. *Harris,* 6 Munf.

§ 256. Hearsay admissible to prove the time of stating certain things.—An issue may arise as to whether certain things were said at a particular time, independently of the truth of the thing so said. In such case, proof that the things were said is admissible. The question may be, Were certain acts of violence excusable? and it would be admissible to prove certain exclamations of terror or of threat, without calling the persons who uttered them.[1] Did a railroad officer act prudently at a collision? Cries of alarm uttered at the time, or even telegrams delivered before the collision, can be received when relevant, without calling the persons who uttered the cries or telegrams issued.[2]

§ 257. Hearsay admissible to prove mental condition.—Whenever it is material to ascertain the condition of a party's mind at a particular time, statements made to him which account for his attitude are not excluded because they are hearsay. Thus, threats by A towards B are hearsay when repeated by a third party; yet when B is on trial for an injury done to A, as he alleges in self-defense, it is admissible for him to prove that these threats were communicated to him by such third party.[1] So, a belief in the community that A is a man of great ferocity is admissible in the same issue on B's behalf.[2] When the state of a party's mind is at issue, those communications made to him which may account for his conduct are admissible, though hearsay.[3]

465; *Forshee* v. *Abrams,* 2 Iowa, 571.

[1] *Com.* v. *Daley,* 2 Clark (Pa.) 361; *Reg.* v. *Vincent,* 9 Car. & P. 275; *Redford* v. *Birley,* 3 Starkie, 88.

[2] 1 Wharton, Ev. § 254.

[1] Post, § 757, and authorities cited.

[2] Supra, § 69; post, §§ 756, 757; *Williams* v. *State,* 14 Tex. App. 102, 46 Am. Rep. 237.

[3] Post, § 540; 1 Wharton, Ev. §§ 447–450; *State* v. *Lull,* 48 Vt. 581. Compare *Sheen* v. *Bumpstead,* 2 Hurlst. & C. 193, 32 L. J. Ch. N. S. 271, 10 Jur. N. S. 242, 8 L. T. N. S. 832, 11 Week. Rep. 734; *DuBost* v. *Beresford,* 2 Campb. 511; *State* v.

§ 258. Hearsay admissible in proof of value.—Questions of the value of property become material in criminal issues, where the law fixes the punishment according to the value of the property taken. The law does not take judicial notice of the values of personal property, unelss it is something fixed by law, as in the case of money,[1] and hence proof of value is essential where the punishment depends upon the value in issue.[2]

Where value is in issue, hearsay is primary, and indeed the best, evidence, and in proving value it is always admissible to resort to hearsay.[3] The inquiry in such cases should be confined to the market value at the time, or what the article would bring at a well-conducted sale.[4] If there is no market value, the opinions of those qualified to judge are competent to show intrinsic value.[5] Also, in proving market value, the opinions of witnesses, though based on hearsay, are competent.[6] The general rule in all criminal prosecutions, where proof of value is essential and material, is that the market value of the goods, or that for which similar goods are, at the time and

Wagner, 61 Me. 178; *Lee* v. *Kilburn*, 3 Gray, 594; *Bartlett* v. *Decreet*, 4 Gray, 113.

[1] *State* v. *Moseley*, 38 Mo. 380; *Keating* v. *People*, 160 Ill. 480, 43 N. E. 724; *Collins* v. *People*, 39 Ill. 233; *Grant* v. *State*, 55 Ala. 201; *Ector* v. *State*, 120 Ga. 543, 48 S. E. 315; *Lane* v. *State*, 113 Ga. 1040, 39 S. E. 463, 14 Am. Crim. Rep. 460; *Portwood* v. *State*, 124 Ga. 783, 53 S. E. 99.

[2] *Ellison* v. *State*, 25 Tex. App. 328, 8 S. W. 462; *Com.* v. *McKenney*, 9 Gray, 114; *Parker* v. *State*, 111 Ala. 72, 20 So. 641; *Ayers* v. *State*, 3 Ga. App. 305, 59 S. E. 924; *Wright* v. *State*, 1 Ga. App. 158, 57 S. E. 1050; *Johnson* v. *State*, 109 Ga. 268, 34 S. E. 573; *May* v. *State*, 111 Ga. 840, 36 S. E. 222.

[3] *State* v. *Smith*, 48 Iowa, 595; 1 Wharton, Ev. §§ 447–450.

[4] *State* v. *James*, 58 N. H. 67, 4 Am. Crim. Rep. 348.

[5] *Cohen* v. *State*, 50 Ala. 108; *Ayers* v. *State*, 3 Ga. App. 305, 59 S. E. 924; *Keipp* v. *State*, 51 Tex. Crim. Rep. 417, 103 S. W. 392; *State* v. *Walker*, 119 Mo. 467, 24 S. W. 1011; *State* v. *Maggard*, 160 Mo. 469, 83 Am. St. Rep. 483, 61 S. W. 184, 14 Am. Crim. Rep. 437.

[6] *Cliquot's Champagne*, 3 Wall. 114, 18 L. ed. 116; *Merrill* v. *Grinnell*, 30 N. Y. 594, 613.

As to opinion evidence on real estate values, see *Swift & Co.* v.

place of the theft, bought and sold in the open market, is the correct standard of value.[7]

§ 259. Character proved by reputation.—Whenever character is in issue, as we have elsewhere more fully considered,[1] then evidence of general reputation in the community where the party resides or does business is always admissible, and indeed is the only mode in which character can be exhibited to us.

In such cases, it is always proper to inquire of the witness

Newport News, 105 Va. 108, 3 L.R.A.(N.S.) 404, 52 S. E. 821.

[7] *Keipp* v. *State,* 51 Tex. Crim. Rep. 417, 103 S. W. 392; *Baden* v. *State,* — Tex. Crim. Rep. —, 74 S. W. 769; *McBroom* v. *State,* — Tex. Crim. Rep. —, 61 S. W. 480.

Hearsay or opinion evidence on values in criminal issues is not exclusive, but any evidence from which the jury can infer the value of the stolen chattel is admissible. *Roberts* v. *State,* 55 Ga. 220; *McCrary* v. *State,* 96 Ga. 348, 23 S. E. 409; *Martinez* v. *State,* 16 Tex. App. 122; *Saddler* v. *State,* 20 Tex. App. 195; *Filson* v. *Territory,* 11 Okla. 351, 67 Pac. 473, 14 Am. Crim. Rep. 524; *Cannon* v. *State,* 18 Tex. App. 172; *Odell* v. *State,* 44 Tex. Crim. Rep. 307, 70 S. W. 964; *Baden* v. *State,* — Tex. Crim. Rep. —, 74 S. W. 769; *State* v. *Doepke,* 68 Mo. 208, 30 Am. Rep. 785, 2 Am. Crim. Rep. 638; *Pratt* v. *State,* 35 Ohio St. 514, 35 Am. Rep. 617; *People* v. *Cole,* 54 Mich. 238, 19 N. W. 968; *State* v. *Brown,* 55 Kan. 611, 40 Pac. 1001; *Printz* v. *People,* 42 Mich. 144, 36 Am. St. Rep. 437, 3 N. W. 306; *State* v. *Finch,* 70 Iowa, 316, 59 Am. Rep. 443, 30 N. W. 578; *Brooks* v. *State,* 28 Neb. 389, 44 N. W. 436; *Edmonds* v. *State,* 42 Neb. 684, 60 N. W. 957; *Dozier* v. *State,* 130 Ala. 57, 30 So. 396.

Where the value is the same every where, evidence of the market value of stolen property outside of the county where stolen is admissible in proof. *Odell* v. *State,* 44 Tex. Crim. Rep. 307, 70 S. W. 964. But see *Clark* v. *State,* 23 Tex. App. 612, 5 S. W. 178.

In felonies where the degree of the offense depends on the property, the value must be established beyond a reasonable doubt. *Chesnut* v. *People,* 21 Colo. 512, 42 Pac. 656; *Powell* v. *State,* 88 Ga. 32, 13 S. E. 829; *State* v. *Wood,* 46 Iowa, 116; *Unger* v. *State,* 42 Miss. 642; *Com.* v. *McKenney,* 9 Gray, 114.

Sufficiency of proof. *People* v. *Harris,* 77 Mich. 568, 43 N. W. 1060; *Com.* v. *Riggs,* 14 Gray, 376, 77 Am. Dec. 333.

A failure to prove the alleged value is a reversible error. *Hasley* v. *State,* 50 Tex. Crim. Rep. 45, 94 S. W. 899.

[1] Supra, §§ 57 et seq.

on cross-examination his understanding of the words "community" and "reputation;" how much territory the first embraces in the opinion of the witness, and who, within the radius stated, has spoken of the defendant respecting his reputation; what was said and when at the time the question of his reputation in that community was the subject of discussion and comment.[2]

§ 260. Conclusions as to reputation not admissible.—Where the offense is laid in the indictment in general terms, as where the defendant is charged with keeping a common gambling or disorderly house, general reputation as to the fact sought to be proved is not admissible. To sustain the indictment, it is necessary to prove the particular facts which constitutes the offense.[1] Thus, upon the trial of one indicted as a common gambler, evidence that he was and is, by reputation, "a common gambler," is not admissible; his acts, not his character, are to be shown.[2] So, on an indictment for fornication, general reputation in the neighborhood that the defendant lived in fornication with a woman is not admissible.[3]

§ 261. Reputation admissible in prosecutions for keeping disorderly house.—On indictments for keeping houses

[2] *Brown* v. *United States,* 164 U. S. 221, 41 L. ed. 410, 17 Sup. Ct. Rep. 33; *Hoge* v. *People,* 117 Ill. 35, 6 N. E. 796; *Randall* v. *State,* 132 Ind. 539, 32 N. E. 305; *State* v. *Dale,* 108 Mo. 205, 18 S. W. 976; *Gifford* v. *People,* 87 Ill. 210; *McCarty* v. *People,* 51 Ill. 231, 99 Am. Dec. 542; *Cole* v. *State,* 59 Ark. 50, 26 S. W. 377; *People* v. *Markham,* 64 Cal. 157, 49 Am. Rep. 700, 30 Pac. 620; *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. *Kirkpatrick,* 63 Iowa, 554, 19 N. W. 660; *State* v. *Johnson,* 41 La. Ann. 574, 7 So. 670.

[1] *Com.* v. *Stewart,* 1 Serg. & R. 342; Archbold, Crim. Pl. 105. See *Rex* v. *Rogier,* 1 Barn. & C. 272, 2 Dowl. & R. 431, 25 Revised Rep. 393; 2 Wharton, Crim. Law, 10th ed. § 1430.

[2] *Com.* v. *Hopkins,* 2 Dana, 418.

[3] *Overstreet* v. *State,* 3 How. (Miss.) 328.

of ill fame, when such is the statutory term describing the offense, the ill fame or bad reputation of the house may be put in evidence.[1] Likewise, the bad reputation of those who visit it is in any view competent evidence.[2]

[1] *United States* v. *Gray,* 2 Cranch, C. C. 675, Fed. Cas. No. 15,251; *United States* v. *Stevens,* 4 Cranch, C. C. 341, Fed Cas. No. 16,391; *Cadwell* v. *State,* 17 Conn. 467; *People* v. *Lock Wing,* 61 Cal. 380; *People* v. *Buchanan,* 1 Idaho, 681. See *United States* v. *Johnson,* 12 Rep. 135.

So where a statute makes it indictable to keep a house reputed to be a tippling house. *State* v. *Buckley,* 40 Conn. 246; *State* v. *Haley,* 52 Vt. 476. But contra, see *State* v. *Boardman,* 64 Me. 523, 1 Am. Crim. Rep. 351. And see *Com.* v. *Davis,* 11 Gray, 49; *State* v. *Brunell,* 29 Wis. 435; *State* v. *Morgan,* 40 Conn. 44; *State* v. *Thomas,* 47 Conn. 546, 36 Am. Rep. 98; *King* v. *State,* 17 Fla. 183; *State* v. *West,* 46 La. Ann. 1009, 15 So. 418; *State* v. *Hull,* 18 R. I. 207, 20 L.R.A. 609, 26 Atl. 191, 10 Am. Crim. Rep. 427; *State* v. *Lewis,* 5 Mo. App. 465; *Demartini* v. *Anderson,* 127 Cal. 33, 59 Pac. 207; *Harkey* v. *State,* 33 Tex. Crim. Rep. 100, 47 Am. St. Rep. 19, 25 S. W. 291; *Territory* v. *Stone,* 2 Dak. 155, 4 N. W. 697; *Hogan* v. *State,* 76 Ga. 82; *Graeter* v. *State,* 105 Ind. 271, 4 N. E. 461; *Com.* v. *Cardoze,* 119 Mass. 210; *State* v. *Bresland,* 59 Minn. 281, 61 N. W. 450. But see *State* v. *Hendricks,* 15 Mont. 194, 48 Am. St. Rep. 666, 39 Pac. 93.

Great care should be paid to the wording of the statute in such cases, and the construction of the courts of the same. If it appears that reputation is essential, so that the keeping of a house of such repute is the offense, then reputation is a constituent part, or an objective fact itself, and evidence of reputation is proper. But where the actual character of the house is the fact in issue, then reputation becomes like any other evidentiary fact, and is used as one of the exceptions to the hearsay rule. Care should be taken to examine the decision of the courts as to whether they are proceeding upon the theory that reputation, being essential, is admissible, or are admitting facts from which a reputation may be inferred. *Betts* v. *State,* 93 Ind. 375; *Drake* v. *State,* 14 Neb. 535, 17 N. W. 117; *State* v. *Shaw,* 125 Iowa, 422, 101 N. W. 109; *State* v. *Steen,* 125 Iowa, 307, 101 N. W. 96; *State* v. *Harris,* 14 N. D. 501, 105 N. W. 621.

[2] *State* v. *Boardman,* 64 Me. 523, 1 Am. Crim. Rep. 351; *State* v. *M'Gregor,* 41 N. H. 407; *Com.* v. *Gannett,* 1 Allen 7, 79 Am. Dec. 693; *Com.* v. *Lambert,* 12 Allen, 177; *Com.* v. *Kimball,* 7 Gray, 328; *Harwood* v. *People,* 26 N. Y. 190, 84 Am. Dec. 175; *Sparks* v. *State,* 59 Ala. 82; *O'Brien* v. *People,* 28 Mich. 213; *State* v. *Brunell,* 29 Wis. 435;

But of a disorderly house, reputation is not admissible, because it is secondary evidence of disorder, which is susceptible of immediate proof.[3] Hence, particular acts of disorder are admissible from which the character of the house

Clementine v. *State,* 14 Mo. 112; *King* v. *State,* 17 Fla. 183; *Morris* v. *State,* 38 Tex. 603; *Sylvester* v. *State,* 42 Tex. 496, 1 Am. Crim. Rep. 350. See *Berry* v. *People,* 1 N. Y. Crim. Rep. 43, 57; *Territory* v. *Chartrand,* 1 Dak. 379, 46 N. W. 583; *McConnell* v. *State,* 2 Ga. App. 445, 58 S. E. 546; *Winslow* v. *State,* 5 Ind. App. 306, 32 N. E. 98; *Walker* v. *Com.* 117 Ky. 727, 79 S. W. 191; *State* v. *Price,* 115 Mo. App. 656, 92 S. W. 174; *Com.* v. *Murr,* 7 Pa. Super. Ct. 391; *Com.* v. *Sarves,* 17 Pa. Super. Ct. 407; *Com.* v. *Bunnell,* 20 Pa. Super. Ct. 51; *State* v. *Cambron,* 20 S. D. 282, 105 N. W. 241; *Stone* v. *State,* 47 Tex. Crim. Rep. 575, 85 S. W. 808; *Wimberly* v. *State,* 53 Tex. Crim. Rep. 11, 108 S. W. 384; *Botts* v. *United States,* 83 C. C. A. 646, 155 Fed. 50, 12 A. & E. Ann. Cas. 271; *State* v. *Porter,* 130 Iowa, 690, 107 N. W. 923.

[3] *United States* v. *Jourdine,* 4 Cranch, C. C. 338, Fed. Cas. No. 15,499; *State* v. *Foley,* 45 N. H. 466; *Com.* v. *Stewart,* 1 Serg. & R. 342; *Com.* v. *Hopkins,* 2 Dana, 418; supra, § 255; *United States* v. *Nailor,* 4 Cranch, C. C. 372, Fed. Cas. No. 15,853; *Betts* v. *State,* 93 Ind. 375; *State* v. *Hendricks,* 15 Mont. 194, 48 Am. St. Rep. 666, 39 Pac. 93.

While the weight of authority is that reputation itself cannot be received to establish the fact of a disorderly house, the facts and circumstances from which the same may be inferred are admissible. The fact that a witness contracted a disease in such house is admissible (*State* v. *Garing,* 75 Me. 591); that the keeper concealed a criminal from arrest is admissible (*Mahalovitch* v. *State,* 54 Ga. 217); that doors were broken is admissible (*Com.* v. *O'Brien,* 8 Gray, 487); defendant's own conduct in the house is competent (*State* v. *Smith,* 29 Minn. 193, 12 N. W. 524); lewd acts committed elsewhere by those who resort to the house are admissible (*Beard* v. *State,* 71 Md. 275, 4 L.R.A. 675, 17 Am. St. Rep. 536, 17 Atl. 1044, 8 Am. Crim. Rep. 173).

As to weight and sufficiency of evidence, see *Schneider* v. *Com.* 33 Ky. L. Rep. 770, 20 L.R.A.(N.S.) 107, 111 S. W. 303.

Reputation of the keeper would be a circumstance proper for the consideration of the jury. *Whitlock* v. *State,* 4 Ind. App. 432, 30 N. E. 934; *Sparks* v. *State,* 59 Ala. 82 See *State* v. *Worth,* R. M. Charlt. (Ga.) 5.

may be inferred,[4] and also the bad conduct of those frequenting the house.[5]

When "notorious adultery" is indictable under a statute, proof of the "notoriety" is as material as the proof of the fact of adultery, in establishing the offense.[6] And reputation is material when a defendant is charged with the statutory offense of being a common thief.[7]

VIII. Exception as to Refreshing Memory.

§ 261a. Collateral hearsay to refresh memory.—Conversations with third persons may become admissible when introduced for the purpose of identifying facts, but such conversations are not evidence of the truth of the facts which they state. They are evidence only on the single point of fixing particular dates, places, or other extrinsic incidents of the facts testified to by the witnesses.[1] The same rule exists as to writings introduced in order to refresh memory.[2]

[4] *Com.* v. *Davenport,* 2 Allen, 299; *Com.* v. *O'Brien,* 8 Gray, 487; *Com.* v. *Cardoze,* 119 Mass. 210; *Com.* v. *Stewart,* 1 Serg. & R. 342; *State* v. *Webb,* 25 Iowa, 235; *State* v. *Patterson,* 29 N. C. (7 Ired. L.) 70; *Mahalovitch* v. *State,* 54 Ga. 217.

Particular acts as indicating ownership or keeping may be shown. Giving bail for inmates (*Harwood* v. *People,* 26 N. Y. 190, 84 Am. Dec. 175); dealing cards in house (*United States* v. *Miller,* 4 Cranch, C. C. 104, Fed. Cas. No. 15,773); occupying house (*State* v. *Wells,* 46 Iowa, 662); payment of taxes and exercising control (*Cook* v. *State,* 42 Tex. Crim. Rep. 539, 61 S. W. 307; *State* v. *Wilson,* 124 Iowa, 264, 99 N. W. 1060).

[5] See note 2, supra.

[6] *People* v. *Gates,* 46 Cal. 52. See *State* v. *Thomas,* 47 Conn. 546, 36 Am. Rep. 98; *Com.* v. *Whittaker,* 131 Mass. 224.

[7] *World* v. *State,* 50 Md. 49; *Kissel* v. *Lewis,* 156 Ind. 233, 59 N. E. 478.

[1] Wharton, Ev. § 257; *Com.* v. *Ford,* 130 Mass. 64, 39 Am. Rep. 426; *State* v. *Collins,* 15 S. C. 373, 40 Am. Rep. 697; *Cooper* v. *State,* 59 Miss. 267; *Philadelphia & T. R. Co.* v. *Stimpson,* 14 Pet. 448, 10 L. ed. 535; *Hill* v. *North,* 34 Vt. 604; *Browning* v. *Skillman,* 24 N. J. L. 351; *State* v. *Fox,* 25 N. J. L. 566; post, § 519. See *State* v. *Legg,* 59 W. Va. 315, 3 L.R.A.(N.S.) 1152, 53 S. E. 545.

[2] *Com.* v. *Jeffs,* 132 Mass. 5; 1 Greenl. Ev. § 436; *Breese* v. *United*

IX. Res Gestæ.

§ 262. Res gestæ admissible though hearsay.—*Res gestæ*[1] are events speaking for themselves, through the

States, 45 C. C. A. 535, 106 Fed. 683; Terrell, Crimes by Nat. Bank Officers & Agents, p. 69; *Putnam* v. *United States,* 162 U. S. 687, 40 L. ed. 1118, 16 Sup. Ct. Rep. 923; *Nicholls* v. *Webb,* 8 Wheat. 326, 5 L. ed. 628; *Insurance Cos.* v. *Weide,* 14 Wall. 375, 20 L. ed. 894. But see *Chaffee* v. *United States,* 18 Wall. 516, 21 L. ed. 908.

[1] Definition and use, 15 Am. L. Rev. pp. 5, 81, Thayer; Use of phrase, Wigmore,, Ev. § 1795; *Schlater* v. *LeBlanc,* 121 La. 919, 46 So. 921.

Text cited and approved in the following cases: *Hunter* v. *State,* 40 N. J. L. 495; *Freeman* v. *State,* 40 Tex. Crim. Rep. 545, 46 S. W. 641, 51 S. W. 230; *People* v. *Wong Ark,* 96 Cal. 125, 30 Pac. 1115; *Graves* v. *People,* 18 Colo. 170, 32 Pac. 63; *State* v. *Thompson,* 132 Mo. 301, 34 S. W. 31; *State* v. *Hudspeth,* 150 Mo. 12, 51 S. W. 483; *State* v. *Harris,* 150 Mo. 56, 51 S. W. 481; *State* v. *Tighe,* 27 Mont. 327, 71 Pac. 3; *St. Clair* v. *United States,* 154 U. S. 134, 38 L. ed. 936, 14 Sup. Ct. Rep. 1002; *Territory* v. *Clayton,* 8 Mont. 1, 19 Pac. 293.

As to how near the main transaction declarations must be made, in order to constitute part of the *res gestæ,* see note in 19 L.R.A. 733.

Res gestæ present the same opportunity for the admission of improper testimony that police power affords for setting aside the fundamental rules of law which safeguard liberty and the possession of property. Under the phrase "police power," municipalities are upheld in every invasion of personal and property right, while under *res gestæ* testimony subversive of every principle of evidence is freely admitted.

The difficulty is not with the definition, but with the application. Bearing in mind that *res gestæ* are events speaking for themselves, through the instinctive acts and words of participants, and that the exact converse of the rule is the narration of these words and acts after the event, it is clear that the application is so often incorrectly made as to be a serious menace to the rules of evidence.

As an illustration of this, in *Lewis* v. *State,* 29 Tex. App. 201, 25 Am. St. Rep. 720, 15 S. W. 642, from one to one and a half hours after deceased had been wounded, she stated that defendant came up behind her while she was at the washtub, "ran his hand under my arm, pulled me backward, and nearly cut me in two." The trial judge says: "The evidence was not offered or admitted as dying declarations, but as part of the *res gestæ.*" And the court of appeals says: "We agree with the trial judge that the evidence was *res gestæ* and admissible."

instinctive words and acts of participants, but are not the words and acts of participants when narrating the events.

Again, in *Drake* v. *State,* 29 Tex. App. 266, 15 S. W. 725, a witness, over objection, testified that two minutes after deceased was shot, he was asked who shot him, and he replied, in substance, that the defendant shot him, and, after detailing the circumstances, added "that he shot him for nothing."

The court of appeals held that the above-recited statements, "detailed by the witness Cunningham, were properly admitted in evidence against the defendant as *res gestæ.*" See *Humphrey* v. *State,* 55 Tex. Crim. Rep. 329, 116 S. W. 570.

Apparently the Texas courts make no distinction as to the grounds of admission between *res gestæ,* admissions, and confessions.

See *Lander* v. *People,* 104 Ill. 256, where expressions made the day after an assault by other parties were held competent as *res gestæ.*

A careful reading of the case law shows a constant tendency to enlarge the rule of *res gestæ;* two grounds seem to underlie as reasons, —necessity, the general ground of all hearsay evidence, and spontaneity, which as the product of natural emotions and feelings, seems to render it trustworthy.

All that is admitted as *res gestæ* could well be admitted under the well-known and substantive rules of evidence, but, as the courts have chosen to name *res gestæ* in terms, it must be considered under that head, and to this end the law upon the subject is to be found in the notes.

The court of criminal appeals of Texas has so far departed from the definition in its admission of all facts, circumstances, statements, occurrences, before, accompanying, and after, that, as illustrating the rule, the cases would be of no value as to the limits set for *res gestæ.* This court is unquestionably the ablest criminal court in the United States, and its practice as to *res gestæ* is readily explained from the fact that the Texas court of criminal appeals always considers the entire record, weighing, analyzing, and thoroughly digesting all the evidence before applying the law to the case in hand, and hence admissions as *res gestæ* in the Texas court are not so harmful an application of the rules of evidence as in courts less painstaking with examination of records, and who dwell more upon the strict rules of law.

Facts constituting *res gestæ* within the definition of the text.

In homicide.—*Nelson* v. *State,* 130 Ala. 83, 30 So. 728; *Collins* v. *State,* 138 Ala. 57, 34 So. 993; *Morris* v. *State,* 146 Ala. 66, 41 So. 274; *Hammond* v. *State,* 147 Ala. 79, 41 So. 761; *Robinson* v. *State,* 118 Ga. 198, 44 S. E. 985; *Starr* v. *State,* 160 Ind. 661, 67 N. E. 527; *Powers* v. *Com.* 29 Ky. L. Rep. 277, 92 S. W. 975; *State* v. *Elkins,* 101 Mo. 344, 14 S. W. 116; *State* v. *Nelson,* 166 Mo. 191, 89 Am. St. Rep. 681, 65 S. W. 749; *State* v. *Tighe,* 27 Mont. 327,

What is said or done by participants under the immediate spur of a transaction becomes thus part of the transaction,

71 Pac. 3; *United States* v. *Angell*, 11 Fed. 34; *Armor* v. *State*, 63 Ala. 173; *Jordan* v. *State*, 81 Ala. 20, 1 So. 577; *Carr* v. *State*, 43 Ark. 99, 5 Am. Crim. Rep. 438; *State* v. *Corcoran*, 38 La. Ann. 949; *State* v. *Harris*, 45 La. Ann. 842, 40 Am. St. Rep. 259, 13 So. 199; quarrelsome character as part of *res gestæ*, *State* v. *Dumphey*, 4 Minn. 438, Gil. 340; *Scaggs* v. *State*, 8 Smedes & M. 722; *Nelson* v. *State*, 2 Swan, 237; *Haynes* v. *Com.* 28 Gratt. 942; *Williams* v. *Com.* 85 Va. 607, 8 S. E. 470; *Ryan* v. *State*, 100 Ala. 105, 14 So. 766; *McCoy* v. *State*, 91 Miss. 257, 44 So. 814; *State* v. *Ryder*, 80 Vt. 422, 68 Atl. 652; *State* v. *Baker*, 209 Mo. 444, 108 S. W. 6; *State* v. *Kane*, 77 N. J. L. 244, 72 Atl. 39; *Hibbard* v. *United States*, 96 C. C. A. 554, 172 Fed. 66, 18 A. & E. Ann. Cas. 1040 (perjury); *Phillips* v. *State*, 161 Ala. 60, 49 So. 794; *State* v. *Gardner*, 83 S. C. 476, 65 S. E. 630.

In larceny.— *Crittenden* v. *State*, 134 Ala. 145, 32 So. 273; *People* v. *Taylor*, — Cal. —, 69 Pac. 292; *People* v. *Linares*, 142 Cal. 17, 75 Pac. 308; *People* v. *Hart*, 114 App. Div. 9, 20 N. Y. Crim. Rep. 199, 99 N. Y. Supp. 758; *People* v. *Long*, 44 Mich. 296, 6 N. W. 673; *People* v. *Machen*, 101 Mich. 400, 59 N. W. 664.

Assault with intent to kill, facts and circumstances admissible. *Elmore* v. *State*, 110 Ala. 63, 20 So. 323; *Williams* v. *State*, 72 Ga. 180; *State* v. *Donyes*, 14 Mont. 70 35 Pac. 455; *State* v. *Lockett*, 168, Mo. 480, 68 S. W. 563.

Assault with intent to kill, facts and circumstances inadmissible.—*Surginer* v. *State*, 134 Ala. 120, 32 So. 277; *Starr* v. *State*, 160 Ind. 661, 67 N. E. 527; *State* v. *Taylor*, 70 Vt. 1, 42 L.R.A. 673, 67 Am. St. Rep. 648, 39 Atl. 447; *State* v. *Raymo*, 76 Vt. 430, 57 Atl. 993.

Facts and circumstances admissible in robbery.—*People* v. *Winthrop*, 188 Cal. 85, 50 Pac. 390; *People* v. *Piggott*, 126 Cal. 509, 59 Pac. 31; *Morgan* v. *State*, 48 Ohio St. 371, 27 N. E. 710.

Facts and circumstances admissible in forgery.—*State* v. *Bigelow*, 101 Iowa, 430, 70 N. W. 600; *People* v. *Marion*, 29 Mich. 31; *Randolph* v. *State*, 65 Neb. 520, 91 N. W. 356.

Facts and circumstances admissible in false pretenses.—*Lawrence* v. *State*, 103 Md. 17, 63 Atl. 96; *State* v. *Bohle*, 182 Mo. 58, 81 S. W. 179; *People* v. *Cook*, 41 Hun, 67; *People* v. *Lewis*, 136 N. Y. 633, 32 N. E. 1014.

Facts and circumstances admissible in prosecution for stolen goods.—*State* v. *Smith*, 37 Mo. 58; *State* v. *Simon*, 70 N. J. L. 407, 57 Atl. 1016.

Facts and circumstances admissible in rape.—*State* v. *Bebb*, 125 Iowa, 494, 101 N. W. 189; *State* v. *Falsetta*, 43 Wash. 159, 86 Pac. 168, 10 A. & E. Ann. Cas. 177; *People* v. *Hosmer*, 66 App. Div. 616, 72 N. Y. Supp. 480.

Acts and statements of the ac-

because it is then the transaction that thus speaks. In such cases it is not necessary to examine as witnesses the persons

cused generally held admissible as *res gestæ.*—*Territory* v. *Price,* 14 N. M. 262, 91 Pac. 733; *Glenn* v. *State,* 157 Ala. 12, 47 So. 1034; *Maddox* v. *State,* 159 Ala. 53, 48 So. 689; *People* v. *Hayes,* 9 Cal. App. 301, 99 Pac. 386; *Holland* v. *State,* 162 Ala. 5, 50 So. 215; *Harp* v. *Com.* — Ky. —, 119 S. W. 1191.

Acts and statements of the accused cotemporaneous with the crime admissible as *res gestæ.*—*State* v. *Montgomery,* 8 Kan. 351; *Turner* v. *United States,* 2 Hayw. & H. 343, Fed. Cas. No. 14,262a; *United States* v. *Nardella,* 4 Mackey, 503; *Calley* v. *Com.* 11 Ky. L. Rep. 346, 12 S. W. 132; *Ferrel* v. *Com.* 15 Ky. L. Rep. 321, 23 S. W. 344; *State* v. *Walker,* 77 Me. 488, 1 Atl. 357, 5 Am. Crim. Rep. 465; in larceny, *State* v. *Gabriel,* 88 Mo. 631; *United States* v. *Omeara,* 1 Cranch, C. C. 165, Fed. Cas. No. 15,919; *United States* v. *Lee,* 2 Cranch, C. C. 104, Fed. Cas. No. 15,584; *Blaunt* v. *State,* 49 Ala. 381; *Riddle* v. *State,* 49 Ala. 389; *State* v. *Brawn,* 28 Or. 147, 41 Pac. 1042.

Acts and statements of the accused cotemporaneous with the crime inadmissible as *res gestæ.*—*Cook* v. *State,* 134 Ala. 137, 32 So. 696; *State* v. *Hudspeth,* 159 Mo. 178, 60 S. W. 136.

Acts and statements of the accused before the crime admissible as *res gestæ.*

In homicide.—*Campbell* v. *State,* 133 Ala. 81, 91 Am. St. Rep. 17, 31 So. 802; *Hainsworth* v. *State,* 136 Ala. 13, 34 So. 203; *Viberg* v. *State,* 138 Ala. 100, 100 Am. St. Rep. 22, 35 So. 53; *People* v. *Lee,* 1 Cal. App. 169, 81 Pac. 969; *Sanders* v. *State,* 113 Ga. 267, 38 S. E. 841; *State* v. *Elvins,* 101 Mo. 243, 13 S. W. 937; *State* v. *Register,* 133 N. C. 746, 46 S. E. 21; *Irvine* v. *State,* 104 Tenn. 132, 56 S. W. 845; *Hall* v. *State,* 130 Ala. 45, 30 So. 422; *Trulock* v. *State,* 70 Ark. 558, 69 S. W. 677; *Evans* v. *State,* 62 Ala. 6; *Pitman* v. *State,* 22 Ark. 354; *Ortiz* v. *State,* 30 Fla. 256, 11 So. 611; *Manroe* v. *State,* 5 Ga. 85; *State* v. *Crass,* 68 Iowa, 180, 26 N. W. 62; *State* v. *Vallery,* 47 La. Ann. 182, 49 Am. St. Rep. 363, 16 So. 745; *State* v. *Kennade,* 121 Mo. 405, 26 S. W. 347; *State* v. *King,* 9 Mont. 445, 24 Pac. 265; *Garber* v. *State,* 4 Coldw. 161.

Statements and acts of the accused before the crime inadmissible as part of *res gestæ. Shelton* v. *State,* 73 Ala. 5; *People* v. *Wyman,* 15 Cal. 70; *People* v. *Henderson,* 28 Cal. 465; *Kahlenbeck* v. *State,* 119 Ind. 118, 21 N. E. 460; *Newcamb* v. *State,* 37 Miss. 383; *State* v. *Evans,* 65 Mo. 574; *State* v. *Umfried,* 76 Mo. 404; *State* v. *Ching Ling,* 16 Or. 419, 18 Pac. 844.

Acts and statements of accused after crime admissible as *res gestæ.*

In homicide. *Parrish* v. *State,* 139 Ala. 16, 36 So. 1012; *Ferguson* v. *State,* 141 Ala. 20, 37 So. 448; *Lillie* v. *State,* 72 Neb. 228, 100 N. W. 316; *State* v. *Webster,* 21 Wash. 63, 57 Pac. 361; *Caddell* v. *State,*

who, as participators in the transaction, thus instinctively spoke or acted. What they did or said is *res gestæ;* it is part of the transaction itself.

136 Ala. 9, 34 So. 191; *Plant* v. *State,* 140 Ala. 52, 37 So. 159; *Hammond* v. *State,* 147 Ala. 79, 41 So. 761; *State* v. *Phillips,* 118 Iowa, 660, 92 N. W. 876; *People* v. *Quimby,* 134 Mich. 625, 96 N. W. 1061; *State* v. *Vinso,* 171 Mo. 576, 71 S. W. 1034; *Sullivan* v. *State,* 58 Neb. 796, 79 N. W. 721; *State* v. *Davis,* 104 Tenn. 501, 58 S. W. 122; *Johnson* v. *State,* 8 Wyo. 494, 58 Pac. 761, 13 Am. Crim. Rep. 374; *State* v. *Sullivan,* 80 Miss. 596, 32 So. 55; *State* v. *McLaughlin,* 149 Mo. 19, 50 S. W. 315; *Killins* v. *State,* 28 Fla. 313, 9 So. 711; *State* v. *Davis,* 87 N. C. 514; *Prince* v. *State,* 100 Ala. 144, 46 Am. St. Rep. 28, 14 So. 409 (bodily condition); *State* v. *Brabham,* 108 N. C. 793, 13 S. E. 217 (unnatural behavior); *Moore* v. *State,* 2 Ohio St. 500 (showing workings of the mind); *State* v. *Gooch,* 94 N. C. 987 (statement of wounds by survivor of two assaulted).

Statements and acts of accused after crime held inadmissible as *res gestæ.*— *Pitts* v. *State,* 140 Ala. 70, 37 So. 101; *Blair* v. *State,* 69 Ark. 558, 64 S. W. 948; *People* v. *Dice,* 120 Cal. 189, 52 Pac. 477 (surrender to officer); *Wright* v. *State,* 88 Md. 705, 41 Atl. 1060; *Johnson* v. *State,* 129 Wis. 146, 5 L.R.A.(N.S.) 809, 108 N. W. 55, 9 A. & E. Ann. Cas. 923; *State* v. *Taylor,* 7 Idaho, 134, 61 Pac. 288, 12 Am. Crim. Rep. 598; *Bodine* v. *State,* 129 Ala. 106, 29 So. 926; *Thornton* v. *State,* 107 Ga. 683, 33 S. E. 673; *Collins* v. *People,* 194 Ill. 506, 62 N. E. 902.

Length of time as affecting the admissibility of acts and statements of accused. Admissible in the following cases: *State* v. *Blanchard,* 108 La. 110, 32 So. 397 (time must be so short accused cannot conceive some narrative to aid him).

Length of time as affecting admissibility of acts and statements of accused held inadmissible in the following cases: *State* v. *Stallings,* 142 Ala. 112, 38 So. 261 (five minutes); *Cole* v. *State,* 125 Ga. 276, 53 S. E. 958 (ten to fifteen minutes); *Warrick* v. *State,* 125 Ga. 133, 53 S. E. 1027 (five minutes); *Powers* v. *Com.* 114 Ky. 237, 70 S. W. 644, 1050, 71 S. W. 494 (several minutes afterwards); *Little* v. *State,* 87 *Miss.* 512, 40 So. 165 (five minutes); *Smith* v. *Territory,* 11 Okla. 669, 69 Pac. 805 (few minutes); *Stewart* v. *State,* 78 Ala. 436 (an hour later); *Evans* v. *State,* 58 Ark. 47, 22 S. W. 1026 (three hours after); *State* v. *Rutledge,* 37 La. Ann. 378 (at coroner's inquest); *State* v. *Rider,* 95 Mo. 474, 8 S. W. 723 (a few minutes and after going 200 or 300 yards); *People* v. *Callaghan,* 4 Utah, 49, 6 Pac. 49 (after walking 3 or 4 miles).

The statements of parties injured, received as *res gestæ* of the crime in the following cases, generally: *State* v. *Thompson,* 141 Mo. 408, 42 S. W. 949, 171 U. S. 380, 43 L. ed.

204, 18 Sup. Ct. Rep. 922 (statement as to who gave the food to deceased while eating same in case of poisoning); *Bankhead* v. *State,* 124 Ala. 14, 26 So. 979 (exclamation); *Goodman* v. *State,* 122 Ga. 111, 49 S. E. 922 (exclamations); *State* v. *Maxey,* 107 La. 799, 32 So. 206 (signs made); *State* v. *Spivey,* 151 N. C. 676, 65 S. E. 995; *Wilson* v. *People,* 94 Ill. 299 (explanatory declarations); *Gibson* v. *State,* — Miss. —, 16 So. 298 (threats); *State* v. *David,* 131 Mo. 380, 33 S. W. 28 (actions at time of alleged poisoning); *State* v. *Mace,* 118 N. C. 1244, 24 S. E. 798 (exclamations); *Hall* v. *State,* 132 Ind. 317, 31 N. E. 536 (poisoning); *Baker* v. *State,* 85 Ark. 300, 107 S. W. 983; *Herrington* v. *State,* 130 Ga. 307, 60 S. E. 572; *Soto* v. *Territory,* 12 Ariz. 36, 94 Pac. 1104; *State* v. *Lewis,* 139 Iowa, 405, 116 N. W. 606; *State* v. *Harris,* — R. I. —, 69 Atl. 506; *State* v. *Alton,* 105 Minn. 410, 117 N. W. 617, 15 A. & E. Ann. Cas. 806; *People* v. *Del Vermo,* 192 N. Y. 470, 85 N. E. 690; *Price* v. *State,* 1 Okla. Crim. Rep. 358, 98 Pac. 447; *State* v. *Hinson,* 150 N. C. 827, 64 S. E. 124.

Acts and declarations of the party injured before the commission of the crimes admitted as *res gestæ.*— *Hall* v. *State,* 130 Ala. 45, 30 So. 422 (wife's appeals not to kill her husband); *Trulock* v. *State,* 70 Ark. 558, 69 S. W. 677 (exclamations before shooting); *Warrick* v. *State,* 125 Ga. 133, 53 S. E. 1027 (deceased statement as to where he was going); *State* v. *Bone,* 114 Iowa, 537, 87 N. W. 507 (statements between accused and deceased); *Stephens* v. *Com.* 20 Ky. L. Rep. 544, 47 S. W. 229 (request to argue this thing); *People* v. *Farrell,* 137 Mich. 127, 100 N. W. 264 (deceased bidding accused "good night"); *Schrader* v. *State,* 84 Miss. 593, 36 So. 385 (forcing quarrel on decedent); *State* v. *Lucey,* 24 Mont. 295, 61 Pac. 994 (conversation showing enticement of deceased to his death); *McCormick* v. *State,* 66 Neb. 337, 92 N. W. 606 (acting on statements heard); *Martin* v. *State,* 77 Ala. 1 (deceased's statement of destination before the killing); *Harris* v. *State,* 96 Ala. 24, 11 So. 255 (deceased's statement of his object and purpose in going to the house where he was killed); *United States* v. *Nardello,* 4 Mackey, 503 (deceased's statement that he was looking for defendant); *Garner* v. *State,* 28 Fla. 113, 29 Am. St. Rep. 232, 9 So. 835 (prior threats); *Thomas* v. *State,* 67 Ga. 460 (statement of wife night of the homicide); *State* v. *Vincent,* 24 Iowa, 570, 95 Am. Dec. 753 (statements of deceased and accused when journeying together); *State* v. *Peffers,* 80 Iowa, 580, 46 N. W. 662 (deceased was "going to see what she wanted"); *Tilley* v. *Com.* 89 Va. 136, 15 S. E. 526 (deceased on her way to house near which body was found); *Maher* v. *People,* 10 Mich. 212, 81 Am. Dec. 781 (statements of accused relating to his wife's conduct with accused in trial for assault); *State* v. *Sloan,* 47 Mo. 604 (threats of deceased against accused); *State* v. *Biggerstaff,* 17 Mont. 510, 43 Pac. 709 ("there he comes," exclamation by deceased); *Dickson* v. *State,* 39 Ohio St. 73 (threats to third par-

ty); *Kirby* v. *State,* 7 Yerg. 259 (statement of deceased as to object of going to a particular place).

Acts and declarations of the party injured before the crime not considered as *res gestæ.*—*Domingus* v. *State,* 94 Ala. 9, 11 So. 190 (deceased's statement of going to his place of business unconnected with affray); *Montag* v. *People,* 141 Ill. 75, 30 N. E. 337 (statement of threats in absence of deceased); *Wood* v. *State,* 92 Ind. 269 (statements not unless continued to the crime); *State* v. *Carey,* 56 Kan. 84, 42 Pac. 371 (statement of threats by defendant on seeing deceased, that he was afraid of him); *State* v. *Kelly,* 77 Conn. 266, 58 Atl. 705 (statement as to purchases of poison); *State* v. *Shafer,* 22 Mont. 17, 55 Pac. 526 (declarations of deceased that he was afraid of defendant).

Statements and acts of the injured party after the commission of the crime, generally, admitted as *res gestæ.*

In homicide.—*Ford* v. *State,* 129 Ala. 16, 30 So. 27 (flight and holding off crowd with gun); *Nelson* v. *State,* 130 Ala. 83, 30 So. 728 (deceased's statement while in range of accused's gun); *Starks* v. *State,* 137 Ala. 9, 34 So. 687 (deceased's exclamation, "I am shot to death"); *Sheehy* v. *Territory,* 9 Ariz. 269, 80 Pac. 356 ("Boys, I am shot"); *Marlow* v. *State,* 49 Fla. 7, 38 So. 653 (deceased's statement as to writing a note in presence of accused after the shooting); *State* v. *Gilbert,* 8 Idaho, 346, 69 Pac. 62, 1 A. & E. Ann. Cas. 280 (deceased's statement that he was stabbed to the heart); *State* v. *Hunter,* 118 Iowa, 686, 92 N. W. 872 (evidence of what deceased was doing before the affray); *Shotwell* v. *Com.* 24 Ky. L. Rep. 255, 68 S. W. 403 (deceased's exclamation, "I am all shot to pieces"); *State* v. *Maxey,* 107 La. 799, 32 So. 206 (statement by deceased of how and by whom wound was inflicted); *Lambert* v. *People,* 29 Mich. 71 (complaints of a crime when admissible as *res gestæ*); *State* v. *Laster,* 71 N. J. L. 586, 60 Atl. 361 (exclamation of deceased before shooting); *Com.* v. *Van Horn,* 188 Pa. 143, 41 Atl. 469 (statements as quick as could be made after wound inflicted); *Andrews* v. *Com.* 100 Va. 801, 40 S. E. 935 (exclamations to prove identity); *Bliss* v. *State,* 117 Wis. 596, 94 N. W. 325 (exclamations to witness accusing defendant); *Johnson* v. *State,* 102 Ala. 1, 16 So. 99 (dying declaration as *res gestæ*); *Von Pollnitz* v. *State,* 92 Ga. 16, 44 Am. St. Rep. 72, 18 S. E. 301 (deceased's statement at door or room where she was beaten); *Norfleet* v. *Com.* 17 Ky. L. Rep. 1137, 33 S. W. 938 (statements between deceased and accused); *State* v. *Euzebe,* 42 La. Ann. 727, 7 So. 784 (instinctive declarations); *Com.* v. *M'Pike,* 3 Cush. 181, 50 Am. Dec. 727 (statement after going to another room); *State* v. *Martin,* 124 Mo. 514, 28 S. W. 12 (statement in answer to question); *State* v. *Murphy,* 16 R. I. 528, 17 Atl. 998 (statement by deceased that he had been robbed and assaulted, giving name); *State* v. *Talbert,* 41 S. C. 526, 19 S. E. 852; *People* v. *Callaghan,* 4 Utah, 49, 6

Pac. 49 (statement of deceased as to who shot him); *Kirby* v. *Com.* 77 Va. 681, 46 Am. Rep. 747; *Puryear* v. *Com.* 83 Va. 51, 1 S. E. 512 (deceased accusing defendant of poisoning her, while in the agonies of death).

Acts and declarations of injured person in rape.

Immediate complaint of person so injured admissible as *res gestæ*. —*McMath* v. *State,* 55 Ga. 303; *McMurrin* v. *Rigby,* 80 Iowa, 322, 45 N. W. 877; *People* v. *Gage,* 62 Mich. 271, 4 Am. St. Rep. 854, 28 N. W. 835; *Lacy* v. *State,* 45 Ala. 80 (complaint not *res gestæ,* but in corroboration); *People* v. *Brown,* 53 Mich. 531, 19 N. W. 172; *Brown* v. *State,* 72 Miss. 997, 17 So. 278; *State* v. *Imlay,* 22 Utah, 156, 61 Pac. 557.

Admissibility as *res gestæ* of acts and declarations of injured person as affected by lapse of time.

Cases holding same admissible.—*State* v. *Forbes,* 111 La. 473, 35 So. 710 (declarations, if relating to homicide, made two minutes after); *State* v. *Hudspeth,* 159 Mo. 178, 60 S. W. 136 (fifty minutes after); *Territory* v. *Davis,* 2 Ariz. 59, 10 Pac. 359 (three minutes after); *People* v. *Wong Ah Foo,* 69 Cal. 180, 10 Pac. 375 (*eo instanti,* but after accused had crossed the street); *Stevenson* v. *State,* 69 Ga. 68 (on reaching deceased after hearing report of gun at 300 yards); *Mitchell* v. *State,* 71 Ga. 128 (five minutes after shooting); *State* v. *Molisse,* 38 La. Ann. 381, 58 Am. Rep. 181 (ten minutes after); *Lambert* v. *People,* 29 Mich. 71 (three minutes after); *Com.* v. *Werntz,* 161 Pa. 591, 29 Atl. 272 (while wounds were being dressed); *State* v. *Arnold,* 47 S. C. 9, 58 Am. St. Rep. 867, 24 S. E. 926 (five to ten minutes).

Cases holding same inadmissible.—*State* v. *Trusty,* 1 Penn. (Del.) 319, 40 Atl. 766; *Vickery* v. *State,* 50 Fla. 144, 38 So. 907 (after ten minutes, where not a product of the difficulty); *State* v. *Potter,* 13 Kan. 414 (an hour a part where not connected); *State* v. *Charles,* 111 La. 933, 36 So. 29 (ten minutes after shooting in reply to physician's question); *People* v. *Wasson,* 65 Cal. 538, 4 Pac. 555 (some days after); *People* v. *Wong Ark,* 96 Cal. 125, 30 Pac. 1115, disapproving *People* v. *Vernon,* 35 Cal. 49, 95 Am. Dec. 49; *State* v. *Frazier,* Houst. Crim. Rep. (Del.) 176 (thirty minutes after); *Lambright* v. *State,* 34 Fla. 564, 16 So. 582, 9 Am. Crim. Rep. 383 (twelve hours after); *People* v. *Dewey,* 2 Idaho, 83, 6 Pac. 103 (thirty to forty-five minutes after affray had ceased); *State* v. *Pomeroy,* 25 Kan. 349 (three to five minutes); *State* v. *Estoup,* 39 La. Ann. 219, 1 So. 448 (ten minutes after); *Kraner* v. *State,* 61 Miss. 158 (several minutes after); *State* v. *Dominique,* 30 Mo. 585 (two days after); *Collins* v. *State,* 46 Neb. 37, 64 N. W. 432; *Estell* v. *State,* 51 N. J. L. 182, 17 Atl. 118, 8 Am. Crim. Rep. 514 (few minutes after); *Territory* v. *Armijo,* 7 N. M. 428, 37 Pac. 1113; *Denton* v. *State,* 1 Swan, 279 (twenty-five to thirty minutes after).

Admissibility of acts and statements of third persons, generally,

as *res gestæ* of the crime. Held admissible.—*Hall* v. *State,* 130 Ala. 45, 30 So. 422 (third person told defendant not to hit the husband, he had killed the wife); *Byrd* v. *State,* 69 Ark. 537, 64 S. W. 270 (confusion as to who struck first); *Cardwell* v. *Com.* 20 Ky. L. Rep. 496, 46 S. W. 705 (shot fired by third party); *Selby* v. *Com.* 25 Ky. L. Rep. 2209, 80 S. W. 221 (statement as to explosion of pistol); *Com.* v. *Ratcliffe,* 130 Mass. 36 (declarations of one against the other); *Hartnett* v. *McMahan,* 168 Mass. 3, 46 N. E. 392 (bystander's remark); *State* v. *Elkins,* 101 Mo. 344, 14 S. W. 116 (bystander's remark); *State* v. *Sexton,* 147 Mo. 89, 48 S. W. 452 (declarations of people hearing gun fired); *State* v. *McCourry,* 128 N. C. 594, 38 S. E. 883 (accusations of third parties); *Baysinger* v. *Territory,* 15 Okla. 386, 82 Pac. 728 (bystander's statement); *State* v. *Duncan,* 8 Rob. (La.) 562 (declarations of third parties); *Dismukes* v. *State,* 83 Ala. 287, 3 So. 671 (exclamations); *Appleton* v. *State,* 61 Ark. 590, 33 S. W. 1066 (exclamations of third parties); *People* v. *Murphy,* 45 Cal. 137 (exclamations of wife of defendant); *United States* v. *Schneider,* 21 D. C. 381, (declarations of bystander); *Flanegan* v. *State,* 64 Ga. 52 (remark of bystander); *Barrow* v. *State,* 80 Ga. 191, 5 S. E. 64 (remark of bystander as to knife); *Rapp* v. *Com.* 14 B. Mon. 614 (interference of third party); *State* v. *Horton,* 33 La. Ann. 289 ("I know you, J."); *Stroud* v. *Com.* 14 Ky. L. Rep. 179, 19 S. W. 976 (statement of bystander); *Com.* v. *Crowley,* 165 Mass. 569, 43 N. E. 509 (answers to questions to show state of defendant's mind with regard to fear of deceased); *People* v. *Palmer,* 105 Mich. 568, 63 N. W. 656 (threats made to third person); *State* v. *Walker,* 78 Mo. 380 (exclamation of third party); *State* v. *Kaiser,* 124 Mo. 651, 28 S. W. 182 (exclamation of third person); *Newman* v. *State,* 160 Ala. 102, 49 So. 786; *Barnard* v. *United States,* 89 C. C. A. 376, 162 Fed. 618 (perjury); *Haines* v. *People,* 138 Ill. App. 49; *State* v. *Rutledge,* 135 Iowa, 581, 113 N. W. 461.

Statements of third persons before the commission of the act as *res gestæ* of the act admissible.—*Wood* v. *State,* 128 Ala. 27, 86 Am. St. Rep. 71, 29 So. 557 ("I have come to see you about what you did to me yesterday"); *Shirley* v. *State,* 144 Ala. 35, 40 So. 269 ("Look, there is Uncle Isaac going to shoot us"); *State* v. *Wright,* 112 Iowa, 436, 84 N. W. 541 (why a party was sent on a trip with defendant); *Johnson* v. *Com.* 22 Ky. L. Rep. 1885, 61 S. W. 1005 (statements made by witness day preceding); *State* v. *Jarrell,* 141 N. C. 722, 53 S. E. 127, 8 A. & E. Ann. Cas. 438 ("We will whip you in a minute"); *Alexander* v. *United States,* 138 U. S. 353, 34 L. ed. 954, 11 Sup. Ct. Rep. 350.

Statements and declarations of third parties after the crime held admissible as *res gestæ.*—*McUin* v. *United States,* 17 App. D. C. 323 (call to another person); *Knight* v. *State,* 114 Ga. 48, 88 Am. St. Rep. 17, 39 S. E. 928 (deceased asked

who shot him, and third party named accused); *Grant* v. *State,* 124 Ga. 757, 53 S. E. 334 ("Have you shot Mary?" Defendant not replying, a child answered, "You have shot mama"); *Ross* v. *Com.* 21 Ky. L. Rep. 1344, 55 S. W. 4, 13 Am. Crim. Rep. 294 (explanation of act); *Collins* v. *Com.* 24 Ky. L. Rep. 884, 70 S. W. 187 (exclamations after shooting); *People* v. *McArron,* 121 Mich. 1, 79 N. W. 944 (exclamations of third party); *People* v. *Hossler,* 135 Mich. 384, 97 N. W. 754 (statement of wife to defendant after killing); *State* v. *Williams,* 96 Minn. 351, 105 N. W. 265 (statement of third party mortally wounded); *State* v. *Woodward,* 191 Mo. 617, 90 S. W. 90; *State* v. *McCourry,* 128 N. C. 594, 38 S. E. 883 (third person's statement how killing was done); *Stein* v. *State,* 37 Ala. 123 (statement of party furnishing poisoned water as to its effect on himself); *Kirk* v. *State,* 73 Ga. 620 (answer of deceased to third person as to who shot him); *Lander* v. *People,* 104 Ill. 248 (exclamation of witnesses day succeeding); *Surber* v. *State,* 99 Ind. 71 (exclamation of bystanders following crime); *State* v. *Schmidt,* 73 Iowa, 469, 35 N. W. 590 (third persons after crime); *People* v. *Foley,* 64 Mich. 148, 31 N. W. 94 (statements made to accused by his wife).

Statements and declarations excluded on the ground of being narration, or as showing premeditation and thought.—*Smith* v. *Territory,* 11 Okla. 669, 69 Pac. 805; *State* v. *Blanchard,* 108 La. 110, 32 So. 397; *State* v. *Smith,* 43 Or. 109, 71 Pac. 973; *People* v. *Davis,* 56 N. Y. 95; *United States* v. *King,* 34 Fed. 302; *Forrest* v. *State,* 21 Ohio St. 641; *Hall* v. *State,* 132 Ind. 317, 31 N. E. 536; *Parker* v. *State,* 136 Ind. 284, 35 N. E. 1105.

Other crimes as *res gestæ* of the crime charged.

In homicide.—*Vasser* v. *State,* 75 Ark. 373, 87 S. W. 635 (shooting second person after the first); *Oliver* v. *State,* 38 Fla. 46, 20 So. 803; *Denham* v. *Com.* 119 Ky. 508, 84 S. W. 538 (robbery at the time of assault); *Com.* v. *Kennedy,* 170 Mass. 18, 48 N. E. 770 (persons given poison at the same time); *State* v. *Adams,* 138 N. C. 688, 50 S. E. 765 (series of killing family members); *State* v. *Porter,* 32 Or. 135, 49 Pac. 964; *State* v. *Hayes,* 14 Utah, 118, 46 Pac. 752; *State* v. *Shockley,* 29 Utah, 25, 110 Am. St. Rep. 639, 80 Pac. 865 (to prove malignant and abandoned mind); *Dove* v. *State,* 37 Ark. 261; *Turner* v. *State,* 102 Ind. 425, 1 N. E. 869, 5 Am. Crim. Rep. 360; *Snapp* v. *Com.* 82 Ky. 173, 6 Am. Crim. Rep. 183; *Gassenheimer* v. *State,* 52 Ala. 313; *Hobbs* v. *State,* 75 Ala. 1; *Seams* v. *State,* 84 Ala. 410, 4 So. 521 (to show animus); *Hawes* v. *State,* 88 Ala. 37, 7 So. 302; *Doghead Glory* v. *State,* 13 Ark. 236 (attack on another); *Piela* v. *People,* 6 Colo. 343; *Pritchett* v. *State,* 92 Ga. 65, 18 S. E. 536; *State* v. *Dooley,* 89 Iowa, 584, 57 N. W. 414.

Other offenses as *res gestæ* of the crime charged.

In larceny.—*Lowe* v. *State,* 134 Ala. 154, 32 So. 273 (cattle stealing); *Echols* v. *State,* 147 Ala. 700, 41 So. 298 (stealing goods of third

party); *Bradford* v. *State*, 147 Ala. 95, 41 So. 462; *People* v. *Nagle*, 137 Mich. 88, 100 N. W. 273; *State* v. *Halpin*, 16 S. D. 170, 91 N. W. 605; *State* v. *Anderson*, 120 La. 331, 45 So. 267; *Arnold* v. *State*, 131 Ga. 494, 62 S. E. 806; *State* v. *Anderson*, 53 Or. 479, 101 Pac. 198.

Prior offenses so connected with the crime charged as to be *res gestæ* of the crime.

In homicide.—*People* v. *Woods*, 147 Cal. 265, 109 Am. St. Rep. 151, 81 Pac. 652; *People* v. *McClure*, 148 Cal. 418, 83 Pac. 437; *Burton* v. *Com.* 119 Ky. 664, 60 S. W. 526; *Gallaher* v. *State*, 101 Ind. 411 (acts during a riot); *Kennedy* v. *State*, 107 Ind. 144, 57 Am. Rep. 99, 6 N. E. 305, 7 Am. Crim. Rep. 422; *State* v. *McCahill*, 72 Iowa, 111, 30 N. W. 553, 33 N. W. 599 (in riot); *Mask* v. *State*, 32 Miss. 405.

Subsequent offenses so connected with the crime charged as to be *res gestæ* of the crime.—*People* v. *Teixeira*, 123 Cal. 297, 55 Pac. 988 (evidence of subsequent assault admissible as *res gestæ*); *State* v. *Robinson*, 112 La. 939, 36 So. 811; *Moran* v. *Territory*, 14 Okla. 544, 78 Pac. 111; *State* v. *Burton*, 27 Wash. 528, 67 Pac. 1097; *Reed* v. *Com.* 98 Va. 817, 36 S. E. 399.

Statements incriminating accused so connected with the crime as to be part thereof, admissible as *res gestæ*.—*Nordan* v. *State*, 143 Ala. 13, 39 So. 406 (stating defendant gave poison); *Simmons* v. *State*, 145 Ala. 61, 40 So. 660 (that defendant had a pistol, made to other persons); *Smith* v. *State*, 147 Ala. 692, 40 So. 959 ("he has shot me" after the crime); *State* v. *Wilmbusse*, 8 Idaho, 608, 70 Pac. 849 (statement that defendant fired the shot); *Green* v. *State*, 154 Ind. 655, 57 N. E. 637; *State* v. *Morrison*, 64 Kan. 669, 68 Pac. 48, 13 Am. Crim. Rep. 347 (statement after throat was cut); *State* v. *Robinson*, 52 La. Ann. 541, 27 So. 129, 13 Am. Crim. Rep. 357 (statement as to who shot); *State* v. *Carter*, 106 La. 407, 30 So. 895; *State* v. *Foley*, 113 La. 52, 104 Am. St. Rep. 493, 36 So. 885; *State* v. *Epstein*, 25 R. I. 131, 55 Atl. 204, 15 Am. Crim. Rep. 10; *Franklin* v. *State*, 34 Tex. Crim. Rep. 203, 29 S. W. 1088; *Andrews* v. *Com.* 100 Va. 801, 40 S. E. 935 (as to who shot); *Bliss* v. *State*, 117 Wis. 596, 94 N. W. 325.

Statements of deceased preceding the crime as *res gestæ* in abortion.—*State* v. *Dickinson*, 41 Wis. 299, 2 Am. Crim. Rep. 1; *Solander* v. *People*, 2 Colo. 48; *State* v. *Hayden*, 1 Ky. L. Rep. 71; *Cluverius* v. *Com.* 81 Va. 787; *State* v. *Howard*, 32 Vt. 380.

Likewise, statements exculpating accused are admissible as part of the *res gestæ*.—*State* v. *Hudspeth*, 150 Mo. 12, 51 S. W. 483; *Johnson* v. *State*, 8 Wyo. 494, 58 Pac. 761, 13 Am. Crim. Rep. 374; *Driscoll* v. *People*, 47 Mich. 413, 11 N. W. 221.

Acts and statements admissible as *res gestæ* in stolen property.—*Mitchell* v. *Territory*, 7 Okla. 527, 54 Pac. 782 (statement and declarations when in possession of property); *State* v. *Territory*, 14 Okla. 518, 79 Pac. 214; *State* v. *White*, 77 Vt. 241, 59 Atl. 829, 2 A. & E. Ann. Cas. 302; *Allen* v. *State*, 73 Ala. 23; *Baysinger* v. *State*, 77 Ala. 63, 54 Am. Rep. 46; *Walker* v. *State*,

As long as the transaction continues, so long do acts and deeds emanating from it become part of it,[2] so that in describing it in a court of justice they can be detailed.

The distinguishing question is, Is the evidence offered that of the event speaking through the participants? If so, what was thus said can be introduced without calling those who said it. Is the evidence offered that of observers speaking about the event? If so, such observers must be called to testify.

Nor are there any limits of time within which the *res gestæ* can be arbitrarily confined. They vary in fact with each particular case.[3]

If, in one of our streets, there is an unexpected collision between two men, entire strangers to each other, then the *res gestæ* of the collision is confined to the few moments that it occupies.

But in case of feuds and riots and strikes or disturbances, where parties are arrayed against each other for weeks, and

28 Ga. 254; *Bennett* v. *People,* 96 Ill. 602; *Perry* v. *State,* 41 Tex. 483; *O'Connell* v. *State,* 55 Ga. 296; *Parsons* v. *State,* 43 Ga. 197; *Lovett* v. *State,* 80 Ga. 255, 4 S. E. 912; *Comfort* v. *People,* 54 Ill. 404; *State* v. *Gabriel,* 88 Mo. 631; *Atwood's Case,* 4 N. Y. City Hall Rec. 91; *State* v. *Weaver,* 104 N. C. 758, 10 S. E. 486; *Leggestt* v. *State,* 15 Ohio, 283. Contra to this are *State* v. *Wisdom,* 8 Port. (Ala.) 511; *Spivey* v. *State,* 26 Ala. 90; *Taylor* v. *State,* 42 Ala. 529; *Maynard* v. *State,* 46 Ala. 85; *Cooper* v. *State,* 63 Ala. 80; *Allen* v. *State,* 73 Ala. 23; *Williams* v. *State,* 105 Ala. 96, 17 So. 86; *State* v. *Pettis,* 63 Me. 124; *State* v. *Ware,* 62 Mo. 597; *State* v. *Slack,* 1 Bail. L. 330.

[2] *Mitchum* v. *State,* 11 Ga. 615; *McGowen* v. *McGowen,* 52 Tex. 657, 664; *Little Rock, M. R. & T. R. Co.* v. *Leverett,* 48 Ark. 333, 3 Am. St. Rep. 230, 3 S. W. 50.

[3] *People* v. *Vernon,* 35 Cal. 49, 95 Am. Dec. 49; *Davids* v. *People,* 192 Ill. 176, 61 N. E. 537; *Johnson* v. *State,* 8 Wyo. 494, 58 Pac. 761, 13 Am. Crim. Rep. 374; *State* v. *Lockett,* 168 Mo. 480, 68 S. W. 563; *Lambright* v. *State,* 34 Fla. 564, 16 So. 582, 587, 9 Am. Crim. Rep. 383; *Wright* v. *State,* 88 Md. 705, 41 Atl. 1060; *Enos* v. *Tuttle,* 3 Conn. 247; *Com.* v. *Werntz,* 161 Pa. 591, 29 Atl. 272; *State* v. *Phillips,* 118 Iowa, 660, 92 N. W. 876; *Hupfer* v. *National Distilling Co.* 119 Wis. 417, 96 N. W. 809.

people are so absorbed in the collision as to be conscious of little else, then all that such parties say and do under such circumstances is as much a part of the *res gestæ* as the blows given in the homicides, for which particular prosecutions may be brought.[4]

Declarations claimed to be a part of the *res gestæ* may precede,[5] accompany,[6] or follow[7] the transaction to which they relate. But it is only when they precede, accompany, or follow the transaction so as to be wrought up in it and emanate from it, that they can be rightfully regarded as excepted from the rule which excludes hearsay.[8]

It is the universal rule that narratives of the transaction after it has occurred are inadmissible as *res gestæ*, and not admissible at all unless as admissions by the party charged;[9] on the same principle declarations prior to the transaction are

[4] *Com.* v. *Daley,* 2 Clark (Pa.) 361; *Gordon's Case,* 21 How. St. Tr. 542, 11 Eng. Rul. Cas. 282; *United States* v. *Angell,* 11 Fed. 34, *Robinson* v. *State,* 57 Md. 15; post, § 263.

In confessions, see post, § 691.

In dying declarations, post § 296. Compare *Nutting* v. *Page,* 4 Gray, 584; *Meek* v. *Perry,* 36 Miss. 190. See *Edmonds* v. *State,* 34 Ark. 720; 10 Am. Rep. 28, 29, note; 1 Crim. Law Mag. 62, note; 21 Alb. L. J. 484, 504; 22 Alb. L. J. 4.

[5] *State* v. *Biggerstaff,* 17 Mont. 510, 43 Pac. 709; *Monroe* v. *State,* 5 Ga. 85; *Means* v. *Carolina C. R. Co.* 124 N. C. 574, 45 L.R.A. 164, 32 S. E. 960; *Cox* v. *State,* 8 Tex. App. 254, 34 Am. Rep. 746; *Means* v. *State,* 10 Tex. App. 16, 38 Am. Rep. 640; *Shirley* v. *State,* 144 Ala. 35, 40 So. 269; *Trulock* v. *State,* 70 Ark. 558, 69 S. W. 677; *State* v. *Wagner,* 61 Me. 178; *Bankhead* v. *State,* 124 Ala. 14, 26 So. 979.

[6] *State* v. *Woodward,* 191 Mo. 617, 90 S. W. 90; *People* v. *Woods,* 147 Cal. 265, 109 Am. St. Rep. 151, 81 Pac. 652. See note 1.

[7] *Plant* v. *State,* 140 Ala. 52, 37 So. 159; *Ferguson* v. *State,* 141 Ala. 20, 37 So. 448; *State* v. *Vinso,* 171 Mo. 576, 71 S. W. 1034; *Moran* v. *Territory,* 14 Okla. 544, 78 Pac. 111; *Johnson* v. *State,* 88 Ga. 203, 14 S. E. 208; *State* v. *Garrand,* 5 Or. 216.

[8] *State* v. *Prater,* 52 W. Va. 132, 43 S. E. 230; *St. Clair* v. *United States,* 154 U. S. 133, 38 L. ed. 936, 14 Sup. Ct. Rep. 1002; Greenl. Ev. § 108.

[9] *Smith* v. *Territory,* 11 Okla. 669, 60 Pac. 805; *State* v. *Blanchard,* 108 La. 110, 32 So. 397; supra, note 1; post, § 264.

excluded.[10] The conflict arises in the cases where the question is whether the declarations offered were a part of the transaction. Thus, in the Bedingfield Case,[11] a declaration by the deceased about fifteen minutes after her throat had been cut by the defendant, and about ten minutes before her death, charging the accused with the assault, was not part of the *res gestæ*. In Com. v. M'Pike[12] the declaration was made "after a very considerable interval of time."[13]

Whatever may be said as to the ruling in the Bedingfield Case, the ruling in the M'Pike Case cannot be sustained. It cannot be regarded as a dying declaration, because there was no proof of consciousness of approaching death. To hold that it was not in the category of hearsay, because it was a part of the *res gestæ*, would require the admission in evidence of statements by participants in past transactions, no matter how long the interval between the transaction and its recital. Passing the line which distinguishes the transaction talking of itself and talking as modifying the transaction, or passing the line between the time of the transaction and the time that follows, we have no limits that can be imposed. If declarations made ten minutes after the transaction are received, on the same principle declarations made ten years after must be received. The impulses of anger, or of ungrounded suspicion may operate even more effectively, in many minds, ten minutes after an injury than they would after ten years had elapsed.[14]

[10] Post, § 268. But see note 1 as to statements preceding crime in abortion.

[11] 14 Cox, C. C. 341.

[12] *Com.* v. *M'Pike,* 3 Cush. 181, 50 Am. Dec. 727. See also *Lander* v. *People,* 104 Ill. 256.

[13] J. B. Thayer, 15 Am. L. Rev. Jan. 1881, 85.

[14] Roscoe, Crim. Ev. 261; *People* v. *Williams,* 3 Abb. App. Dec. 596; *Cheek* v. *State,* 35 Ind. 492; *People* v. *Ah Lee,* 60 Cal. 85, overruling *People* v. *Vernon,* 35 Cal. 49, 95 Am. Dec. 49.

The better rule is that when the transaction is over, no matter how short may have been the interval and the assailant is absent, declarations by the assailed, even

§ 263. Res gestæ must spring with the act.—The distinguishing feature of declarations of this class is that they should be the necessary incidents of the litigated act; necessary in this sense, that they are a part of the intermediate concomitants or conditions of such act, and are not produced by the calculated policy of the actors. They must stand in immediate casual relation to the act, and become part either of the action immediately producing it, or of the action which it immediately produces. Incidents that are thus immediately and unconsciously associated with an act, whether such incidents are doings or declarations, become in this way evidence of the character of the act.[1]

though subsequently deceased, are not part of the *res gestæ*. *Com.* v. *Hackett*, 2 Allen, 136; *Hunter* v. *State*, 40 N. J. L. 495. See *Hunter State*, 40 N. J. L. 495. See *Thomas* v. *State*, 67 Ga. 460; 21 Alb. L. J. 484 et seq; 22 Alb. L. J 4 et seq.; 10 Cent. L. J. 23; 16 Cent. L. J. 2; 14 Am. L. Rev. 817; 15 Am. L. Rev. 1, 21, by J. B. Thayer; *State* v. *Hayden*, 9 Rep. 237.

But as conflicting with *Hayden's Case*, see *People* v. *Williams*, 3 Abb. App. Dec. 596; *Cheek* v. *State*, 35 Ind. 492; *Cooper* v. *State*, 63 Ala. 80; *State* v. *Pomeroy*, 25 Kan. 349; *Pharr* v. *State*, 10 Tex. App. 485; *State* v. *Dickinson*, 41 Wis. 299, 2 Am. Crim. Rep. 1.

Declarations on recovering consciousness. *Johnson* v. *State*, 65 Ga. 94; *Lanier* v. *State*, 57 Miss. 102.

Traveler's Ins. Co. v. *Mosley*, 8 Wall. 397, 19 L. ed. 437, pushes the limits of the *res gestæ* to an extent that may be gravely questioned. See Wharton, Ev. §§ 261, 268, *People* v. *Davis*, 56 N. Y. 102.

[1] *United States* v. *Craig*, 4 Wash. C. C. 729, Fed. Cas. No. 14,883; *United States* v. *O'Meara*, 1 Cranch, C. C. 165, Fed. Cas. No. 15,919; *State* v. *Wagner*, 61 Me. 178; *Com.* v. *Williams*, 105 Mass. 62; *Com.* v. *Vosburg*, 112 Mass. 419; *Russell* v. *Frisbie*, 19 Conn. 205; *Hight* v. *Hayt*, 19 N. Y. 464; *Greenfield* v. *People*, 85 N. Y. 75, 39 Am. Rep. 636; *Schnicker* v. *People*, 88 N. Y. 192; *Hunter* v. *State*, 40 N. J. L. 495; *Brown* v. *Com.* 76 Pa. 319; *State* v. *Frazier*, Houst. Crim. Rep. (Del.) 176; *Haynes* v. *Com.* 28 Gratt. 942; *State* v. *Ridgely*, 2 Harr. & McH. 120, 1 Am. Dec. 372; *Robinson* v. *State*, 57 Md. 14; *Comfort* v. *People*, 54 Ill. 404; *Davison* v. *People*, 90 Ill. 222; *Lander* v. *People*, 104 Ill. 248; *Hamilton* v. *State*, 36 Ind. 281, 10 Am. Rep. 22; *Binns* v. *State*, 57 Ind. 46, 26 Am. Rep. 48; *People* v. *Marble*, 38 Mich. 117; *State* v. *Porter*, 34 Iowa, 131; *Mack* v. *State*, 48 Wis. 271, 4 N. W. 449; *State* v. *Tilly*, 25 N. C. (3 Ired. L.) 424; *State* v. *Huntly*, 25 N. C. (3

Under this rule, evidence in homicide trials has been received of the exclamations of the defendant at the time of the attack;[2] crisis of the deceased and of others assaulted at the same time;[3] statements of the deceased at the time, or so soon before, or afterwards, so as to preclude the hypothesis of concoction or premeditation, charging the defendant with the act;[4] in robbery, explanations of the parties immediately after the robbery;[5] in abduction, declarations of the mother of the abducted children, immediately after the abduction, though in defendant's absence,[6] in larceny, to rebut presumptions arising from the possession of the property, declarations of the parties at the time of receiving the goods are received.[7] On the same principle, the cries of a mob led by parties tried for riot and unlawful meeting can be received against defendants without regard to the time, during the continuance of the riot, that such cries were uttered.[8]

Ired. L.) 418; *State* v. *Rawles,* 65 N. C. 334; *Mitchum* v. *State,* 11 Ga. 615; *Stiles* v. *State,* 57 Ga. 183; *Flanegan* v. *State,* 64 Ga. 52; *Johnson* v. *State,* 65 Ga. 94; *Manier* v. *State,* 6 Baxt. 595; *Taylor* v. *State,* 11 Lea, 708; *Ross* v. *State,* 62 Ala. 224; *Cooper* v. *State,* 63 Ala. 80; *Steele* v. *State,* 61 Ala. 213; *Allen* v. *State,* 60 Ala. 19; *Head* v. *State,* 44 Miss. 731; *Field* v. *State,* 57 Miss. 474, 34 Am. Rep. 476; *State* v. *Graham,* 46 Mo. 490; *State* v. *Testerman,* 68 Mo. 408; *State* v. *Swain,* 68 Mo. 605; *State* v. *Evans,* 65 Mo. 574; *State* v. *Thomas,* 30 La. Ann. 600; *Wilson* v. *State,* 33 Ark. 557, 34 Am. Rep. 52; *State* v. *Winner,* 17 Kan. 298. See note 1 § 262, supra.

[2] *O'Mara* v. *Com.* 75 Pa. 424; *Wilson* v. *People,* 94 Ill. 299; *Mitchum* v. *State,* 11 Ga. 615; *People* v. *Roach,* 17 Cal. 297.

[3] *State* v. *Wagner,* 61 Me. 178; *Bradshaw* v. *Com.* 10 Bush, 576; *People* v. *Murphy,* 45 Cal. 137.

[4] Post, § 296; *Com.* v. *M'Pike,* 3 Cush. 181, 50 Am. Dec. 727; *State* v. *Nash,* 10 Iowa, 81. See *State* v. *Pomeroy,* 25 Kan. 349; note 1, § 262, supra.

[5] *Driscoll* v. *People,* 47 Mich. 413, 11 N. W. 221. See note 1, § 262, supra.

[6] *Robinson* v. *State,* 57 Md. 15.

[7] *Rex* v. *Abraham,* 2 Car. & K. 550, 3 Cox, C. C. 430; *State* v. *Daley,* 53 Vt. 442, 38 Am. Rep. 694; *Leggett* v. *State,* 15 Ohio, 283; *People* v. *Dowling,* 84 N. Y. 478. *Aliter,* as to past transactions, *Allen* v. *State,* 71 Ala. 5; note 1, § 262, supra. See *Reg.* v. *Wood,* 1 Post. & F. 497; post, §§ 293, 691, 761.

[8] *Gordon's Case,* 21 How. St. Tr. 535, 11 Eng. Rul. Cas. 282, post, §§ 690, 691.

But the comments and criticisms of the observers cannot be introduced as *res gestæ;* such persons must be called and examined in court, as to what they saw. Their statements made at the time are hearsay.[9]

§ 264. Narrative of events not res gestæ.—The rule before us, however, does not permit the introduction, under the guise of *res gestæ,* of a narrative of past events made after the events are closed, by either the party injured or by bystanders.[1] But we must again remember that continuousness cannot always be measured by time. In this view we can understand the comments of Lord Denman,[2] concurring in a prior remark of Parke, B.,[3] "that it is impossible to tie down to time the rule as to the declarations" that may be made part of the *res gestæ* in cases of bankruptcy, to which Lord Denman added "that if there be connecting circumstances, a declaration may, even at a month's interval, form part of the whole *res gestæ.*"[4]

[9] *Bradshaw* v. *Com.* 10 Bush, 576; *People* v. *Murphy,* 45 Cal. 137.

[1] Post, § 691; *Hyde* v. *Palmer,* 3 Best & S. 657, 32 L. J. Q. B. N. S. 126, 7 L. T. N. S. 823, 11 Week. Rep. 433; *Com.* v. *Cooper,* 5 Allen, 495, 81 Am. Dec. 762; *Com.* v. *James,* 99 Mass. 438; *Greenfield* v. *People,* 85 N. Y. 75, 39 Am. Rep. 636; *Hays* v. *State,* 40 Md. 633; *Gardner* v. *People,* 4 Ill. 83; *Cross* v. *People,* 47 Ill. 152, 95 Am. Dec. 474; *Dukes* v. *State,* 11 Ind. 557, 71 Am. Dec. 370; *Binns* v. *State,* 57 Ind. 46, 26 Am. Rep. 48; *Tipper* v. *Com.* 1 Met. (Ky.) 6; *Riggs* v. *State,* 6 Coldw. 517; *Hall* v. *State,* 48 Ga. 608; *Chaney* v. *State,* 31 Ala. 342; *Hall* v. *State,* 40 Ala. 698; *Steele* v. *State,* 61 Ala. 213; *Scaggs* v. *State,* 8 Smedes & M. 722; *State use of Clendenin* v. *Schneider,* 35 Mo. 535; *State* v. *Brown,* 64 Mo. 367; *Mutcha* v. *Pierce,* 49 Wis. 231, 35 Am. Rep. 776, 5 N. W. 486; *State* v. *Pomeroy,* 25 Kan. 349; *People* v. *Simonds,* 19 Cal. 275. See *Binns* v. *State,* 66 Ind. 428; *People* v. *Ah Lee,* 60 Cal. 85; Greenl. Ev. § 110; *People* v. *Davis,* 56 N. Y. 102. See *Lees* v. *Marton,* 1 Moody & R. 210; note 1, § 262, supra.

[2] *Rouch* v. *Great Western R. Co.* 1 Q. B. 51, 4 Perry & D. 686, 2 Eng. Ry. & C. Cas. 505, 5 Jur. 821.

[3] *Rawson* v. *Haigh,* 2 Bing. 104, 9 Moore, C. P. 217, 1 Car. & P. 77.

[4] *Ridley* v. *Gyde,* 9 Bing. 349;

§ 265. Coincident business declarations as res gestæ.—The rule before us is not limited to declarations explanatory of crimes. To business relations, also, the same test is applicable,—declarations which are the immediate accompaniment of an act being admissible as part of the *res gestæ;* remembering that immediateness is tested by closeness not of time, but of causal relation, as just explained.[1]

Such declarations are incident to the transaction, and as such are necessary to a clear comprehension of the principal transaction which they illustrate.[2]

The modern tendency is to enlarge the class of incidents springing out of the main transaction.[3]

It should be observed that in business relations the incidents and declarations lead up to and from the principal transaction. Hence the rule might be enlarged without serious harm.

However, in personal injury cases, and in all cases where the recovery is in the nature of damages for tort or injury, the incidents spring from the main transaction, and the doctrine may well be limited, owing to the intensity of the personal factor developed in such cases.

But in criminal cases, the established rule should be strictly adhered to, and not extended.[4]

§ 266. Declarations and occurrences as res gestæ.—What is done is a part of the *res gestæ,* as much so as what

People v. *Marble,* 38 Mich. 117; *Cox* v. *State,* 64 Ga. 374, 37 Am. Rep. 76; note 1, § 262, supra.

[1] Wharton, Ev. § 262. But see *State* v. *Seymour,* Houst. Crim. Rep. (Del.) 508; post, § 691.

[2] *Hupfer* v. *National Distilling Co.* 119 Wis. 417, 96 N. W. 809; *Galena & C. Union R. Co.* v. *Fay,* 16 Ill. 558, 63 Am. Dec. 323.

[3] *Travellers' Ins. Co.* v. *Mosley,* 8 Wall. 397, 19 L. ed. 437; *Vicksburg & M. R. Co.* v. *O'Brien,* 119 U. S. 99, 30 L. ed. 299, 7 Sup. Ct. Rep. 118 (Field's opinion dissenting); *Jack* v. *Mutual Reserve Fund Life Asso.* 51 C. C. A. 36, 113 Fed. 49; *Washington & G. R. Co.* v. *McLane,* 11 App. D. C. 220.

[4] *State* v. *Maddox,* 92 Me. 348, 42 Atl. 788.

is said;[1] thus, it was admissible to prove the inscriptions on flags exhibited at seditious meetings, without producing the flags,[2] for such inscriptions used on such occasions are the public expression of the sentiments of those who bear them, and have rather the character of speeches than of writings.[3] Nor is the application of this rule limited to cases when the fact to be brought out is that which is the primary object of litigation. Thus (subject to the limitations hereinafter stated), when an evidentiary fact is put in evidence, either party is entitled to introduce as proof whatever tends to explain it, whether in the way of words or signs.[4] It is essential, however, to the admission of declarations under this exception, that they should have emanated instinctively from the act put in evidence. If they were before or after it, so as to be open to the suspicion of being self-serving, they are to be excluded.[5] They are admissible because they are so wrought up in the body of the act that they cannot be separated from it. In such cases the act is part of the declaration and the declaration part of the act. The words and deeds form part of a common mass of signs which cannot, in this

[1] *Savage* v. *State*, 18 Fla. 909.

[2] Supra, § 81.

[3] *Rex* v. *Hunt*, 3 Barn. & Ald. 574, 22 Revised Rep. 485.

[4] *Mack* v. *State*, 48 Wis. 271, 4 N. W. 449, citing the following cases: *Wiggin* v. *Plummer*, 31 N. H. 251–267; *Gordon* v. *Shurtliff*, 8 N. H. 260; *Plumer* v. *French*, 22 N. H. 454; *Hersom* v. *Henderson*, 23 N. H. 498; *Ranger* v. *Goodrich*, 17 Wis. 79–85; *Lund* v. *Tyngsborough*, 9 Cush. 36–41; *Bates* v. *Ableman*, 13 Wis. 644–650; *Sorenson* v. *Dundas*, 42 Wis. 642; *Felt* v. *Amidon*, 43 Wis. 467; *Hamilton* v. *State*, 36 Ind. 280, 10 Am. Rep. 22. See *Parsons* v. *State*, 43 Ga. 197; *Comfort* v. *People*, 54 Ill. 404; *Head* v. *State*, 44 Miss. 731; *M'Kee* v. *People*, 36 N. Y. 113; *Russell* v. *Frisbie*, 19 Conn. 205; post, § 691; *People* v. *Majone*, 1 N. Y. Crim. Rep. 87–94; *Wilson* v. *People*, 94 Ill. 299; *State* v. *Maxey*, 107 La. 799, 32 So. 206; *Waldele* v. *New York C. & H. R. R. Co.* 29 Hun, 35.

[5] Post, § 690; *Futch* v. *State*, 90 Ga. 472, 16 S. E. 102. See *Atchison, T. & S. F. R. Co.* v. *Logan*, 65 Kan. 748, 70 Pac. 878.

sense, be distinguished. A man, for instance, is wounded in an affray. His cry immediately on receiving the hurt is as much an act as his attempt to ward it off. But the admission of statements of this class does not imply the acceptance of any facts they assert. They are admissible as parts of an act, not as verifiers of an independent transaction. The act of which the statement is part may have taken place, and yet the statement be in the main false.[6]

Thus, to take a common case, a party assailed may exclaim, at the moment of assault, "This was in revenge." The exclamation is evidence as part of the transaction, but it is no more proof of an old grudge than would be a statement to the same effect made a month before the assault or a month afterwards.[7]

§ 267. Test of secondariness does not apply.—The test of secondariness does not apply in such cases. Thus, a foreign proclamation on a printed placard is treated as an inscription or act done at such a time, and may be proved by oral evidence or an examined copy.[1]

§ 268. Statements made in preparation for crime inadmissible.—Statements concocted in advance as part of a projected scheme of crime are clearly not within the exception.[1] Such statements are inadmissible as self-serving, and

[6] See *People* v. *Ah Yute,* 53 Cal. 613.

[7] Declarations of bystanders at the time of a surgical operation are admissible to show what then took place. See *Hitchcock* v. *Burgett,* 38 Mich. 501; *Robinson* v. *State,* 57 Md. 14. Compare *Ohio & M. R. Co.* v. *Porter,* 92 Ill. 437. That the admissibility of such declarations is not affected by the party making them being incompetent as a witness, see *State* v. *Dellwood,* 33 La. Ann. 1229.

A statement as part of the *res gestæ* cannot be used to prove its own competency. *State* v. *Williams,* 108 La. 222, 32 So. 402.

[1] *Bruce* v. *Nicolopulo,* 11 Exch. 129, 3 C. L. R. 775, 24 L. J. Exch. N. S. 321, 3 Week. Rep. 483.

[1] Wharton, Ev. § 268.

cannot, therefore, be introduced by the defendants on their own behalf.[2] They may be put in evidence, however, by the prosecution, when the object is to prove premeditation and preparation on part of the defendants.[3]

§ 269. Declarations inadmissible to explain unexecuted intent.—A declaration is inadmissible for the purpose of explaining an unexecuted intent, unless the subjective condition of the party's mind is at issue.[1] When the quality or tone of an overt act is at issue, declarations as to such act cannot be proved unless the proof of the act itself is admissible, and the act itself is proved.[2]

§ 270. Narration of witness inadmissible when witness can be produced.—The subsequent narrative of a mere witness to a transaction is not in any view to be received as a part of the *res gestæ*, if the witness himself is obtainable on trial.[1] The opinions of a bystander, if admissible, must be proved by calling him as a witness.[2] It does not follow, however, as we will hereafter see, that because a defendant may

[2] *Berney* v. *State*, 69 Ala. 220.

[3] Post, § 753; Wharton, Ev. § 268.

Facts, circumstances, and declaractions showing premeditation and preparation for crime are, generally speaking, relevant on the trial of the charge. *People* v. *Kelly*, 146 Cal. 119, 79 Pac. 846 (registering under assumed names); *Howard* v. *State*, 109 Ga. 137, 34 S. E. 330 (trying to induce another to commit the crime); *Com.* v. *Robinson*, 146 Mass. 571, 16 N. E. 452 (preceding acts to render the crime certain and more effective); *Com.* v. *McManiman*, 27 Pa. Super. Ct. 304 (showing intimacy between accomplice and accused); *State* v. *Johnson*, 111 La. 935, 36 So. 30 (showing presence of accused near scene of crime shortly after or before the crime).

[1] *Hall* v. *State*, 48 Ga. 607; *Caw* v. *People*, 3 Neb. 357. See *Hale* v. *Taylor*, 45 N. H. 405; *Lund* v. *Tyngsborough*, 9 Cush. 36.

[2] Wharton, Ev. 266.

[1] Wharton, Ev. § 267. See *Kennard* v. *Burton*, 25 Me. 39; *Reed* v. *New York C. R. Co.* 45 N. Y. 574.

[2] Supra, § 263; *Detroit & M. R. Co.* v. *Van Steinburg*, 17 Mich. 99.

testify as a witness, therefore his declarations are inadmissible, nor, as has already been noticed, is it necessary in proving cries at a particular moment of excitement, to call the persons by whom the cries were made.[3]

Nor are such utterances conditioned on the admissibility as witnesses of the persons making them.[4]

[3] Supra, § 256.

[4] *State* v. *Dellwood,* 33 La. Ann. 1229; *Wilson* v. *State,* 49 Tex. Crim. Rep. 50, 90 S. W. 312; *Kenney* v. *State,* — Tex. Crim. Rep. —, 65 L.R.A. 316, 79 S. W. 817; *Kenney* v. *Phillipy,* 91 Ind. 511; *Thomas* v. *State,* 47 Tex. Crim. Rep. 534, 122 Am. St. Rep. 712, 84 S. W. 823; *Beal-Doyle Dry Goods Co.* v. *Carr,* 85 Ark. 479, 108 S. W. 1053, 14 A. & E. Ann. Cas. 48; *Soto* v. *Territory,* 12 Ariz. 36, 94 Pac. 1104.

"*Res gestæ* is not a witness. It cannot be summoned as a witness, nor sworn as a witness, nor put under the rule as a witness, nor punished for contempt nor perjury as a witness. But it is a fact, an integral part of the transaction, occurring *dum fervet opus,* and, as a fact, it can be testified to by any competent witness who may have heard it, just as such witness may testify as to any other fact which transpires during the transaction, and which is and was a part thereof." *Kenney* v. *State,* — Tex. Crim. Rep. —, 65 L.R.A. 316, 79 S. W. 817.

So, the declarations of a wife may be received as *res gestæ* even where she would not be a competent witness against her husband. *People* v. *Foley,* 64 Mich. 148, 31 N. W. 94.

And even the fact that the party who makes the declaration is not named will not of itself exclude the declaration. *Johnson* v. *St. Paul & W. Coal Co.* 126 Wis. 492, 105 N. W. 1048.

Inability on the part of the witness to identify the person will not exclude the statement. *State* v. *McLaughlin,* 149 Mo. 19, 50 S. W. 315.

So, the declaration may be a conclusion of the declarant, but it is not inadmissible for that reason if properly a part of the *res gestæ. People* v. *Swenson,* 49 Cal. 388; *State* v. *Foley,* 113 La. 52, 104 Am. St. Rep. 493, 36 So. 885; *Shotwell* v. *Com.* 24 Ky. L. Rep. 255, 68 S. W. 403; *State* v. *Henderson,* 24 Or. 100, 32 Pac. 1030. *Contra* to this, see *State* v. *Remsey,* 48 La. Ann. 1407, 20 So. 904; *Carr* v. *State,* 76 Ga. 592; *Allen* v. *State,* 111 Ala. 80, 20 So. 490; *Beck* v. *State,* 76 Ga. 452.

But it must always appear that the declarant who made the declaration was more than a mere observer. It must appear that he was present, and that he took part in the event either by act or by word. See supra, § 262; *Bradshaw* v. *Com.* 10 Bush, 576; *State* v. *Riley,* 42 La.

X. Exception as to Declarations Concerning Party's Own Health and State of Mind.

§ 271. Declarations as to injuries and mental condition.—The character of an injury may be explained by exclamations of pain and terror at the time the injury is received, and by declarations as to its cause.[1] When, also, the nature of a party's sickness or hurt is in litigation, his instinctive declarations to his physician or nurse, during such sickness, may be received as part of the testimony and as explanatory of the conclusions of such physician or nurse.[2] Im-

Ann. 995, 8 So. 469; *Flynn* v. *State,* 43 Ark. 289; *Morton* v. *State,* 91 Tenn. 437, 19 S. W. 225.

Such declaration does not prove itself, but it must be proved by independent evidence. *Flynn* v. *State,* 43 Ark. 289.

[1] *Aveson* v. *Kinnaird* (1805), 6 East, 188, 2 Smith, 286, 8 Revised Rep. 455; *Blandy's Case,* 18 How. St. Tr. 1135; *Reg.* v. *Guttridge,* 9 Car. & P. 472; *State* v. *Wagner,* 61 Me. 178; Wharton, Ev. § 268; supra, § 252.

The theory of mental condition is analogous to that of dying declarations. A sudden shock or excitement or illness, stilling for the time being the action of the reasoning faculties, so that the evidence or reflection is absent from what is said, and the utterances are made out of the actual physical and mental sensations, gives a character to the utterance that may be taken as trustworthy. As early as 1693, in an action for assault and battery committed upon the wife of plaintiff, Lord Holt "allowed that what the wife said immediate upon the hurt received, and before she had time to devise or contrive anything for her own advantage, might be given in evidence." *Thompson* v. *Trevanion,* Skinner, 402, 11 Eng. Rul. Cas. 282.

In *Aveson* v. *Kinnaird,* 6 East, 188, 2 Smith, 286, 8 Revised Rep. 455, there were offered the declarations on sick bed by plaintiff's wife, and, following the case of *Thompson* v. *Tevanion,* these declarations upon the subject of her own health were admitted. These would now be called *res gestæ,* or the events that sprang from the main transaction, and were admissible to explain and illustrate it. *Knox* v. *Wheelock,* 54 Vt. 150; *Hewitt* v. *Eisenhart,* 36 Neb. 794, 55 N. W. 252; *Birmingham R. & Electric Co.* v. *Ellard,* 135 Ala. 433, 33 So. 276; *Harris* v. *Detroit City R. Co.* 76 Mich. 227, 42 N. W. 1111. See *State* v. *Dart,* 29 Conn. 153, 76 Am. Dec. 596.

[2] *Com.* v. *M'Pike,* 3 Cush. 181, 50 Am. Dec. 727; *Wilson* v. *Granby,*

mediate groans and gestures are in like manner admissible.[3]

47 Conn. 59, 36 Am. Rep. 51; *People* v. *Williams,* 3 Park. Crim. Rep. 84; *Pierson* v. *People,* 79 N. Y. 424, 35 Am. Rep. 524; *Edington* v. *Mutual L. Ins. Co.* 67 N. Y. 185; *State* v. *Gedicke,* 43 N. J. L. 86, 4 Am. Crim. Rep. 6; *Tooney* v. *State,* 8 Tex. App. 452; *State* v. *Glass,* 5 Or. 73; *Johnson* v. *State,* 17 Ala. 618. But see *Witt* v. *Witt,* 3 Swabey & T. 143, 32 L. J. Prob. N. S. 179, 9 Jur. N. S. 207, 8 L. T. N. S. 175, 11 Week. Rep. 154 (letters written to a physician); *Roosa* v. *Boston Loan Co.* 132 Mass. 439; *Weyrich* v. *People,* 89 Ill. 90; *Dowlen* v. *State,* 14 Tex. App. 61, 4 Am. Crim. Rep. 49; *Louisville, N. A. & C. R. Co.* v. *Falvey,* 104 Ind. 409, 3 N. E. 389, 4 N. E. 908; *Thomas* v. *Herrall,* 18 Or. 546, 23 Pac. 497; *Towle* v. *Blake,* 48 N. H. 92; *Atchison, T. & S. F. R. Co.* v. *Johns,* 36 Kan. 769, 59 Am. Rep. 609, 14 Pac. 237; *Martin* v. *Sherwood,* 74 Conn. 475, 51 Atl. 526; *Healy* v. *Visalia & T. R. Co.* 101 Cal. 585, 36 Pac. 125; *Wright* v. *Ft. Howard,* 60 Wis. 119, 50 Am. Rep. 350, 18 N. W. 750; *Barber* v. *Merriam,* 11 Allen, 322; *State* v. *Davidson,* 30 Vt. 383, 73 Am. Dec. 312.

[3] *Bacon* v. *Charlton,* 7 Cush, 581; *Hyatt* v. *Adams,* 16 Mich. 180; *State* v. *Porter,* 34 Iowa, 131; *Kennard* v. *Burton,* 25 Me. 46, 43 Am. Dec. 249; *Caldwell* v. *Murphy,* 11 N. Y. 419; *Phillips* v. *Kelly,* 29 Ala. 628; *Mayo* v. *Wright,* 63 Mich. 32, 29 N. W. 832; *Hagenlocher* v. *Coney Island & B. R. Co.* 99 N. Y. 136, 1 N. E. 536; *Anderson* v. *Citizens' Street R. Co.* 12 Ind. App. 194, 38 N. E. 1109; *Houston & T. C. R. Co.* v. *Shafer,* 54 Tex. 641; *Roche* v. *Brooklyn City & N. R. Co.* 105 N. Y. 294, 59 Am. Rep. 506, 11 N. E. 630; *Grand Rapids & Q. R. Co.* v. *Huntley,* 38 Mich. 543, 31 Am. Rep. 321.

Courts face the construction of an enlarged rule under difficulties. There are the established precedents, which, having settled into rules of action, ought not to be disturbed. There is the incoming of new elements, which, if possible, must be harmonized with existing rules. By reason of this perplexity, subsidiary principles are often unnecessarily disturbed.

Nowhere is this more clearly seen than in a change of the rules relating to the admission of testimony. When legislation enlarged the rule to admit the testimony of interested parties, and, in criminal cases, of the accused himself, courts leaned to the view that the enlarged admission dispensed with the hearsay rule in many of its applications.

This is clearly seen in New York with reference to testimony as to injuries and mental condition. When the enlarged rule was first applied, the New York courts assumed, apparently, that because the witness himself was accessible, the hearsay rule was to that extent abrogated. Hence, when these

But declarations made after convalescence, or when there has been an opportunity to think over the matter in reference to projected litigation, are inadmissible.[4] Thus, in an action

courts came to pass upon the question of the admission of the statements of third persons, when the question of pain or suffering was involved, the incompetency of the witness being now removed, such statements ought not to be admitted. *Reed* v. *New York C. R. Co.* 45 N. Y. 578; *Kennedy* v. *Rochester City & B. R. Co.* 130 N. Y. 656, 29 N. E. 141; *Davidson* v. *Cornell,* 132 N. Y. 237, 30 N. E. 573; *Link* v. *Sheldon,* 136 N. Y. 1, 32 N. E. 696.

This arises from assuming that the witness himself is the best source of testimony, while, as a matter of actual fact, demonstrated by experience, the immediate groans and exclamations arising out of the sensibilities, uncontrolled by the reflective faculties, are the safest guide to the injuries and the mental condition.

In such instances, the hearsay rule is not involved, but such matters come under the necessity principle.

The trustworthiness of the exclamation is based upon its spontaneity, which is best explained by the word "involuntary," or the thing speaking for itself without control of the will.

Hence the sound rule, supported by the great weight of authority, outside of New York, is: Immediate statements of sensations and inarticulate exclamations, made in the presence of any person, are admissible. *Com.* v. *Trefethen,* 157 Mass. 185, 24 L.R.A. 235, 31 N. E. 961; *Sanders* v. *Reister,* 1 Dak. 173, 46 N. W. 680; *Travellers' Ins. Co.* v. *Mosley,* 8 Wall. 397, 19 L. ed. 437; *North American Acci. Asso.* v. *Woodson,* 12 C. C. A. 392, 24 U. S. App. 364, 64 Fed. 691; *St. Louis & S. F. R. Co.* v. *Murray,* 55 Ark. 258, 16 L.R.A. 791, 29 Am. St. Rep. 38, 18 S. W. 53; *Puls* v. *Grand Lodge, A. O. U. W.* 13 N. D. 572, 102 N. W. 169.

Also statements made to a physician upon which the physician based his conclusions and on which he acted. And this ought to admit both past and present statements as to pain and condition. The test of testimony being its trustworthiness, the statements made to a physician for the purpose of treatment would, in all human probability, have no other foundation than the exact truth as it appeared to the declarant, freed from any personal factor, except that it is the basis on which he expects the physician to act to give him the most speedy and certain relief. *Kennedy* v. *Upshaw,* 66 Tex. 451, 1 S. W. 311; *Knox* v. *Wheelock,* 54 Vt. 152; *Com.* v. *Fenno,* 134 Mass. 218; *Denver & R. G. R. Co.* v. *Roller,* 49 L.R.A. 77, 41 C. C. A. 22, 100 Fed. 752.

[4] Wharton, Ev. § 268; *State* v. *Gedicke,* 43 N. J. L. 86, 4 Am. Crim. Rep. 6; *Stewart* v. *Everts,* 76 Wis. 35, 20 Am. St. Rep. 17, 44 N. W.

for carnally knowing the plaintiff, a girl of ten years, by force, and giving her the venereal disease, her statements made to a physician three months after the event have been ruled out.[5] But where such subsequent declarations are a part of the case on which the opinion of the physician as an expert is based, they have been received.[6]

Except, however, for the purpose of indicating symptoms, declarations of this class are not evidence,[7] though they may be received to prove the condition of a party prior to an alleged poisoning,[8] when this is involved in the statement to the physician on which his advice is given.[9]

§ 272. Statements admissible to prove mental condition.—We have just seen [1] that, for the purpose of exhibiting the condition of the mind, statements made to such party by third persons may be admissible. We have now to recognize the position that, to determine such condition of mind, it is admissible to put in evidence such expressions of the party as may be shown to have been instinctive, and not

1092. See *Kath* v. *Wisconsin C. R. Co.* 121 Wis. 503, 99 N. W. 217.

The statements of past suffering are excluded, for they are not caused by an existing condition; the reflective faculties are dominant, and the statement of the past pain is like the narration of any other event, and is therefore excluded. *Lush* v. *McDaniel,* 36 N. C. (13 Ired. L.) 487, 57 Am. Dec. 566; *Powell* v. *State,* 101 Ga. 9, 65 Am. St. Rep. 277, 29 S. E. 309; *State* v. *Fournier,* 68 Vt. 262, 35 Atl. 178.

[5] *Morrissey* v. *Ingham,* 111 Mass. 63.

[6] *Barber* v. *Merriam,* 11 Allen, 322. Compare *Ashland* v. *Marlborough,* 99 Mass. 47. Though see *Rogers* v. *Crain,* 30 Tex. 289.

[7] *Collins* v. *Waters,* 54 Ill. 485.

[8] *Reg.* v. *Johnson,* 2 Car. & K. 354; *Blandy's Case,* 18 How. St. Tr. 1135. See *Smith* v. *State,* 53 Ala. 486; *Field* v. *State,* 57 Miss. 474, 34 Am. Rep. 476; post, § 296; *State* v. *Thompson,* 132 Mo. 301, 34 S. W. 31.

[9] Post, § 272; *Messner* v. *People,* 45 N. Y. 1; post, 457, 458; supra, § 263. See *Edmonds* v. *State,* 34 Ark. 720; *Stone* v. *Moore,* 83 Iowa, 186, 49 N. W. 76.

[1] Supra, § 256.

to have been uttered for the purpose of producing a particular effect.[2]

So, when the extent of a mental or other disease is in controversy, contemporaneous declarations of the person so af-

[2] Supra, § 271; *Com.* v. *O'Connor,* 11 Gray, 94; *Rowell* v. *Lowell,* 11 Gray, 420; *Liles* v. *State,* 30 Ala. 24, 68 Am. Dec. 108; *State* v. *Hays,* 22 La. Ann. 39; *People* v. *Shea,* 8 Cal. 538; Wharton, Ev. § 269; *Reg.* v. *Vincent,* 9 Car. & P. 275; *Sugden* v. *St. Leonards,* L. R. 1 Prob. Div. 154, 49 L. J. Prob. N. S. 49, 34 L. T. N. S. 369, 24 Week. Rep. 479; *Sanders* v. *Reister,* 1 Dak. 173, 46 N. W. 680; *Elmer* v. *Fessenden,* 151 Mass. 359, 5 L.R.A. 724, 22 N. E. 635, 24 N. E. 208; *Com.* v. *Trefethen,* 157 Mass. 185, 24 L.R.A. 240, 31 N. E. 961; *Wright* v. *Doe,* 5 Clark & F. 683, 6 Scott, 58, 4 Bing. N. C. 489; *Gilchrist* v. *Bale,* 8 Watts, 356, 34 Am. Dec. 469; *Hunter* v. *State,* 40 N. J. L. 495; *Lake Shore & M. S. R. Co.* v. *Herrick,* 49 Ohio St. 25, 29 N. E. 1052; *Mutual L. Ins. Co.* v. *Hillmon,* 145 U. S. 285, 36 L. ed. 707, 13 Sup. Ct. Rep. 909; *State* v. *Young,* 119 Mo. 523, 24 S. W. 1046; *Buel* v. *State,* 104 Wis. 149, 80 N. W. 84, 15 Am. Crim. Rep. 175.

It frequently becomes important to prove that a certain person had a certain intention at a certain time, and the expression of that person of that intention at that time, becoming material evidence that he expressed such intention, is admissible. *Mutual L. Ins. Co.* v. *Hillmon,* 145 U. S. 285, 36 L. ed. 707, 12 Sup. Ct. Rep. 909; *Connecticut Mut. L. Ins. Co.* v. *Hillmon,* 188 U. S. 208, 47 L. ed. 446, 23 Sup. Ct. Rep. 294; *Burton* v. *State,* 107 Ala. 68, 18 So. 240; *State* v. *Smith,* 49 Conn. 380; *State* v. *Jones,* 64 Iowa, 349, 17 N. W. 911, 20 N. W. 470; *State* v. *Smith,* 106 Iowa, 701, 77 N. W. 499; *Com.* v. *O'Brien,* 179 Mass. 533, 61 N. E. 213; *Reg.* v. *Buckley,* 13 Cox, C. C. 293, 294; *Denver & R. G. R. Co.* v. *Spencer,* 25 Colo. 9, 52 Pac. 211; *Denver & R. G. R. Co.* v. *Spencer,* 27 Colo. 313, 51 L.R.A. 121, 61 Pac. 606; *Weightnovel* v. *State,* 46 Fla. 1, 35 So. 856 (intention to submit to an abortion); *Seifert* v. *State,* 160 Ind. 464, 98 Am. St. Rep. 340, 67 N. E. 100; *Walling* v. *Com.* 18 Ky. L. Rep. 812, 38 S. W. 429; *State* v. *Hayward,* 62 Minn. 474, 65 N. W. 63; *People* v. *Conklin,* 175 N. Y. 333, 67 N. E. 624; *Carroll* v. *State,* 3 Humph. 321; *State* v. *Mortenson,* 26 Utah, 336, 73 Pac. 562, 633; *State* v. *Power,* 24 Wash. 34, 63 L.R.A. 902, 63 Pac. 1112 (abortion); *State* v. *Dickinson,* 41 Wis. 299, 2 Am. Crim. Rep. 1 (abortion).

Intention as explanatory of the crime. *United States* v. *Stone,* 8 Fed. 232 (larceny); *United States* v. *Durland,* 65 Fed. 408; *Price* v. *State,* 107 Ala. 161, 18 So. 130; *Cummings* v. *State,* 50 Neb. 274, 69 N. W. 756; *Matthews* v. *State,* — Tex. Crim. Rep. —, 42 S. W. 375; *Jackson* v. *Com.* 96 Va. 107, 30 S. E. 452.

fected are admissible,[3] though not as to conditions of prior diseases.[4] When the bona fides of a transaction are in question, the instinctive and unpremeditated declarations of parties during the negotiations are admissible as touching such bona fides.[5] In life insurance cases, the party's views as to his condition may be shown.[6] As will be hereafter seen,[7] the declarations of a deceased person may be proved to show that the defendant, charged with killing such person, acted in self-defense.

§ 273. Declarations of prosecutrix in rape.—In prosecutions for rape where the injured woman is a witness, it was formerly material to show that she made complaint of the injury while it was recent.[1] The rule is now that length

[3] Supra, § 271; 1 Wharton & S. Med. Jur. 3d ed. § 286; *Perkins* v. *Concord* R. Co. 44 N. H. 223; *Howe* v. *Howe,* 99 Mass. 88; *Illinois C. R. Co.* v. *Sutton,* 42 Ill. 438, 92 Am. Dec. 81; *Stone* v. *Watson,* 37 Ala. 279; *State* v. *Kring,* 64 Mo. 591, 2 Am. Crim. Rep. 313; *Reg.* v. *Johnson,* 2 Car. & K. 354; Roscoe, Crim. Ev. 8th ed. § 31; *Reg.* v. *Gloster,* 16 Cox, C. C. 471.

[4] *Chapin* v. *Marlborough,* 9 Gray, 244, 69 Am. Dec. 281; *Stewart* v. *Redditt,* 3 Md. 67; *Ross* v. *State,* 62 Ala. 224.

[5] *Banfield* v. *Parker,* 36 N. H. 353; *Zabriskie* v. *Smith,* 13 N. Y. 322, 64 Am. Dec. 551. See *State* v. *Daley,* 53 Vt. 442, 38 Am. Rep. 694; post, § 691; supra, § 263.

[6] *Aveson* v. *Kinnaird,* 6 East 188, 2 Smith, 286, 8 Revised Rep. 455. See *Witt* v. *Witt,* 3 Swaley & T. 143, 32 L. J. Prob. N. S. 179, 9 Jur. N. S. 207, 8 L. T. N. S. 175, 11 Week. Rep. 154.

[7] Post, §§ 756, 757.

[1] Immediateness is essential to their admissibility. See *Hornbeck* v. *State,* 35 Ohio St. 277, 35 Am. Rep. 608.

Mr. Wigmore (Wigmore, Ev. §§ 1135 et seq.), in his excellent work on evidence, states that three theories have prevailed, generally, since the 1800's, which have been used as accounting for the admissibility of declarations in rape. First, to remain silent would involve self-contradiction, and the failure to complain at the time would be offered as discrediting her testimony, and the defense might assume that no complaint was made, so that to forestall such an assumption the woman might testify that the complaint was made in fact. Citing *State* v. *DeWolf,* 8 Conn. 99, 20 Am. Dec. 90; *Baccio* v. *People,* 41 N. Y. 268; *State* v. *Neel,* 21 Utah, 151, 60 Pac. 510. Also, that the silence might be explained away,

of time intervening between the injury and the complaint will not, of itself, exclude proof of it, but that the court will look into all of the circumstances surrounding the fact, and on these he may exercise his discretion as to its admission or rejection.[2]

Proof of such complaint is original evidence,[3] but the weight

citing *State* v. *Knapp*, 45 N. H. 155. That, in consequence of this theory, two results follow: (a) details could not be given, and (b) the woman must be a witness. Second, where the woman's testimony might be questioned, a sort of corroboration was allowed by showing that she told the same story at the time of making the complaint. Under this, three results would follow: (a) details are admissible, (b) the woman must testify, and (c) she must have been impeached. Third, such declarations admissible under the hearsay exception, as spontaneous declarations or as *res gestæ*. Hence, the declarations of a woman under the sudden fright of an assault are receivable under such exception.

Under this theory, three results follow: (a) details are admissible, (b) the woman need not be a witness, (c) she need not have been impeached.

Under the first, the complaint is admissible. Under the second and third, the details are proper. The first and second do not conflict, because the first is used to admit the fact of complaint, and the second invoked to admit details.

[2] *Com.* v. *Cleary*, 172 Mass. 175, 51 N. E. 746; *People* v. *Marrs*, 125 Mich. 376, 84 N. W. 284; *Higgins* v. *People*, 58 N. Y. 377; *Donaldson* v. *People*, 33 Colo. 333, 80 Pac. 906; *People* v. *Mayes*, 66 Cal. 597, 56 Am. Rep. 126, 6 Pac. 691; *State* v. *Brown*, 54 Kan. 71, 37 Pac. 996; *State* v. *Bebb*, 125 Iowa, 494, 101 N. W. 189; *Legore* v. *State*, 87 Md. 735, 41 Atl. 60; *Polson* v. *State*, 137 Ind. 519, 35 N. E. 907; *State* v. *Marcks*, 140 Mo. 656, 41 S. W. 973, 43 S. W. 1095; *State* v. *Peres*, 27 Mont. 358, 71 Pac. 162; *State* v. *Halford*, 17 Utah, 475, 54 Pac. 819; *State* v. *Wilkins*, 66 Vt. 1, 17, 28 Atl. 323; *State* v. *Mulkern*, 85 Me. 106, 26 Atl. 1017; *State* v. *Oswalt*, 72 Kan. 84, 82 Pac. 586; *State* v. *Miller*, 191 Mo. 587, 90 S. W. 767; *Vaughn* v. *State*, 78 Neb. 317, 110 N. W. 992; *State* v. *Werner*, 16 N. D. 83, 112 N. W. 60; *Reg.* v. *Lillyman* [1896] 2 Q. B. 167, 65 L. J. Mag. Cas. N. S. 195, 74 L. T. N. S. 730, 44 Week. Rep. 654, 18 Cox, C. C. 346, 60 J. P. 536. But see *Bigcraft* v. *People*, 30 Colo. 298, 70 Pac. 417; *People* v. *Lambert*, 120 Cal. 170, 52 Pac. 307.

[3] *State* v. *Patrick*, 107 Mo. 147, 17 S. W. 666; *Griffin* v. *State*, 76 Ala. 29; *Territory* v. *Godfrey*, 6 Dak. 46, 50 N. W. 481; *People* v. *Barney*, 114 Cal. 554, 47 Pac. 41; *Oleson* v. *State*, 11 Neb. 276, 38 Am. Rep. 366, 9 N. W. 38; *Brazier's Case*, 1 East, P. C. 443; *Rex* v. *Clarke*,

of authority is that details will not be received in evidence on direct examination,[4] unless the complaint is so intimately

2 Starkie, 241; *Reg.* v. *Guttridge,* 9 Car. & P. 471; *Reg.* v. *Megson,* 9 Car. & P. 420; *Reg.* v. *Osborne,* Car. & M. 622; *State* v. *Knapp,* 45 N. H. 148; *State* v. *Niles,* 47 Vt. 82, 1 Am. Crim. Rep. 646; *State* v. *Bryne,* 47 Conn. 465; *People* v. *McGee,* 1 Denio, 19; *Baccio* v. *People,* 41 N. Y. 265; *People* v. *Croucher,* 2 Wheeler, Crim. Cas. 42; *Johnson* v. *State,* 17 Ohio, 593; *Laughlin* v. *State,* 18 Ohio, 99, 51 Am. Dec. 444; *McCombs* v. *State,* 8 Ohio St. 643; *Maillet* v. *People,* 42 Mich. 262, 3 N. W. 854, 3 Am. Crim. Rep. 379; *Oleson* v. *State,* 11 Neb. 276, 38 Am. Rep. 366, 9 N. W. 38; *Phillips* v. *State,* 9 Humph. 246, 49 Am. Dec. 709; *Nugent* v. *State,* 18 Ala. 521; *Lacy* v. *State,* 45 Ala. 80; *Scott* v. *State,* 48 Ala. 420; *Hogan* v. *State,* 46 Miss. 274; *State* v. *Jones,* 61 Mo. 232; *Pefferling* v. *State,* 40 Tex. 486; *Pleasant* v. *State,* 15 Ark. 624; Wharton, Crim. Law, § 566.

In prosecutions for assault with intent to ravish, see *Veal* v. *State,* 8 Tex. App. 474.

[4] *Griffin* v. *State,* 76 Ala. 29; *Barnett* v. *State,* 83 Ala. 40, 3 So. 612; *Sanders* v. *State,* 148 Ala. 603, 41 So. 466; *Thompson* v. *State,* 38 Ind. 39; *Territory* v. *Kirby,* 3 Ariz. 288, 28 Pac. 1134; *Trimble* v. *Territory,* 8 Ariz. 273, 71 Pac. 932; *Williams* v. *State,* 66 Ark. 264, 50 S. W. 517; *People* v. *Scalamiero,* 143 Cal. 343, 76 Pac. 1098; *Donaldson* v. *People,* 33 Colo. 333, 80 Pac. 906; *Ellis* v. *State,* 25 Fla. 702, 6 So. 768; *Lowe* v. *State,* 97 Ga. 792, 25 S. E. 676; *Fields* v. *State,* 2 Ga. App. 41, 58 S. E. 327; *State* v. *Neil,* 13 Idaho, 539, 90 Pac. 860, 91 Pac. 318; *State* v. *Fowler,* 13 Idaho, 317, 89 Pac. 757; *Stevens* v. *People,* 158 Ill. 111, 41 N. E. 856; *State* v. *Clark,* 69 Iowa, 294, 28 N. W. 606; *State* v. *Daugherty,* 63 Kan. 473, 65 Pac. 695; *Jeffries* v. *State,* 89 Miss. 643, 42 So. 801; *State* v. *Bateman,* 198 Mo. 212, 94 S. W. 843; *State* v. *Griffin,* 43 Wash. 591, 86 Pac. 951, 11 A. & E. Ann. Cas. 95; *Legore* v. *State,* 87 Md. 735, 41 Atl. 60; *Walsh* v. *State,* 60 Neb. 101, 82 N. W. 368; *State* v. *Campbell,* 20 Nev. 122, 17 Pac. 620; *State* v. *Ivins,* 36 N. J. L. 233; *People* v. *Clemons,* 37 Hun, 580; *State* v. *Stines,* 138 N. C. 686, 50 S. E. 851; *Harmon* v. *Territory,* 5 Okla. 368, 49 Pac. 55; *State* v. *Sargent,* 32 Or. 110, 49 Pac. 889; *Adams* v. *State,* 52 Tex. Crim. Rep. 13, 105 S. W. 197; *Reddick* v. *State,* 35 Tex. Crim. Rep. 463, 60 Am. St. Rep. 56, 34 S. W. 274; *Holst* v. *State,* 23 Tex. App. 1, 59 Am. Rep. 770, 3 S. W. 757; *State* v. *Neel,* 21 Utah, 151, 60 Pac. 510; *State* v. *Carroll,* 67 Vt. 477, 32 Atl. 235; *State* v. *Hunter,* 18 Wash. 670, 52 Pac. 247; *Bannen* v. *State,* 115 Wis. 317, 329, 91 N. W. 107, 965.

The husband may testify that his wife made complaint to him. *Barnes* v. *State,* 88 Ala. 204, 16 Am. St. Rep. 48, 7 So. 38.

In England and in the following states, details and even the name of the offender may be given in

connected with the injury that they form a part of the *res gestæ*.[5] But the exception as to such declarations is not to be

evidence: (England) *Reg.* v. *Wood*, 14 Cox, C. C. 46; *Reg.* v. *Lillyman* [1896] 2 Q. B. 167, 65 L. J. Mag. Cas. N. S. 195, 74 L. T. N. S. 730, 44 Week. Rep. 654, 18 Cox, C. C. 346, 60 J. P. 536; (Iowa) *State* v. *Cook*, 92 Iowa, 483, 61 N. W. 185; *State* v. *Andrews*, 130 Iowa, 609, 105 N. W. 215; (Ohio) *Laughlin* v. *State*, 18 Ohio, 99, 51 Am. Dec. 444; (North Carolina) *State* v. *Mitchell*, 89 N. C. 521; *State* v. *Freeman*, 100 N. C. 429, 5 S. E. 921; (Tennessee) *Hill* v. *State*, 5 Lea, 725; *Benstine* v. *State*, 2 Lea, 169, 31 Am. Rep. 593, 3 Am. Crim. Rep. 386; *Phillips* v. *State*, 9 Humph. 246, 49 Am. Dec. 709; (Connecticut) *State* v. *Kinney*, 44 Conn. 153, 26 Am. Rep. 436; *State* v. *Sebastian*, 81 Conn. 1, 69 Atl. 1054.

[5] *State* v. *Imlay*, 22 Utah, 156, 61 Pac. 557; *State* v. *Peter*, 14 La. Ann. 527; *People* v. *Gage*, 62 Mich. 271, 4 Am. St. Rep. 854, 28 N. W. 835; *Phillips* v. *State*, 9 Humph. 246, 49 Am. Dec. 709; *State* v. *Fitzsimon*, 18 R. I. 236, 49 Am. St. Rep. 766, 27 Atl. 446, 9 Am. Crim. Rep. 343; *People* v. *Glover*, 71 Mich. 303, 38 N. W. 874; *Barnett* v. *State*, 83 Ala. 40, 3 So. 612; *Barnes* v. *State*, 88 Ala. 204, 16 Am. St. Rep. 48, 7 So. 38; *State* v. *Byrne*, 47 Conn. 465; *State* v. *Kinney*, 44 Conn. 153, 26 Am. Rep. 436; *State* v. *Patrick*, 107 Mo. 147, 163, 17 S. W. 666; *State* v. *Jerome*, 82 Iowa, 749, 48 N. W. 722; *Laughlin* v. *State*, 18 Ohio, 99, 51 Am. Dec. 444; *McMath* v. *State*, 55 Ga. 303; *Baccio* v. *People*, 41 N. Y. 265; *Stephen* v. *State*, 11 Ga. 225; *Fletcher* v. *Com.* 123 Ky. 571, 96 S. W. 855.

But where the facts and circumstances do not form part of the *res gestæ*, that is, they are not so intimately connected with the complaint as to spring with the act itself, they can be given in evidence only in corroboration, but even then are not admissible where the injured woman does not testify. *Reg.* v. *Nicholas*, 2 Car. & K. 246, 2 Cox, C. C. 136; *State* v. *Wheeler*, 116 Iowa, 212, 93 Am. St. Rep. 236, 89 N. W. 978; *Mathews* v. *State*, 19 Neb. 330, 27 N. W. 234; *Baccio* v. *People*, 41 N. Y. 265; *People* v. *McGee*, 1 Denio, 19.

But evidence of the physical injuries inflicted on the party, as shown by bruises, and her mental condition, as shown by her appearance of fright and terror, is always admissible. *State* v. *Steffens*, 116 Iowa, 227, 89 N. W. 974; *People* v. *Keith*, 141 Cal. 686, 75 Pac. 304; *Com.* v. *Hollis*, 170 Mass. 433, 49 N. E. 632; *State* v. *Bedard*, 65 Vt. 278, 26 Atl. 719; *Bannen* v. *State*, 115 Wis. 317, 91 N. W. 107, 965; *State* v. *McLaughlin*, 44 Iowa, 82; *State* v. *Sargent*, 32 Or. 110, 49 Pac. 889; *State* v. *Sanford*, 124 Mo. 484, 27 S. W. 1099; *State* v. *Houx*, 109 Mo. 654, 32 Am. St. Rep. 686, 19 S. W. 35; *Brown* v. *State*, 72 Miss. 997, 17 So. 278; *People* v. *Batterson*, 50 Hun, 44, 2 N. Y. Supp. 376.

Also the condition of the cloth-

extended beyond cases of rape. For instance, it is not admissible to prove that a witness as to identity spoke to third parties of having identified the accused.[6]

§ 273a. Declarations during travail.—One of the earliest exceptions as to admission of declarations arose in the colonial days, where the mother was a witness in prosecutions for bastardy, and if, during travail, she accused the putative father, such declarations were admissible in Massachusetts and New Hampshire.[1] In Massachusetts and in Maine the travail accusation seems to have been necessary not only to the competency of the mother as a witness, but to maintain

ing of the injured party. *People* v. *Figueroa,* 134 Cal. 159, 66 Pac. 202; *State* v. *Montgomery,* 79 Iowa, 737, 45 N. W. 292; *Long* v. *State,* — Tex. Crim. Rep. —, 46 S. W. 640; *Caudle* v. *State,* 34 Tex. Crim. Rep. 26, 28 S. W. 810; *State* v. *Murphy,* 118 Mo. 7, 25 S. W. 95; *Fields* v. *State,* 2 Ga. App. 41, 58 S. E. 327; *State* v. *Zempel,* 103 Minn. 428, 115 N. W. 275; *State* v. *Brannan,* 206 Mo. 636, 105 S. W. 602.

[6] *People* v. *Mead,* 50 Mich. 228, 15 N. W. 95; post, § 492.

But in matter of identification the prosecutrix may testify and other witnesses who saw him about the time near the place. *State* v. *Johnson,* 67 N. C. 55; *Lander* v. *People,* 104 Ill. 248; *Cotton* v. *State,* 87 Ala. 75, 6 So. 396; *People* v. *Rangod,* 112 Cal. 669, 44 Pac. 1071; *State* v. *Waters,* 132 Iowa, 481, 109 N. W. 1013; *Smith* v. *Com.* 17 Ky. L. Rep. 1162, 33 S. W. 825.

So, likewise, it may be proved that conception followed, and the child itself may be exhibited to corroborate the evidence. *State* v. *Danforth,* 48 Iowa, 43, 30 Am. Rep. 387; *Woodruff* v. *State,* 72 Neb. 815, 101 N. W. 1114; *People* v. *Flaherty,* 27 App. Div. 535, 50 N. Y. Supp. 574; *State* v. *Robinson,* 32 Or. 43, 48 Pac. 357; *State* v. *Neel,* 23 Utah, 541, 65 Pac. 494; *State* v. *Walke,* 69 Kan. 183, 76 Pac. 408; *State* v. *Palmberg,* 199 Mo. 233, 116 Am. St. Rep. 476, 97 S. W. 566.

It has been held that such child cannot be shown to prove its resemblance to the defendant. *State* v. *Danforth,* 48 Iowa, 43, 30 Am. Rep. 387; *Gray* v. *State,* 43 Tex. Crim. Rep. 300, 65 S. W. 375; *State* v. *Palmberg,* 199 Mo. 233, 116 Am. St. Rep. 476, 97 S. W. 556; *Bradshaw* v. *State,* 49 Tex. Crim. Rep. 165, 94 S. W. 223. But contra, see *State* v. *Danforth,* 73 N. H. 215, 111 Am. St. Rep. 600, 60 Atl. 839, 6 A. & E. Ann. Cas. 557.

[1] *Drowne* v. *Stimpson,* 2 Mass. 441; *Long* v. *Dow,* 17 N. H. 470.

the action.[2] In New Hampshire it seems to have been necessary only to render the mother competent as a witness.[3]

Such declarations ought, on principles of logic, to be admitted on the same ground that spontaneous declarations caused by sudden fright, fear, and terror and pain are admitted in other cases.[4]

But, in the absence of a statute, these declarations are excluded as declarations of parties in their own behalf.[5]

§ 273b. Declarations in robbery and larceny.—On the principle under consideration, that exclamations and declarations excited by fear, during the immediate suspension of the reflective faculties, spontaneous, and trustworthy because of that character are admissible, declarations of the parties during a robbery, or the outcry of the victim immediately following the act, or, in larceny, the complaint made immediately after the discovery of the fact, should be admitted.

However, where such declarations are admitted, it is on the theory of *res gestæ* or that the declarations are so intimately connected with the event as to be a part of it,[1] while they are

[2] *Stiles* v. *Eastman*, 21 Pick. 132; *Palmer* v. *McDonald*, 92 Me. 125, 42 Atl. 315.

[3] *Long* v. *Dow*, 17 N. H. 470; *R. R.* v. *J. M.* 3 N. H. 135, 140.

[4] Wigmore, Ev. § 1141.

[5] *State* v. *Lowell*, 123 Iowa, 427, 99 N. W. 125; *Walker* v. *State*, 6 Blackf. 1; *Wilkins* v. *Metcalf*, 71 Vt. 103, 41 Atl. 1035; *Stoppert* v. *Nierle*, 45 Neb. 105, 63 N. W. 382; *State* v. *Spencer*, 73 Minn. 101, 75 N. W. 893, 76 N. W. 48; *State ex rel. Zehntner* v. *Tipton*, 15 Mont. 74, 38 Pac. 222; *Richmond* v. *State*, 19 Wis. 308, Contra, *E. N. E.* v. *State*, 25 Fla. 268, 6 So. 58; *Johnson* v. *Walker*, 86 Miss. 757, 1 L.R.A. (N.S.) 470, 109 Am. St. Rep. 733, 39 So. 49.

[1] *State* v. *Ah Loi*, 5 Nev. 99; *State* v. *Ripley*, 32 Wash. 182, 72 Pac. 1036; *Bow* v. *People*, 160 Ill. 438, 43 N. E. 593; *People* v. *Murphy*, 56 Mich. 546, 23 N. W. 215; *Driscoll* v. *People*, 47 Mich. 413, 11 N. W. 221; *State* v. *Horan*, 32 Minn. 394, 50 Am. Rep. 583, 20 N. W. 905; *State* v. *Driscoll*, 72 Iowa, 583, 34 N. W. 428; *People* v. *Morrigan*, 29 Mich. 5; *Lambert* v. *People*, 29 Mich. 71, modified in *People* v. *Hicks*, 98 Mich. 86, 56 N. W. 1102; *State* v. *Smith*, 26 Wash. 354, 67 Pac 70; *People* v. *Linares*, 142 Cal. 17, 75 Pac. 308 (*res gestæ* of the

excluded, on the *res gestæ* principle, when merely narrative of the offense.[2]

§ 274. When necessary to show consent of third persons.—Cases may arise in which it is important to determine whether an act was done with the consent of a third person. "Although at one time," says Mr. Roscoe,[1] "it appears to have been thought necessary to call the party himself, it is now settled that the want of consent may be proved in other ways. Where an indictment under 6 Geo. III. chap. 36 (repealed), was for lopping and topping an ash timber tree without the consent of the owner, the land steward was called to prove that he himself never gave any consent, and from all that he had heard his master say who had died before the trail, having given orders for apprehending the prisoners on suspicion), he believed that he never did. Bayley, J., left it to the jury to say whether they thought there was reasonable evidence to show that in fact no consent had been given. He adverted to the time of the night when the offense was committed, and to the circumstance of the prisoners running away when detected, as evidence to show that the consent required had not in fact been given." [2]

act); *State* v. *Howard,* 30 Mont. 518, 77 Pac. 50 (*res gestæ* of the act).

Where the acts of defendant are admitted, he is entitled to have his declarations made at the time of the acts also admitted, and it is error to exclude them. *Hamilton* v. *State,* 36 Ind. 280, 10 Am. Rep. 22.

[2] *Moses* v. *State,* 88 Ala. 78, 16 Am. St. Rep. 21, 7 So. 101; *Shoecraft* v. *State,* 137 Ind. 433, 36 N. E. 1113; *Com.* v. *Fagan,* 108 Mass. 471; *Bolling* v. *State,* 98 Ala. 80, 12 So. 782; *People* v. *McCrea,* 32 Cal. 98; *Books* v. *State,* 96 Ga. 353, 28 S. E. 413, 10 Am. Crim. Rep. 135.

[1] Roscoe, Crim. Ev. 8th ed. § 6.

[2] The prisoners were found guilty. *Rex* v. *Hazy,* 2 Car. & P. 458. So, on an indictment on 42 Geo. III. chap. 107, § 1 (now repealed), for killing fallow deer without consent of the owner, and on two other indictments for taking fish out of a pond without consent, evidence was given that the offense was committed under such circumstances as to warrant the jury in finding nonconsent; and the persons engaged in

XI. Dying Declarations; Limitations.

§ 275. Limitations.—Dying declarations form another of the necessity exceptions to the admission of hearsay evidence. The original ground of admission seems to have been the unavailability of the witness. On principles of logic, they should have been admitted in both civil and criminal cases, and in other proceedings where the testimony of a witness may be properly supplied.

However, the rule was early restricted to the ground of necessity.[1] The following limitations are now firmly established:

1. They are not admissible in civil cases.[2]

the management of the different properties were called, but not the owners. The judges held the convictions right. *Rex* v. *Allen,* 1 Moody, C. C. 154. But see *Rex* v. *Rogers,* 2 Campb. 654, where Lawrence, J., thought it necessary to call the owner for the purpose of disproving his consent, and, the owner not being called, a verdict of acquittal was directed.

[1] Greenl. Ev. § 156; 1 East, P. C. 353; *Donnelly* v. *State,* 26 N. J. L. 617; *State* v. *Pearce,* 56 Minn. 226, 57 N. W. 652, 1065; *State* v. *Ferguson,* 2 Hill, L. 619, 27 Am. Dec. 412; *Mattox* v. *United States,* 146 U. S. 140, 36 L. ed. 917, 13 Sup. Ct. Rep. 50; *Sullivan* v. *State,* 102 Ala. 135, 48 Am. St. Rep. 22, 15 So. 264; *Newberry* v. *State,* 68 Ark. 355, 58 S. W. 351; *Graves* v. *People,* 18 Colo. 170, 32 Pac. 63; *White* v. *State,* 100 Ga. 659, 28 S. E. 423; *Marshall* v. *Chicago G. E. R. Co.* 48 Ill. 475, 95 Am. Dec. 561; *Com.* v. *Casey,* 11 Cush. 417, 59 Am. Dec. 150; *People* v. *Longsdale,* 122 Mich. 388, 81 N. W. 277, 12 Am. Crim. Rep. 256; *Lipscomb* v. *State,* 75 Miss. 559, 23 So. 210, 230; *State* v. *Johnson,* 118 Mo. 491, 40 Am. St. Rep. 405, 24 S. W. 229; *People* v. *Corey,* 157 N. Y. 332, 51 N. E. 1024, 11 Am. Crim. Rep. 487; *State* v. *Jefferson,* 125 N. C. 712, 34 S. E. 648; *Railing* v. *Com.* 110 Pa. 100, 1 Atl. 314, 6 Am. Crim. Rep. 7; *Nelson* v. *State,* 7 Humph. 542; *Felder* v. *State,* 23 Tex. App. 477, 59 Am. Rep. 777, 5 S. W. 145; *Hill* v. *Com.* 2 Gratt. 594; *State* v. *Wood,* 53 Vt. 560; *State* v. *Eddon,* 8 Wash. 292, 36 Pac. 139; *Foley* v. *State,* 11 Wyo. 464, 72 Pac. 627; *Coyle* v. *Com.* 122 Ky. 781, 93 S. W. 584; *Brom* v. *People,* 216 Ill. 148, 74 N. E. 790; *State* v. *Knoll,* 69 Kan. 767, 77 Pac. 580.

[2] Not admissible in civil cases. *Rex* v. *Mead,* 2 Barn. & C. 605, 4 Dowl. & R. 120, 26 Revised Rep. 484; *Rex* v. *Lloyd,* 4 Car. & P. 233; *Stobart* v. *Dryden,* 1 Mees. & W.

2. They are admissible only in those prosecutions where the death itself is the subject of the prosecution.[3]

615, 2 Gale, 146, 5 L. J. Exch. N. S. 218; *Daily* v. *New York & N. H. R. Co.* 32 Conn. 357, 87 Am. Dec. 176; *Wooten* v. *Wilkins,* 39 Ga. 223, 99 Am. Dec. 456, disapproving *McFarland* v. *Shaw,* 4 N. C. [2 Cal. Law Repos. 102]; *East Tennessee, V. & G. R. Co.* v. *Maloy,* 77 Ga. 237, 2 S. E. 941; *Duling* v. *Johnson,* 32 Ind. 155; *Thayer* v. *Lombard,* 165 Mass. 174, 52 Am. St. Rep. 507, 42 N. E. 563; *Willis* v. *Kern,* 21 La. Ann. 749; *Wilson* v. *Boerem,* 15 Johns. 286; *Pettiford* v. *Mayo,* 117 N. C. 27, 23 S. E. 252; *State* v. *Harper,* 35 Ohio St. 78, 35 Am. Rep. 596.

And this also applies to the civil actions that are brought to recover damages for the death caused by the wrongful act. *Barfield* v. *Britt,* 47 N. C. (2 Jones, L.) 41, 62 Am. Dec 190; *Marshall* v. *Chicago G. E. R. Co.* 48 Ill. 475, 95 Am. Dec. 561; *Pulliam* v. *State,* 88 Ala. 1, 6 So. 839; *People* v. *Hall,* 94 Cal. 595, 30 Pac. 7; *McBride* v. *People,* 5 Colo. App. 91, 37 Pac. 953; *Binns* v. *State,* 46 Ind. 311; *State* v. *O'Shea,* 60 Kan. 772, 57 Pac. 970; *People* v. *Lonsdale,* 122 Mich. 388, 81 N. W. 277, 12 Am. Crim. Rep. 256; *Merrill* v. *State,* 58 Miss. 65; *State* v. *Jefferson,* 77 Mo. 136; *People* v. *Davis,* 56 N. Y. 95; *State* v. *Shelton,* 47 N. C. (2 Jones, L.) 360, 64 Am. Dec. 587; *Runyan* v. *Price,* 15 Ohio St. 1, 86 Am. Dec. 459; *Railing* v. *Com.* 110 Pa. 100, 1 Atl. 314, 6 Am. Crim. Rep. 7; *State* v. *Howard,* 32 Vt. 380; *Crockman* v. *State,* 5 W. Va. 510; *State* v. *Cameron,* 2 Chand. (Wis.) 172.

But dying declarations are not admissible in prosecutions other than for homicide. Hence they are not admissible on a prosecution for carnally abusing a child under ten years (*Johnson* v. *State,* 50 Ala. 456); nor in mayhem (*Respublica* v. *Langcake,* 1 Yeates, 415); nor incest (*People* v. *Stison,* 140 Mich. 216, 112 Am. St. Rep. 397, 103 N. W. 542, 6 A. & E. Ann. Cas. 69.)

[3] *Rex* v. *Hutchinson,* 2 Barn. & C. 608, note; *Reg.* v. *Hind,* Bell, C. C. 253, 29 L. J. Mag. Cas. N. S. 147, 6 Jur. N. S. 514, 2 L. T. N. S. 253, 8 Week. Rep. 421, 8 Cox, C. C. 300; *Rex* v. *Lloyd,* 4 Car. & P. 233; *Reg.* v. *Newton,* 1 Fost. & F. 641; *Com.* v. *Homer,* 153 Mass. 344, 26 N. E. 872; *State* v. *Meyer,* 64 N. J. L. 382, 45 Atl. 779; *People* v. *Davis,* 56 N. Y. 95; *State* v. *Harper,* 35 Ohio St. 78, 35 Am. Rep. 596; *Railing* v. *Com.* 110 Pa. 103, 1 Atl. 314, 6 Am. Crim. Rep. 7. Contra, *Montgomery* v. *State,* 80 Ind. 345, 41 Am. Rep. 815 (under statute); and *State* v. *Dickinson,* 41 Wis. 308, 2 Am. Crim. Rep. 1. Also *Worthington* v. *State,* 92 Md. 222, 56 L.R.A. 353, 84 Am. St. Rep. 506, 48 Atl. 355 (admitted killing unborn child); *State* v. *Pearce,* 56 Minn. 226, 233, 57 N. W. 652, 1065. In many jurisdictions this is controlled by statute, and where the death is the controlling element the admission is logical.

These limitations are open to criticism.[4] They cannot be defended on principle, but only on the ground that they have become so firmly established that they are an integral part of the law, and as such must be dealt with, within the limitations fixed.

§ 275a. Dying declarations; definition; distinguished from res gestæ.—Dying declarations are the statements made by a person after the mortal wound has been inflicted, under a belief that death is certain, stating the facts concerning the cause of and the circumstances surrounding the homicide.[1]

[4] Wigmore, Ev. § 1436.

[1] The authorities are practically uniform in definition, varying only in expression. Underhill, Crim. Ev. § 102; *Starkey* v. *People,* 17 Ill. 17 (see this case for definition and statement of the nature of dying declarations); *State* v. *Scott,* 12 La. Ann. 274; Greenl. Ev. § 156; *Simons* v. *People,* 150 Ill. 66, 73, 36 N. E. 1019; Wharton, Homicide, Bowlby's 3d ed. § 626; *Westbrook* v. *People,* 126 Ill. 81, 18 N. E. 304; *May* v. *State,* 55 Ala. 39; *State* v. *Clemans,* 51 Iowa, 274, 1 N. W. 546; *State* v. *Jones,* 47 La. Ann. 1524, 18 So. 515; *State* v. *Pearce,* 56 Minn. 226, 239, 57 N. W. 652, 1065; *State* v. *Eddon,* 8 Wash. 292, 36 Pac. 139; *Com.* v. *Lewis,* Addison (Pa.) 279; *Richard* v. *State,* 42 Fla. 528, 29 So. 413; *Ex parte Nettles,* 58 Ala. 268. See *Bell* v. *State,* 72 Miss. 507, 17 So. 232, 10 Am. Crim. Rep. 276; Russell, Crimes, 7th Eng. ed. p. 2084; 1 East, P. C. 353; *Rex* v. *Mead,* 2 Barn & C. 605, 4 Dowl. & R. 120, 26 Revised Rep. 484; *Reg.* v. *Hind,* Bell, C. C. 253, 29 L. J. Mag. Cas. N. S. 147, 6 Jur. N. S. 514, 2 L. T. N. S. 253, 8 Week. Rep. 421, 8 Cox, C. C. 300; Hughes, Crim. Law & Proc. § 88; *Nordgren* v. *People,* 211 Ill. 425, 71 N. E. 1042; *People* v. *Buettner,* 233 Ill. 272, 84 N. E. 218, 13 A. & E. Ann. Cas. 235; *State* v. *Harris,* 112 La. 937, 36 So. 810; *Clemmans* v. *State,* 43 Fla. 200, 30 So. 699; *Montgomery* v. *State,* 80 Ind. 338, 41 Am. Rep. 815; *State* v. *O'Shea,* 60 Kan. 772, 57 Pac. 970; *Terrell* v. *Com.* 13 Bush, 246; *People* v. *Beverly,* 108 Mich. 509, 66 N. W. 379; *Craven* v. *State,* 49 Tex. Crim. Rep. 78, 122 Am. St. Rep. 799, 90 S. W. 311; *State* v. *Furney,* 41 Kan. 115, 13 Am. St. Rep. 262, 21 Pac. 213, 8 Am. Crim. Rep. 131; *Walker* v. *State,* 52 Ala. 192; *People* v. *Fong Ah Sing,* 64 Cal. 253, 28 Pac. 233, 11 Am. Crim. Rep. 33; *People* v. *Fong Ah Sing,* 70 Cal. 8, 11 Pac. 323; *Hackett* v. *People,* 54 Barb. 370; *People* v. *Sweeney,* 41 Hun, 332; *State* v. *Shelton,* 47 N. C. (2 Jones, L.) 360, 64 Am. Dec. 587.

They are distinguished from *res gestæ*, in that such declarations must be made after the mortal wounding, and are confined to the cause and circumstances of the act.[2]

§ 275b. Preliminary evidence; exclusion of jury.—The relevancy and admissibility of dying declarations are questions solely for the court.[1]

[2] *Nordan* v. *State*, 143 Ala. 13, 39 So. 406; *State* v. *Baldwin*, 79 Iowa, 714, 45 N. W. 297, 8 Am. Crim. Rep. 566; *State* v. *Perigo*, 80 Iowa, 37, 45 N. W. 399; *Medina* v. *State*, 43 Tex. Crim. Rep. 52, 63 S. W. 331, 12 Am. Crim. Rep. 246; *Brown* v. *State*, 74 Ala. 478.

But while the rule is that the statement must be confined to the circumstances of the killing, and is not admissible as to what occurred before or after, the following cases seem to indicate a relaxation of that rule: *Rex* v. *Baker*, 2 Moody & R. 53; *State* v. *Wilson*, 23 La. Ann. 559 (declarations of one shot at the same time as the other); *State* v. *Terrell*, 12 Rich. L. 329 (declarations of one poisoned at the same time); *McLean* v. *State*, 16 Ala. 672 (what accused said to him that morning admitted); *Wilkerson* v. *State*, 91 Ga. 729, 44 Am. St. Rep. 63, 17 S. E. 990; *Perry* v. *State*, 102 Ga. 365, 30 S. E. 903 (husband's statement as to adultery of wife admitted); *Bush* v. *State*, 109 Ga. 120, 34 S. E. 298 (threats admitted); *Seifert* v. *State*, 160 Ind. 464, 98 Am. St. Rep. 340, 67 N. E. 100 (admission of statement as to who furnished instruments in abortion). See *State* v. *Parker*, 172 Mo. 191, 72 S. W. 650.

[1] *Woodcock's Case*, 2 Leach, C. L. 563 note; *State* v. *Howard*, 32 Vt. 380; *Rex* v. *Hucks*, 1 Starkie, 521; *Justice* v. *State*, 99 Ala. 180, 13 So. 658; *Fogg* v. *State*, 81 Ark. 417, 99 S. W. 537; *Newberry* v. *State*, 68 Ark. 355, 58 S. W. 351; *People* v. *Ybarra*, 17 Cal. 166; *People* v. *Thomson*, 145 Cal. 717, 79 Pac. 435; *Brennan* v. *People*, 37 Colo. 256, 86 Pac. 79; *Green* v. *State*, 43 Fla. 552, 30 So. 798; *Gipe* v. *State*, 165 Ind. 433, 1 L.R.A.(N.S.) 419, 112 Am. St. Rep. 238, 75 N. E. 881; *Young* v. *State*, 114 Ga. 849, 40 S. E. 1000; *Von Pollnitz* v. *State*, 92 Ga. 16, 44 Am. St. Rep. 72, 18 S. E. 301; *State* v. *Wilmbusse*, 8 Idaho, 608, 70 Pac. 849; *Williams* v. *State*, 168 Ind. 87, 79 N. E. 1079; *Starkey* v. *People*, 17 Ill. 17; *State* v. *Kuhn*, 117 Iowa, 216, 90 N. W. 733; *State* v. *Furney*, 41 Kan. 115, 13 Am. St. Rep. 262, 21 Pac. 213, 8 Am. Crim. Rep. 131; *Baker* v. *Com.* 106 Ky. 212, 50 S. W. 54; *State* v. *Molisse*, 36 La. Ann. 920; *Com.* v. *Bishop*, 165 Mass. 148, 42 N. E. 560; *State* v. *Cantieny*, 34 Minn. 1, 24 N. W. 458, 6 Am. Crim. Rep. 418; *Bell* v. *State*, 72 Miss. 507, 7 So. 232, 10 Am. Crim. Rep. 276; *State* v. *Zorn*, 202 Mo. 12, 100 S. W. 591; *Binfield* v. *State*, 15 Neb. 484, 19 N. W. 607; *Donnelly* v. *State*,

When such testimony is offered, the jury should be excluded from the court room, and the preliminary evidence heard by the court alone. If found irrelevant and inadmissible, the question is determined free from all prejudice in favor of or against the accused. If found relevant and admissible, then, on the return of the jury, the testimony should be offered *de novo* in the presence of the jury.

No reason can be adduced why this commendable procedure ought not to be enforced in every case, and there is every reason why it should prevail as the established practice of the trial court.[2]

26 N. J. L. 463; *State* v. *Williams,* 67 N. C. 12; *People* v. *Smith,* 104 N. Y. 491, 58 Am. Rep. 537, 10 N. E. 873; *People* v. *Brecht,* 120 App. Div. 769, 105 N. Y. Supp. 436; *Willoughby* v. *Territory,* 16 Okla. 577, 86 Pac. 56, 8 A. & E. Ann. Cas. 537; *State* v. *Doris,* 51 Or. 136, 16 L.R.A. (N.S.) 660, 94 Pac. 44; *State* v. *Shaffer,* 23 Or. 555, 32 Pac. 545; *Com.* v. *Murray,* 2 Ashm. (Pa.) 41; *Com.* v. *Winkelman,* 12 Pa. Super. Ct. 497; *State* v. *McCoomer,* 79 S. C. 63, 60 S. E. 237; *State* v. *Franklin,* 80 S. C. 332, 60 S. E. 953; *Bolin* v. *State,* 9 Lea, 516; *Smith* v. *State,* 9 Humph. 9; *Bateson* v. *State,* 46 Tex. Crim. Rep. 34, 80 S. W. 88; *State* v. *Center,* 35 Vt. 378; *Vass* v. *Com.* 3 Leigh, 786, 24 Am. Dec. 695; *State* v. *Eddon,* 8 Wash. 292, 36 Pac. 139.

[2] As favoring this practice, it is said in *Smith* v. *State,* 9 Humph. 9: "The jury shall not hear such declarations till the judge has determined that they are dying declarations, lest, peradventure, they may control their judgment, although upon hearing other proof they may become satisfied that they were not dying declarations. It is dying declarations, as such, that are admitted; not declarations which may be dying declarations or not, as the case may afterward turn out. The necessary consequence is that, if a judge permit declarations of a deceased person to go before the jury as dying declarations, and the proof does not show satisfactorily that they were such, it is error for which this court can and must reverse, and that, too, whether they were objected to or not by the prisoner upon the trial; for the testimony being of such a dangerous character, watched with such jealous suspicion, and the question as to the propriety of receiving being vested alone in the judge, it is his duty as counsel for the prisoner to exclude it, if, in his opinion, it be not legitimate, whether its reception be objected to or not; in fact the implied acquiescence in the reception of testimony generally, resulting from the absence of objection, cannot be pre-

Dying declarations have every element of dramatic evidence. As the last utterances of a sentient, conscious being, standing on the threshold of eternity, they possess an impressiveness out of all proportion to their evidentiary value. In all homicide cases, the elemental passions are at any moment apt to override the judgment. A court may be judicial and impartial, and a jury dispassionate, up to the point where the dying declaration is admitted, and then find its impartiality and self-restraint seriously tried over the recital of the dying declaration.

The fact that the testimony offered as a predicate does not

dicated of such testimony as this, for its validity depends upon the fact that the declarations were dying declarations within the meaning of the law, and if they were not, the reception of them is illegal, and this illegality could not have been removed upon objection taken thereto, which, peradventure, may be done as to testimony of another character, or, at least, proof of a legitimate character may be introduced to the same fact; neither of which, in the abuse of an objection, may be thought of, and therefore, as a general rule, if testimony to establish a fact be not objected to, the reception of it will constitute no good ground for a reversal."

Also, in *North* v. *People,* 139 Ill. 81, 28 N. E. 966: "Had the dying declarations been held inadmissible, then the jury might have been improperly affected by the preliminary proof, and to avoid the possibility of that, it is held that the jury should always be withdrawn before the preliminary proof is introduced."

The practice of excluding the jury during such hearing is commended in the following cases: *State* v. *Shaffer,* 23 Or. 555, 32 Pac. 545; *Baxter* v. *State,* 15 Lea, 657; *Swisher* v. *Com.* 26 Gratt. 963, 21 Am. Rep. 330; *Coyle* v. *Com.* 122 Ky. 781, 93 S. W. 584. See *Leigh* v. *People,* 113 Ill. 372.

But the matter of the exclusion lies in the discretion of the court, and the weight of authority is that of itself such exclusion will not constitute reversible error. *Doles* v. *State,* 97 Ind. 555; *People* v. *Smith,* 104 N. Y. 493, 58 Am. Rep. 537, 10 N. E. 873; *State* v. *Murdy,* 81 Iowa, 603, 47 N. W. 867; *State* v. *Zorn,* 202 Mo. 12, 100 S. W. 591; *State* v. *Minor,* 193 Mo. 597, 92 S. W. 466.

And where they were properly admitted, the hearing of the preliminary evidence in the first instance by the jury is necessarily harmless. *North* v. *People,* 139 Ill. 81, 28 N. E. 966.

But this does not militate against the soundness of the rule that the

support the evidentiary qualifications demanded by the law does not dislodge from the mind of the juror matters of a prejudicial character brought to his knowledge while such testimony is being rehearsed in his presence, and the instruction to disregard it does not remove the fixed impression from his mind.[3]

preliminary evidence is for the court alone. It was always the custom in an earlier day, when an attorney desired to propound a question that he thought might be improper, or suggested evidence that seemed to be improper, to have it written down, the objection attached, and submitted to the court so as not to be heard by the jury for a ruling, and then it might be filed as one of the exceptions.

There is no retardation when justice is the essense of the inquiry. And any prolongation of the trial that might result from hearing the evidence when the jury was excluded, and hearing it again if the court decides the preliminary matter in favor of admission, is more than balanced by the impartiality assured to the accused.

[3] The harm of such testimony has never been more accurately nor more clearly stated than in the following passages from the opinion in the case of *Drury* v. *Territory*, 9 Okla. 398, 60 Pac. 101, 13 Am. Crim. Rep. 300. "Trial courts cannot be too careful in guarding the rights and interests of those on trial for crime. It is better in case of doubt to give the prisoner the benefit of the doubt, and the court should never permit incompetent and prejudicial evidence to go to the jury, which it is clear at the time will have to be withdrawn, and the jury instructed to disregard it. Courts sometimes admit evidence upon a theory that it will be made competent, or that other facts will be shown later which will render such evidence competent. If such theory is not sustained, or if such testimony is not made competent by proof of the proper foundation facts, then the court is compelled to withdraw the evidence from the jury, and direct the jury to disregard it. Such failure on the part of the party offering such evidence is generally apparent to the jury, and more frequently results to the detriment of the party who introduced the testimony than to the adverse party. But such is not the case when incompetent evidence is introduced which could in no event be proper for the jury to consider. It has been a question seriously and much discussed as to whether such errors can be cured by a withdrawal of such evidence, and an instruction to the jury to disregard it." p. 411.

"But in cases where improper and prejudicial evidence has been permitted to go to the jury upon a wrong theory, or under a mistake of the court as to the law, or upon the contention by the prosecution that it will later be made competent

Should the examination of the juror disclose his knowledge of these facts before his acceptance, it would properly disqualify him to sit as a juror. When, after his acceptance, the same facts come to his knowledge under the sanctity of an oath, the impression then made cannot be removed by a direction to disregard it.

At this point also, in the preliminary evidence, the court should hear the accused. He has a right to show, by competent testimony, that the declarant did not believe he was about to die;[4] that the dying statement was made in a reckless state

by proof of other facts which are not proven, and the evidence thus introduced is of a character to prejudice the jurors against the defendant, and to make a fixed impression on the mind, and it is not reasonably probable that the verdict would have been the same had this illegal evidence not been introduced, we think a new trial should be granted." p. 414.

"Without reflecting in any degree upon the intelligence, integrity, and honesty of purpose of the average juror, it is a fact which has long been apparent to courts and lawyers, that matters of a prejudicial character within the knowledge of a juror, and which have found a permanent lodgment in his mind, will inadvertently and unconsciously enter into and affect his verdict. The juror does not possess that trained and disciplined mind which enables him to closely discriminate between that which he is permitted to consider and that which he is not, and is, from his inexperience in such matters, unable to draw conclusions entirely uninfluenced and unaffected by the incompetent matters within his knowledge; and these are the reasons that a person having some knowledge of the facts in a case is not permitted to sit as a juror."

And in accordance with this are all the English authorities, that the judge has to deal with the matter as a preliminary question of fact. *Reg.* v. *Goddard,* 15 Cox, C. C. 7, *Hawkins,* J.

It ought never to be left to the jury to say whether the declarant thought he was dying or not; for that must be decided by the judge before he receives the evidence. *John's Case,* 1 East P. C. 357; *Welbourn's Case,* 1 East, P. C. 358, 1 Leach, C. L. 503, note; *Rex* v. *Hucks,* 1 Starkie, 523; *Reg.* v. *Smith,* 10 Cox, C. C. 82, Leigh & C. C. C. 607, 34 L. J. Mag. Cas. N. S. 153, 11 Jur. N. S. 695, 12 L. T. N. S. 609, 13 Week. Rep. 816.

The matter of the admissibility being so emphatically a question for the judge, there would seem to be no question that the jury have no more right to be present than they would have to be in determining an issue at law on the pleadings.

[4] The logical procedure is to hear

of mind,[5] and that he was hostile to the accused.[6] And a refusal to the defendant so to test the competency of the dying statement has been held error.[7]

The argument of inconvenience and prolongation of trial has no place in a homicide charge. It is the solemn duty, devolving upon the entire tribunal, to hear with patience and deliberation, and to decide dispassionately and impartially, without regarding the length of time that may be required to do justice.[8]

all that is to be said about the declaration, both in favor of and as impeaching its trustworthiness, at the time it is tendered, and hence its impeachment is proper at the preliminary stage, and also in the absence of the jury. *State* v. *Elliott,* 45 Iowa, 486, 2 Am. Crim. Rep. 323; *State* v. *Molisse,* 36 La. Ann. 920.

[5] *Digby* v. *People,* 113 Ill. 123, 55 Am. Rep. 402; *Tracy* v. *People,* 97 Ill. 107.

[6] *Nordgren* v. *People,* 211 Ill. 425, 71 N. E. 1042.

[7] *State* v. *Elliott,* 45 Iowa, 486, 2 Am. Crim. Rep. 323.

[8] This duty is clearly stated under the English practice. "The circumstances under which the declarations were made are to be proved to the judge, and he will hear all that the deceased has said relative to his situation, and will inquire into the state of illness in which he was; the opinions of medical and other persons as to his state, and whether they were made known to the deceased; the conduct of the deceased in settling his affairs, in making his will, giving directions as to his funeral or family; and whether he has recourse to those consolations and rites of religion which are appropriate to the last sad hours of departing mortality; in a word, into every fact and circumstance which may tend to throw light upon the state of the mind of the deceased at the time when the declaration was made, in order the better to enable him to arrive at a satisfactory determination as to whether the evidence is admissible or not." Citing *Rex* v. *Van Butchell,* 3 Car. & P. 629, Hullock, B.; *Rex* v. *Spilsbury,* 7 Car. & P. 187, Coleridge, J.

It has been held in one case, on the preliminary examination, where the witness swore that the deceased said he was dying, that the evidence contradicting that statement, to the effect that the witness did not say he was dying, was more properly admitted on the trial in chief as going to discredit the state's witness. *Hunnicutt* v. *State,* 20 Tex. App. 632 (this was in the absence of the jury). Contra, *State* v. *Elliott,* 45 Iowa, 486, 2 Am. Crim. Rep. 323.

§ 275c. Dying declarations; proof of competency.—A proper predicate must be laid for the introduction of the declaration;[1] it is generally a sufficient predicate to show, by the repeated assertions of the declarant, that he was about to die;[2] it may be laid by showing that the surrounding circumstances were of such a character as to satisfy the court that the declarant believed that he would die;[3] such belief is indicated

[1] *Wilson* v. *State,* 140 Ala. 43, 37 So. 93; *State* v. *Wilmbusse,* 8 Idaho, 608, 70 Pac. 849; *Wyatt* v. *Com.* 8 Ky. L. Rep. 55, 1 S. W. 196; *State* v. *Frazier,* 109 La. 458, 33 So. 561, 12 Am. Crim. Rep. 236; *Ashley* v. *State,* — Miss. —, 37 So. 960; *State* v. *Reed,* 137 Mo. 125, 38 S. W. 574; *Com.* v. *Britton,* Campb. (Pa.) 513.

[2] *Jordan* v. *State,* 81 Ala. 20, 1 So. 577; *Gregory* v. *State,* 140 Ala. 16, 37 So. 259; *McQueen* v. *State,* 94 Ala. 50, 10 So. 433; *Scales* v. *State,* 96 Ala. 69, 11 So. 121; *Smith* v. *State,* 136 Ala. 1, 34 So. 168; *Cole* v. *State,* 105 Ala. 76, 16 So. 762; *Milton* v. *State,* 134 Ala. 42, 32 So. 653; *People* v. *Yokum,* 118 Cal. 437, 50 Pac. 686; *People* v. *Glover,* 141 Cal. 233, 74 Pac. 745; *State* v. *Trusty,* 1 Penn. (Del.) 319, 40 Atl. 766; *State* v. *Frazier,* Houst. Crim. Rep. (Del.) 176; *Grant* v. *State,* 118 Ga. 804, 45 S. E. 603; *State* v. *Bonar,* 71 Kan. 800, 81 Pac. 484; *Crump* v. *Com.* 14 Ky. L. Rep. 450, 20 S. W. 390; *State* v. *Ashworth,* 50 La. Ann. 94, 23 So. 270; *Hawkins* v. *State,* 98 Md. 355, 57 Atl. 27; *Dillard* v. *State,* 58 Miss. 368; *State* v. *Brown,* 188 Mo. 45, 87 S. W. 519; *Hunnicutt* v. *State,* 18 Tex. App. 498, 51 Am. Rep. 330; *Testard* v. *State,* 26 Tex. App. 260, 9 S. W. 888; *Roberts* v. *State,* 48 Tex. Crim. Rep. 378, 88 S. W. 221; *Reg.* v. *Brooks,* 1 Cox, C. C. 6.

Where a person was shot and seriously or mortally wounded, and stated to a relative that he was bound to die, it cannot be assumed that he simply meant that at sometime in the future he was bound to die, so as to exclude a dying declaration made by him, on the theory that he did not contemplate immediately impending death. *Miller* v. *State,* 27 Tex. App. 63, 10 S. W. 445.

[3] *People* v. *Chase,* 79 Hun, 296, 29 N. Y. Supp. 376; *Hammil* v *State,* 90 Ala. 577, 8 So. 380; *Pennington* v. *Com.* 24 Ky. L. Rep. 321, 68 S. W. 451, 12 Am. Crim. Rep. 238; *State* v. *Kring,* 11 Mo. App. 92. And see *Reg.* v. *Goddard,* 15 Cox, C. C. 7; *People* v. *Ybarra,* 17 Cal. 166; *Johnson* v. *State,* 17 Ala. 618; *Watson* v. *State,* 63 Ind. 548, 3 Am. Crim. Rep. 225; *State* v. *Young,* 104 Iowa, 730, 74 N. W. 693; *Pryor* v. *State,* — Miss. —, 39 So. 1012; *State* v. *Vaughan,* 22 Nev. 285, 39 Pac. 733; *Keaton* v. *State,* 41 Tex. Crim. Rep. 621, 57 S. W. 1125; *Puryear* v. *Com.* 83 Va. 51, 1 S. E. 512; *State* v. *Power,* 24 Wash. 34, 63 L.R.A. 902, 63 Pac.

1112; *State* v. *Cornish,* 5 Harr. (Del.) 502; *State* v. *Oliver,* 2 Houst. (Del.) 585; *Fuller* v. *State,* 117 Ala. 36, 23 So. 688; *Anderson* v. *State,* 79 Ala. 5; *Oliver* v. *State,* 17 Ala. 587; *Faire* v. *State,* 58 Ala. 74; *Fuqua* v. *Com.* 118 Ky. 578, 81 S. W. 923; *Rowsey* v. *Com.* 116 Ky. 617, 76 S. W. 409; *State* v. *Whitt,* 113 N. C. 716, 18 S. E. 715; *Com.* v. *VanHorn,* 4 Lack. Leg. News, 63; *Com.* v. *Mika,* 171 Pa. 273, 33 Atl. 65; *People* v. *Lem Deo,* 132 Cal. 199, 64 Pac. 265; *People* v. *Samario,* 84 Cal. 484, 24 Pac. 283; *State* v. *Brown,* 188 Mo. 451, 87 S. W. 519; *Moore* v. *State,* 96 Tenn. 209, 33 S. W. 1046; *King* v. *State,* 34 Tex. Crim. Rep. 228, 29 S. W. 1086. And see *King* v. *Com.* 2 Va. Cas. 78; *Rex* v. *Bonner,* 6 Car. & P. 386; *State* v. *Finley,* 118 N. C. 1161, 24 S. E. 495. And see *State* v. *Blackburn,* 80 N. C. 474; *State* v. *Quick,* 15 Rich. L. 342; *State* v. *Head,* 60 S. C. 516, 39 S. E. 6; *State* v. *Johnson,* 26 S. C.152, 1 S. E. 510, 7 Am. Crim. Rep. 366; *Gipe* v. *State,* 165 Ind. 433, 1 L.R.A.(N.S.) 419, 112 Am. St. Rep. 238, 75 N. E. 881; *State* v. *Dennis,* 119 Iowa, 688, 94 N. W. 235; *State* v. *Smith,* 48 La. Ann. 533, 19 So. 452; *State* v. *Kring,* 11 Mo. App. 92, affirmed in 74 Mo. 612; *State* v. *Fletcher,* 24 Or. 295, 33 Pac. 575. And see *Green* v. *State,* 154 Ind. 655, 57 N. E. 637.

A statement made by a person lying on the ground mortally wounded and gasping for breath, in response to a request by another to bystanders to "listen to him while he tells how it happened before he dies," is admissible in a prosecution for the killing, as a dying declaration. *Newberry* v. *State,* 68 Ark. 355, 58 S. W. 351. *Fulcher* v. *State,* 28 Tex. App. 465, 13 S. W. 750; *People* v. *Vernon,* 35 Cal. 49, 95 Am. Dec. 49; *Hammil* v. *State,* 90 Ala. 576, 8 So. 380; *State* v. *Wilson,* 121 Mo. 434, 26 S. W. 357; *Rex* v. *Hayward,* 6 Car. & P. 157.

An introductory statement declaring a knowledge of impending death, written by a person who took a dying statement of such knowledge by the declarant, on a request that it be written, is not shown to be distinctly ratified by a mere general assent to the document, which was lengthy, made after a single reading of it as a whole, and the signing of it by the declarant,—especially where the circumstances were such as to indicate that a belief of impending death was not then manifestly in the mind of the declarant. *People* v. *Fuhrig,* 127 Cal. 412, 59 Pac. 693; *Crockett* v. *State,* 45 Tex. Crim. Rep. 276, 77 S. W. 4.

A statement by an injured person that, if he must die, he would say that a named person killed him, soon after which he called for an insurance policy on his life, and read it to his wife, and asked her if it was satisfactory, and spoke to her of death, and then stated the circumstances of the killing, is admissible as a dying declaration, including the circumstances of the killing. *Curtis* v. *State,* 14 Lea, 502; *Baxter* v. *State,* 15 Lea, 657. And see *Tinckler's Case,* 1 East, P. C. 354; *State* v. *Bordelon,* 113 La. 690, 37 So. 603; *Pitts* v. *State,* 140 Ala. 70, 37 So. 101; *State* v. *Baldwin,* 15 Wash. 15, 45 Pac. 650.

by sending for a priest;[4] religious expressions are often conclusive as showing his abandonment of hope;[5] anxiety about his business affairs[6] is an element of such predicate.

In the absence of a statement in words of the declarant himself, it will be sufficient if the surrounding facts indicated that he was conscious of the certainty of his death.[7] In aid of this, the court may take into consideration the bodily condition of the declarant, his wounds, his conduct, his language,

[4] *Carver* v. *United States*, 164 U. S. 694, 41 L. ed. 602, 17 Sup. Ct. Rep. 228; *State* v. *Swift*, 57 Conn. 496, 18 Atl. 664. And see *Re Orpen*, 86 Fed. 760; *Hammil* v. *State*, 90 Ala. 577, 8 So. 380; *State* v. *Nash*, 7 Iowa, 347; *State* v. *Trivas*, 32 La. Ann. 1086, 36 Am. Rep. 293; *State* v. *Cantieny*, 34 Minn. 1, 24 N. W. 458, 6 Am. Crim. Rep. 418; *Murphy* v. *People*, 37 Ill. 447; *Com.* v. *Williams*, 2 Ashm. (Pa.) 69; *Logan* v. *State*, 9 Humph. 24; *Rex* v. *Minton*, 1 MacNally, Ev. 386; *People* v. *Lee*, 17 Cal. 76; *State* v. *Wilson*, 24 Kan. 189, 36 Am. Rep. 257; *State* v. *O'Brien*, 81 Iowa, 88, 46 N. W. 752; *Lister* v. *State*, 1 Tex. App. 739; *Cook* v. *State*, 22 Tex. App. 511, 3 S. W. 749.

[5] *United States* v. *Taylor*, 4 Cranch, C. C. 338, Fed. Cas. No. 16,436.

[6] *Reg.* v. *Thomas*, 1 Cox, C. C. 52; *Rex* v. *Bonner*, 6 Car. & P. 386; *Rex* v. *Spilsbury*, 7 Car. & P. 187; *People* v. *Gray*, 61 Cal. 164, 44 Am. Rep. 549; *State* v. *Nash*, 7 Iowa, 347; *State* v. *Trivas*, 32 La. Ann. 1086, 36 Am. Rep. 293; *Curtis* v. *State*, 14 Lea, 502; *Temple* v. *State*, 15 Tex. App. 304, 49 Am. Rep. 200; *State* v. *Nelson*, 101 Mo. 464, 14 S. W. 712; *State* v. *Russell*, 13 Mont. 164, 32 Pac. 854; *State* v. *Johnson*, 76 Mo. 121; *Brakefield* v. *State*, 1 Sneed, 218.

[7] *Clark* v. *State*, 105 Ala. 91, 17 So. 37; *Gerald* v. *State*, 128 Ala. 6, 29 So. 614; *Dunn* v. *State*, 2 Ark. 229, 35 Am. Dec. 54; *People* v. *Taylor*, 59 Cal. 640; *People* v. *Lee Sare Bo*, 72 Cal. 623, 14 Pac. 310; *People* v. *Farmer*, 77 Cal. 1, 18 Pac. 800; *People* v. *Bemmerly*, 87 Cal. 117, 25 Pac. 266; *People* v. *Yokum*, 118 Cal. 437, 50 Pac. 686; *People* v. *Sanchez*, 24 Cal. 17; *People* v. *Gray*, 61 Cal. 164, 44 Am. Rep. 549; *Zipperian* v. *People*, 33 Colo. 134, 79 Pac. 1018; *Lester* v. *State*, 37 Fla. 382, 20 So. 232; *Campbell* v. *State*, 11 Ga. 365; *Young* v. *State*, 114 Ga. 849, 40 S. E. 1000; *Murphy* v. *People*, 37 Ill. 447; *State* v. *Baldwin*, 79 Iowa, 714, 45 N. W. 297, 8 Am. Crim. Rep. 566; *Morgan* v. *State*, 31 Ind. 193; *Peoples* v. *Com.* 87 Ky. 487, 9 S. W. 509, 810; *Com.* v. *Matthews*, 89 Ky. 287, 12 S. W. 333; *Green* v. *Com.* 13 Ky. L. Rep. 897, 18 S. W. 515; *McHargess* v. *Com.* 15 Ky. L. Rep. 323, 23 S. W. 349; *Pennington* v. *Com.* 24 Ky. L. Rep. 321, 68 S. W. 451, 12 Am. Crim. Rep. 238; *State* v. *Wilson*, 23 La.

and his statements, and all facts from which a conclusion may be deduced of his consciousness of approaching dissolution at the time.[8]

The burden of the proof is upon the party seeking to introduce the declarations.[9] It is proper at this point to hear

Ann. 558; *State* v. *Keenan*, 38 La. Ann. 660; *State* v. *Black*, 42 La. Ann. 861, 8 So. 594; *State* v. *Sadler*, 51 La. Ann. 1397, 26 So. 390; *State* v. *Scott*, 12 La. Ann. 274; *State* v. *Newhouse*, 39 La. Ann. 862, 2 So. 799; *Worthington* v. *State*, 92 Md. 222, 56 L.R.A. 353, 84 Am. St. Rep. 506, 48 Atl. 355; *People* v. *Simpson*, 48 Mich. 474, 12 N. W. 662; *McDaniel* v. *State*, 8 Smedes & M. 401, 47 Am. Dec. 93; *Bell* v. *State*, 72 Miss. 507, 17 So. 232, 10 Am. Crim. Rep. 276; *State* v. *Nocton*, 121 Mo. 537, 26 S. W. 551; *Rakes* v. *People*, 2 Neb. 157; *Fitzgerald* v. *State*, 11 Neb. 577, 10 N. W. 495; *State* v. *Roberts*, 28 Nev. 350, 82 Pac. 100; *Donnelly* v. *State*, 26 N. J. L. 463; *People* v. *Chase*, 79 Hun, 296, 29 N. Y. Supp. 376; *People* v. *Grunzig*, 1 Park. Crim. Rep. 299; *People* v. *Knickerbocker*, 1 Park. Crim. Rep. 302; *People* v. *Perry*, 8 Abb. Pr. N. S. 27; *Com.* v. *Britton*, Campb. (Pa.) 513; *Com.* v. *Murray*, 2 Ashm. (Pa.) 41; *Com.* v. *Birriolo*, 197 Pa. 371, 47 Atl. 355; *Kilpatrick* v. *Com.* 31 Pa. 198; *Com.* v. *Wilkelman*, 12 Pa. Super. Ct. 497; *State* v. *Bradley*, 34 S. C. 136, 13 S. E. 315; *Nelson* v. *State*, 7 Humph. 542; *Smith* v. *State*, 9 Humph. 9; *Stewart* v. *State*, 2 Lea, 598; *Curtis* v. *State*, 14 Lea, 502; *Anthony* v. *State*, Meigs, 265, 33 Am. Dec. 143; *Brakefield* v. *State*, 1 Sneed, 215; *Burrell* v. *State*, 18 Tex. 713; *Hill* v. *Com.* 2 Gratt. 594; *Rex* v. *Bonner*, 6 Car. & P. 386; 1 East, P. C. 355; *Rex* v. *Dingler*, 2 Leach, C. L. 561; 2 Russell, Crimes, 761; *Re Orpen*, 86 Fed. 760.

That hope had fled, and an injured person had not the slightest expectation of recovery, may be shown by any circumstances of the case taken together, such as the character of his wounds, his sufferings and pain, the opinion of the surgeon and other attendants as to his condition; his alarm and anxiety, if manifest, and his final preparation for death, if any was made; his taking leave of friends, his seeking the consolations of religion, and the last offices of the church, if such was the case. *People* v. *Sanchez*, 24 Cal. 17.

[8] *Westbrook* v. *People*, 126 Ill. 81, 18 N. E. 304; *State* v. *Gillick*, 7 Iowa, 287; *Pennington* v. *Com.* 24 Ky. L. Rep. 321, 68 S. W. 451, 12 Am. Crim. Rep. 238; *State* v. *Keenan*, 38 La. Ann. 660; *State* v. *Scott*, 12 La. Ann. 274; *State* v. *Russell*, 13 Mont. 164, 32 Pac. 854; *Hill* v. *Com.* 2 Gratt. 594; *Re Orpen*, 86 Fed. 760; *John's Case*, 1 East, P. C. 357.

[9] *Donnelly* v. *State*, 26 N. J. L. 463; *Kelly* v. *United States*, 27 Fed. 616; *Peak* v. *State*, 50 N. J. L. 179, 12 Atl. 701.

the accused against the admissibility of the declaration.[10] And while it is a proper practice, to exclude the jury during such hearing, and a practice that is commended,[11] yet it is within the discretion of the court as to whether or not this inquiry shall be conducted in the presence of the jury.[12] This inquiry is collateral to the admission of the declarations themselves, and is wholly distinct from the declarations themselves.[13]

[10] *State* v. *Cornish,* 5 Harr. (Del.) 502; *State* v. *Elliott,* 45 Iowa, 486, 2 Am. Crim. Rep. 322; *State* v. *Molisse,* 36 La. Ann. 920.

The court does not discharge this duty by simply hearing evidence produced on the part of the state. Evidence, if offered, should be received on the part of the defendant, and it should be weighed upon the determination of the question of admissibility. *State* v. *Elliott,* 45 Iowa, 486, 2 Am. Crim. Rep. 323.

[11] *State* v. *Shaffer,* 23 Or. 555, 32 Pac. 545; *Baxter* v. *State,* 15 Lea, 657; *Swisher* v. *Com.* 26 Gratt. 963, 21 Am. Rep. 330; *Doles* v. *State,* 97 Ind. 555; *North* v. *People,* 139 Ill. 81, 28 N. E. 966. See *Collins* v. *People,* 194 Ill. 506, 92 N. E. 902, and *Price* v. *State,* 72 Ga. 441.

[12] See note 11, above; *State* v. *Furney,* 41 Kan. 115, 13 Am. St. Rep. 262, 21 Pac. 213, 8 Am. Crim. Rep. 131; *Leigh* v. *People,* 113 Ill. 372; *Donnelly* v. *State,* 26 N. J. L. 463.

[13] *Vass* v. *Com.* 3 Leigh, 786, 24 Am. Dec. 695; *People* v. *Fong Ah Sing,* 70 Cal. 8, 11 Pac. 323; *State* v. *Trivas,* 32 La. Ann. 1086, 36 Am. Rep. 293; *Com.* v. *Thompson,* 159 Mass. 56, 33 N. E. 1111; *State* v. *McMullin,* 170 Mo. 608, 71 S. W. 221; *Donnelly* v. *State,* 26 N. J. L. 463; *Peoples* v. *Com.* 87 Ky. 487, 9 S. W. 509, 810; *Sullivan* v. *Com.* 93 Pa. 284; *Benson* v. *State,* 38 Tex. Crim. Rep. 487, 43 S. W. 527. See *People* v. *Knapp,* 26 Mich. 112. Also *Heningburg* v. *State,* 153 Ala. 13, 45 So. 246.

In *Lipscomb* v. *State,* 75 Miss. 559, 23 So. 210, 230, the judges approved the following statement of rules as a proper test for the competency of a dying declaration:

(a) They must have been made under the realization and solemn sense of impending death:

(b) They must have been the utterances of a sane mind:

(c) They must be restricted to the homicide and the circumstances immediately attending it and forming a part of the *res gestæ*:

(d) A declaration, or part of it, is not admissible unless it would be competent and relevant if it were the testimony of a living witness; and,

(e) Great caution should be observed in the admission of dying declarations, and the rules which restrict their admission should be carefully guarded.

§ 275d. Proving the declarations; oral and written.— When the court has determined the collateral question of the competency in favor of the admissibility, the proof of the declaration itself should then be made. Where it has been reduced to writing and approved or signed by the declarant, it should be proved by such writing,[1] though it is not essential to its admission that the declaration should be in writing,[2] nor that it should be signed,[3] though if not in any way recognized by the declarant as his, such writing is not admissible.[4] It is not an objection to its admission that part of the declaration is in writing and signed, and part of it is established by parol,[5] though a verbal declaration made at the same time is not admissible.[6] A lost writing may be proven by a true copy,[7] and where the writing is not admissible for the reason that the declarant did not recognize nor assent to it, those who heard the declaration may testify as to what he did say, and may

[1] *State* v. *Kindle*, 47 Ohio St. 358, 24 N. E. 485; *King* v. *State*, 91 Tenn. 617, 20 S. W. 169; *Collier* v. *State*, 20 Ark. 36; *People* v. *Glenn*, 10 Cal. 32; *State* v. *Tweedy*, 11 Iowa, 350; *State* v. *Cameron*, 2 Chand. (Wis.) 172; *People* v. Tracy, 1 Utah, 343.

[2] *State* v. *Gill*, 14 S. C. 410; *State* v. *Somnier*, 33 La. Ann. 237; *Shenkenberger* v. *State*, 154 Ind. 630, 57 N. E. 519; *Sims* v. *State*, 139 Ala. 74, 101 Am. St. Rep. 17, 36 So. 138; *Blyew* v. *Com.* 91 Ky. 200, 15 S. W. 356.

[3] *State* v. *Carrington*, 15 Utah, 480, 50 Pac. 527; *Freeman* v. *State*, 112 Ga. 48, 37 S. E. 172; *Sims* v. *State*, 139 Ala. 74, 101 Am. St. Rep. 17, 36 So. 138.

[4] *Foley* v. *State*, 11 Wyo. 464, 72 Pac. 627; *Fuqua* v. *Com.* 118 Ky. 578, 81 S. W. 923.

[5] *State* v. *Schmidt*, 73 Iowa, 469, 35 N. W. 590; *Rex* v. *Woodcock*, 1 Leach, C. L. 500, 1 East, P. C. 354, 11 Eng. Rul. Cas. 294; *People* v. *Vernon*, 35 Cal. 49, 95 Am. Dec. 49; *People* v. *Lee*, 17 Cal. 76; *People* v. *Glenn*, 10 Cal. 33; *Ward* v. *State*, 8 Blackf. 101; *Montgomery* v. *State*, 11 Ohio, 424; *State* v. *Craine*, 120 N. C. 601, 27 S. E. 72 (Compare *Zipperian* v. *People*, 33 Colo. 134, 79 Pac. 1018); *Kirby* v. *State*, 151 Ala. 66, 44 So. 38; *Jarvis* v. *State*, 138 Ala. 17, 34 So. 1025; *Kelly* v. *State*, 52 Ala. 361; *Collier* v. *State*, 20 Ark. 36. See *Bailey* v. *Com.* 2 Ky. L. Rep. 436.

[6] *Adams* v. *State*, — Tex. Crim. App. —, 19 S. W. 907; *Hendrickson* v. *Com.* 24 Ky. L. Rep. 2173, 73 S. W. 764.

[7] *Merrill* v. *State*, 58 Miss. 65.

refresh their memories by reference to the incomplete writing.[8] Where written declarations are lost or destroyed, and are first properly accounted for, parol evidence of their contents is admissible.[9] Where the declarations rest in parol, they may be proved by the witness or the witnesses who heard them.[10] On a subsequent trial, a deceased witness's testimony to such declaration may be proved by a person who heard the deceased witness testify and can state the substance of it.[11]

§ 276. General grounds of admissibility.—The dying declarations of a person who expects to die, respecting the circumstances under which he received a mortal injury, are admissible in prosecutions, (1) though the prosecution be for manslaughter;[1] and (2) though the accused was not present

[8] *State* v. *Sullivan,* 51 Iowa, 142, 50 N. W. 572; *Fuqua* v. *Com.* 24 Ky. L. Rep. 2204, 73 S. W. 782; *Allison* v. *Com.* 99 Pa. 17; *Foley* v. *State,* 11 Wyo. 464, 72 Pac. 627; *State* v. *Wilson,* 24 Kan. 189, 36 Am. Rep. 257. See *State* v. *Patterson,* 45 Vt. 308, 12 Am. Rep. 200; *Sim* v. *State,* 139 Ala. 74, 101 Am. St. Rep. 17, 36 So. 138; *Jarvis* v. *State,* 138 Ala. 17, 34 So. 1025; *Mitchell* v. *State,* 82 Ark. 324, 101 S. W. 763; *Salisbury* v. *Com.* 32 Ky. L. Rep. 1085, 107 S. W. 774; *Fuqua* v. *Com.* 118 Ky. 578, 81 S. W. 923.

And where the writing contains incompetent and irrelevant statements, the court will exclude such portions, and allow to be read to the jury only the relevant and competent parts of such writing. *Kelly* v. *State,* 52 Ala. 361; *Freeman* v. *State,* 112 Ga. 48, 37 S. E. 172; *Com.* v. *Thompson,* 159 Mass. 56, 33 N. E. 1111; *Lipscomb* v. *State,* 75 Miss. 559, 23 So. 210, 230; *State* v. *Black,* 42 La. Ann. 861, 8 So. 594; *State* v. *Brunetto,* 13 La. Ann. 45; *State* v. *Wilson,* 121 Mo. 434, 26 S. W. 357; *People* v. *Sweeney,* 41 Hun, 332; *Temple* v. *State,* 15 Tex. App. 304, 49 Am. Rep. 200.

[9] *State* v. *Tweedy,* 11 Iowa, 350; *State* v. *Patterson,* 45 Vt. 308, 12 Am. Rep. 200; *State* v. *Barnes,* 75 N. J. L. 426, 68 Atl. 145.

[10] *Shenkenberger* v. *State,* 154 Ind. 630, 57 N. E. 519; *State* v. *Sullivan,* 51 Iowa, 142, 50 N. W. 572; *Hendrickson* v. *Com.* 24 Ky. L. Rep. 2173, 73 S. W. 764; *State* v. *Sonnier,* 33 La. Ann. 237; *Com.* v. *Haney,* 127 Mass. 455; *Allison* v. *Com.* 99 Pa. 17; *Foley* v. *State,* 11 Wyo. 464, 72 Pac. 627; *Herd* v. *State,* 43 Tex. Crim. Rep. 575, 67 S. W. 495. See *Carter* v. *State,* 2 Ga. App. 254, 58 S. E. 532.

[11] *Black* v. *State,* 1 Tex. App. 368.

[1] *State* v. *Hannah,* 10 La. Ann.

when they were made, and had no opportunity for cross-examination;[2] and they may be received either against or in favor of the party charged with the death.[3]

Such declarations are received on the ground of necessity, although they are received when other evidence is obtainable as well,[4] and also on the ground that when a person is in constant expectation of immediate death, all temptation to falsehood, either from interest, hope, or fear will be removed; and the awful nature of his situation will be presumed to impress him as strongly with the necessity of a strict adherence to

131; *State* v. *Dickinson,* 41 Wis. 299, 2 Am. Crim. Rep. 1.

They are not admissible on prosecutions for the crime of abortion unless made so by statute, because the accused is not indicted for a homicide, but for the crime of abortion. *Railing* v. *Com.* 110 Pa. 100, 1 Atl. 314, 6 Am. Crim. Rep. 7; *Reg.* v. *Hind,* 8 Cox, C. C. 300, Bell, C. C. 253, 29 L. J. Mag. Cas. N. S. 147, 6 Jur. N. S. 514, 2 L. T. N. S. 253, 8 Week. Rep. 421; *Rex* v. *Lloyd,* 4 Car. & P. 233.

Of course, where the statute declares that when death results from abortion, the offense shall be homicide, or where the death of the victim is the subject of the inquiry, then such declarations are admissible. Compare *Montgomery* v. State, 80 Ind. App. 338, 41 Am. Rep. 815; *State* v. *Mayer,* 65 N. J. L. 237, 86 Am. St. Rep. 635, 47 Atl. 486. Also see *Com.* v. *Bishop,* 165 Mass. 148, 42 N. E. 560; *Com.* v. *Thompson,* 159 Mass. 56, 33 N. E. 1111; *State* v. *Pearce,* 56 Minn. 226, 57 N. W. 652, 1065.

[2] 1 Phillipps, Ev. 223; 1 Starkie. Ev. 101; *People* v. *Green,* 1 Denio, 614; *State* v. *Brunetto,* 13 La. Ann. 45.

[3] Post, § 304; *People* v. *Southern,* 120 Cal. 645, 53 Pac. 214; *Moore* v. *State,* 12 Ala. 767, 46 Am. Dec. 276; *State* v. *Saunders,* 14 Or. 304, 12 Pac. 441; *Mattox* v. *United States,* 146 U. S. 151, 36 L. ed. 921, 13 Sup. Ct. Rep. 50; *Rex* v. *Scaife,* 1 Moody & R. 552, 2 Lewin, C. C. 150.

[4] *Reynolds* v. *State,* 68 Ala. 502, 4 Am. Crim. Rep. 152; *People* v. *Glenn,* 10 Cal. 33; *Parks* v. *State,* 105 Ga. 242, 31 S. E. 580; *Lyles* v. *State,* 48 Tex. Crim. Rep. 119, 86 S. W. 763; *Fuqua* v. *Com.* 24 Ky. L. *Rep.* 2204, 73 S. W. 782, *People* v. *Beverly,* 108 Mich. 509, 66 N. W. 379; *Payne* v. *State,* 61 Miss. 161, 4 Am. Crim. Rep. 155; *State* v. *Saunders,* 14 Or. 300, 12 Pac. 441; *Com.* v. *Roddy,* 184 Pa. 274, 39 Atl. 211; *Curtis* v. *State,* 14 Lea, 502; *State* v. *Wood,* 53 Vt. 560; *Luker* v. *Com.* 9 Ky. L. Rep. 385, 5 S. W. 354. Contra, *Stewart* v. *State,* 2 Lea, 598; *Binfield* v. *State,* 15 Neb. 484, 19 N. W. 607; post, § 278.

truth, as the most solemn obligation of an oath administered in a court of justice.[5]

Yet, in dealing with this kind of evidence, it should be observed that passions and prejudices, which in life may pervert the perceptive faculties, do not always lose their power on the deathbed,[6] hence it cannot always be said that the consciousness of the near approach of death is equivalent to an oath administered on the witness stand. A witness sworn in court knows that he may be convicted of perjury if he testifies falsely. A dying man, if he believes in future retribution, will speak, if his faculties are unimpaired, under a similar sanction; but dying men do not always retain their faculties unimpaired, nor do all dying men believe in a future state of retribution. Convicts on the scaffold have as little hope of reprieve as persons on the eve of death; yet there is no kind of evidence so unreliable as the last speechs of convicts on the scaffold.

[5] *Rex* v. *Woodcock*, 1 Leach, C. L. 502, 1 East, P. C. 354, 11 Eng. Rul. Cas. 294; 1 Gilbert, Ev. 280; 1 Chitty, Crim. Law, 568, 569; *State* v. *Smith*, 49 Conn. 376; *People* v. *Grunzig*, 2 Edm. Sel. Cas. 236; *People* v. *Davis*, 56 N. Y. 95; *Brotherton* v. *People*, 75 N. Y. 159, 3 Am. Crim. Rep. 218; *Com.* v. *Murray*, 2 Ashm. (Pa.) 42; *Com.* v. *Williams*, 2 Ashm. (Pa.) 69; *Brown* v. *Com.* 73 Pa. 321, 13 Am. Rep. 740; *Kehoe* v. *Com.* 85 Pa. 127; *Small* v. *Com.* 91 Pa. 304; *State* v. *Nash*, 7 Iowa, 374; *Donnelly* v. *State*, 26 N. J. L. 463; *Walston* v. *Com.* 16 B. Mon. 15; *State* v. *Scott*, 12 La. Ann. 274; *People* v. *Lee*, 17 Cal. 76; *People* v. *Ybarra*, 17 Cal. 166; *Benavides* v. *State*, 31 Tex. 579; *Hill* v. *State*, 41 Ga. 484; *Walker* v. *State*, 52 Ala. 192; *May* v. *State*, 55 Ala. 39; *Dunn* v. *State*, 2 Ark. 229, 35 Am. Dec. 54; *Scott* v. *People*, 63 Ill. 508; *Hurd* v. *People*, 25 Mich. 405; *People* v. *Knapp*, 26 Mich. 112; *Cleveland* v. *Newsom*, 45 Mich. 62, 7 N. W. 222; *State* v. *Oliver*, 2 Houst. (Del.) 585; *Watson* v. *State*, 63 Ind. 548, 3 Am. Crim. Rep. 225; *Campbell* v. *State*, 38 Ark. 498; *Thompson* v. *State*, 11 Tex. App. 51. See *State* v. *Wilson*, 24 Kan. 189, 36 Am. Rep. 257.

[6] With respect to the effect of dying declarations, it is to be observed that, although there may have been an utter abandonment of all hope of recovery, it will often happen that the particulars of the violence of which the deceased has spoken were likely to have occurred under circumstances of con-

Again, there is an absence of the cross-examination, the means by which, when a witness is produced in court, mistaken perceptions are corrected and delusions dispelled. Again, the witnesses who catch up these statements are generally friends of and sympathizers with the dying man, eager to encourage and to preserve any remarks he may utter, no matter how incoherent or feverish, which may vindicate him, or implicate the common object of hate; nor by such witnesses is it likely that questions would be asked as to the grounds of declarant's belief.

The weight, therefore, to be attached to dying declarations, depends upon these conditions: (1) The trustworthiness of the reporters; (2) the capacity of his declarant, at the time, to accurately remember the past; and (3) his disposition to tell truly what he remembers.

It is provided by statute in nearly all of the states, that disbelief does not disqualify as a witness, and hence does not

fusion and surprise calculated to prevent their being accurately observed. The consequences, also of the violence may occasion an injury to the mind, and an indistinctness of memory as to the particular transaction. The deceased may have stated his inferences from facts concerning which he may have drawn a wrong conclusion, or he may have omitted important particulars, from not having his attention called to them. Such evidence, therefore, is liable to be very incomplete. He may naturally also be disposed to give a partial account of the occurrence, although possibly not influenced by animosity nor ill-will. But it cannot be concealed, that animosity and resentment are not unlikely to be felt in such a situation. The passion of anger once excited may not have been entirely extinguished, even when all hope of life is lost. See *Rex* v. *Crockett,* 4 Car. & P. 544, where the declaration was, "That damned man has poisoned me," which may be presumed to be vindictive; and *Rev.* v. *Bonner,* 6 Car. & P. 386, where the dying declaration was distinctly proved to be incorrect. Such considerations show the necessity of caution in receiving impressions from accounts given by persons in a dying state, especially when it is considered that they cannot be subjected to the power of cross-examination,—a power quite as necessary for securing the truth as the religious obligation of an oath can be. Roscoe, Crim. Ev. 36. See *Jones* v. *State,* 71 Ind. 66.

affect the admissibility of the dying declarations. Where the deceased would have been competent as a witness, and the declarations offered meet the requirements as to tests, the court is bound to admit them. When received, the weight and credibility of such declarations are for the jury. The exceptional character of the testimony, and its liability to perversion, require that it should be carefully tested by the rules enumerated.[7]

§ 277. Admission does not contravene any constitutional right.—The admission in evidence of dying declarations does not contravene the constitutional and statutory right of the accused to be confronted with the witnesses against him. The witness who testifies to the dying declaration is the witness against the accused, and the witness with whom the accused is entitled to be confronted. The declarant is not testifying against him. It is the failure to distinguish between the witness who is testifying, and the testimony that he is giving, that lends color to the objection that the accused is not confronted with the witness. When this distinction is observed, it is clear that no constitutional right of the accused is contravened.[1]

[7] *Walker* v. *State,* 37 Tex. 367, 42 Tex. 360.

[1] *Walston* v. *Com.* 16 B. Mon. 15; *Campbell* v. *State,* 11 Ga. 353; *Robbins* v. *State,* 8 Ohio St. 131; *State* v. *Waldron,* 16 R. I. 191, 14 Atl. 847; *Taylor* v. *State,* 38 Tex. Crim. Rep. 552, 43 S. W. 1019; *Burrell* v. *State,* 18 Tex. 718.

"The declarations are facts to be proved by witnesses, who must be confronted with the accused." *Hill* v. *Com.* 2 Gratt. 594.

Such construction has been called "evasive." *State* v. *Houser,* 26 Mo. 431.

"The right to offer that character of proof is not restricted to the side of the prosecutor; it is equally admissible in favor of the party charged with the death." *State* v. *Saunders,* 14 Or. 300, 12 Pac. 441.

The admission of dying declarations is an exception to the general rule, generally attributed to necessity; but whatever the reason, the law is now absolutely settled that no constitutional or statutory rights

§ 278. **Purposes of admission.**—Dying declarations are admitted to identify the accused and the deceased,[1] to establish the circumstances of the *res gestæ*, and to show the transactions from which death results.[2]

When they relate to former or distinct transactions, they do not come within the principle of necessity, since in such cases other testimony may usually be obtained.[3]

of the accused are infringed by their admission. *Marshall* v. *Chicago G. E. R. Co.* 48 Ill. 475, 95 Am. Dec. 561; *Jones* v. *State,* 130 Ga. 274, 60 S. E. 840; *Provisional Government* v. *Herring,* 9 Haw. 181; *Com.* v. *Winkelman,* 12 Pa. Super. Ct. 497; *Payne* v. *State,* 45 Tex. Crim. Rep. 564, 78 S. W. 934; *McLean* v. *State,* 16 Ala. 672; *Green* v. *State,* 66 Ala. 40, 41 Am. Rep. 744; *State* v. *Thawley,* 4 Harr. (Del.) 562; *State* v. *Oliver,* 2 Houst. (Del.) 585; *Campbell* v. *State,* 11 Ga. 353; *State* v. *Nash,* 7 Iowa, 347; *Walston* v. *Com.* 16 B. Mon. 15; *State* v. *Price,* 6 La. Ann. 691; *Com.* v. *Richards,* 18 Pick. 434, 29 Am. Dec. 608; *Com.* v. *M'Pike,* 3 Cush. 181, 50 Am. Dec. 727; *Com.* v. *Carey,* 12 Cush. 246; *McDaniel* v. *State,* 8 Smedes & M. 401, 47 Am. Dec. 93; *Woodsides* v. *State,* 2 How. (Miss.) 655; *Green* v. *State,* 13 Mo. 382; *State* v. *Houser,* 26 Mo. 431; *State* v. *Vansant,* 80 Mo. 67; *People* v. *Cory,* 157 N. Y. 332, 51 N. E. 1024, 11 Am. Crim. Rep. 487; *State* v. *Arnold,* 35 N. C. (13 Ired. L.) 184; *Summons* v. *State,* 5 Ohio St. 342; *Robbins* v. *State,* 8 Ohio St. 131; *Montgomery* v. *State,* 11 Ohio, 424; *State* v. *Saunders,* 14 Or. 302, 12 Pac. 441; *Com.* v. *Stoops,* Addison (Pa.) 381; *State* v. *Jeswell,* 22 R. I. 136, 46 Atl. 405, 12 Am. Crim. Rep. 260; *Anthony* v. *State,* Meigs, 265, 33 Am. Dec. 143; *Burrell* v. *State,* 18 Tex. 713; *Black* v. *State,* 1 Tex. App. 368; *Taylor* v. *State,* 38 Tex. Crim. Rep. 552, 43 S. W. 1019; *Payne* v. *State,* 45 Tex. Crim. Rep. 564, 78 S. W. 934; *Hill* v. *Com.* 2 Gratt. 594; *State* v. *Baldwin,* 15 Wash. 15, 45 Pac. 650; *State* v. *Cameron,* 2 Chand. (Wis.) 172; *Miller* v. *State,* 25 Wis. 384; *State* v. *Dickinson,* 41 Wis. 299, 2 Am. Crim. Rep. 1.

[1] *Lister* v. *State,* 1 Tex. App. 739; *State* v. *Hamilton,* 27 La. Ann. 400; *Worthington* v. *State,* 92 Md. 222, 56 L.R.A. 353, 84 Am. St. Rep. 506, 48 Atl. 355; *Sylvester* v. *State,* 71 Ala. 17; *State* v. *Mace,* 118 N. C. 1244, 24 S. E. 798; *State* v. *Baldwin,* 79 Iowa, 714, 45 N. W. 297, 8 Am. Crim. Rep. 566; *State* v. *Perigo,* 80 Iowa, 37, 45 N. W. 399; *State* v. *Clemons,* 51 Iowa, 274, 1 N. W. 546; *Walker* v. *State,* 139 Ala. 56, 35 So. 1011; *Richards* v. *Com.* 107 Va. 881, 59 S. E. 1104; *Boyd* v. *State,* 84 Miss. 414, 36 So. 525; *State* v. *Mayo,* 42 Wash. 540, 85 Pac. 251, 7 A. & E. Ann. Cas. 881.

[2] *State* v. *Center,* 35 Vt. 378; *Clark* v. *State,* 105 Ala. 91, 17 So. 37.

[3] *Rex* v. *Mead,* 2 Barn. & C. 605,

Hence, declarations by the deceased that accused had attempted two or three times previously, to kill him, are not admissible,[4] or when they show old malice or threats on the part of the accused toward the deceased.[5]

4 Dowl. & R. 120, 26 Revised Rep. 484; *Reg* v. *Hind,* Bell, C. C. 253, 8 Cox, C. C. 300, 29 L. J. Mag. Cas. N. S 147, 6 Jur. N. S. 514, 2 L. T. N. S. 253, 8 Week. Rep. 421; *Reg.* v. *Jenkins,* L. R. 1 C. C. 193, 38 L. J. Mag. Cas. N. S. 82, 20 L. T. N. S. 372, 17 Week. Rep. 621, 11 Cox, C. C. 250; *State* v. *Wood,* 53 Vt. 560; *State* v. *Shelton,* 47 N. C. (2 Jones, L.) 360, 64 Am. Dec. 587; *Johnson* v. *State,* 17 Ala. 618; *Ben* v. *State,* 37 Ala. 103; *Reynolds* v. *State,* 68 Ala. 502, 4 Am. Crim. Rep. 152; *Sylvester* v. *State,* 71 Ala. 17; *State* v. *Jefferson,* 77 Mo. 136; *Leiber* v. *Com.* 9 Bush, 11, 1 Am. Crim. Rep. 309; *Luby* v. *Com.* 12 Bush. 1; *Lister* v. *State,* 1 Tex. App. 739 (competent to prove name); *Montgomery* v. *State,* 80 Ind. 338, 41 Am. Rep. 815; *Sullivan* v. *State,* 102 Ala. 135, 48 Am. St. Rep. 22, 15 So. 264; *Perry* v. *State,* 102 Ga. 365, 30 S. E. 903; *Binns* v. *State,* 46 Ind. 311; *State* v. *Baldwin,* 79 Iowa, 714, 45 N. W. 297, 8 Am. Crim. Rep. 566; *State* v. *Perigo,* 80 Iowa, 37, 45 N. W. 399; *State* v. *O'Shea,* 60 Kan. 772, 57 Pac. 970; *Chittenden* v. *Com.* 10 Ky. L. Rep. 330, 9 S. W. 386; *Peoples* v. *Com.* 87 Ky. 487, 9 S. W. 509, 810; *Henderson* v. *Com.* 5 Ky. L. Rep. 244; *Lipscomb* v. *State,* 75 Miss. 599, 23 So. 210, 230; *State* v. *Parker,* 172 Mo. 191, 72 S. W. 650; *State* v. *Draper,* 65 Mo. 335, 27 Am. Rep. 287; *Nelson* v. *State,* 7 Humph. 542; *Winfrey* v. *State,* 41 Tex. Crim. Rep. 538, 56 S. W. 919; *Medina* v. *State,* 43 Tex. Crim. Rep. 52, 63 S. W. 331, 12 Am. Crim. Rep. 246; *State* v. *Moody* 18 Wash. 165, 51 Pac. 356; *Hackett* v. *People,* 54 Barb. 370; *People* v. *Smith,* 172 N. Y. 210, 64 N. E. 814; *Warren* v. *State,* 9 Tex. App. 619, 35 Am. Rep. 745; *Nordgren* v. *People,* 211 Ill. 425, 71 N. E. 1042; *State* v. *Spivey,* 191 Mo. 87, 90 S. W. 81.

A dying declaration that defendant had no reason whatever for the homicide may be fairly referred solely to the time of the homicide, and may be construed to mean that the deceased attempted no violence toward the defendant; but if construed as relating to past transactions, or as a mere expression of opinion, the specific objection to such portion of the declaration may be called to the attention of the trial court by a motion to strike out, or by some other appropriate method, or the objection will not be considered on appeal. *People* v. *Farmer,* 77 Cal. 1, 18 Pac. 800.

[4] *Nelson* v. *State,* 7 Humph. 542; *State* v. *Draper,* 65 Mo. 335, 27 Am. Rep. 287.

[5] *Jones* v. *State,* 71 Ind. 66; *Mose* v. *State,* 35 Ala. 421. See *State* v. *Wood,* 53 Vt. 560; *Merrill* v. *State,* 58 Miss. 65. Though see *Donnelly* v. *State,* 26 N. J. L. 463, 601.

§ 279. Detailed collateral remarks may be received to sustain declarant's mental capacity.—It is competent to detail collateral remarks on the part of the declarant made at the time of uttering the declarations as to the homicide, when such collateral declarations tend to sustain the declarant's mental capacity. Thus, in a case in the supreme court of New Jersey, in 1857, Chief Justice Green said: "If it be true, as was proved by experts called by the defense, that the injury sustained by the deceased was calculated to derange the mental faculties, it was competent for the state to meet the objection *in limine*, and to show by his acts and words that he was laboring under no hallucination, and that his mental faculties were unimpaired." [1]

§ 280. Two or more killed in the same affray.—The rule confining dying declarations to the utterances of the party whose death is charged in the indictment ought not to be enlarged to admit the declarations of other persons whose death occurred through the same transaction as that in which the former died. A case can hardly be conceived where such other declarations, if relevant, might not be proved as *res gestæ* of the transaction. To admit them as dying declarations would, on principle, admit the dying declarations of persons killed in riots and insurrections; and in prosecutions for such homicides, the testimony would consist, almost entirely, of the last words of men participating in the common excitement, without the sanction of an oath or the corrective effect of cross-examination. While death may bring gravity and conscientious carefulness to persons dying in an isolated

[1] *Donnelly* v. *State*, 26 N. J. L. 496.

It does not have to appear, as a predicate to admission, that the declarant was of sane mind. *State* v. *Reed*, 137 Mo. 125, 38 S. W. 574. The court will not assume that he was insane, in the absence of anything to indicate the fact. *State* v. *Garrand*, 5 Or. 216. See *Com.* v. *Silcox*, 161 Pa. 484, 29 Atl. 105. See *Starkey* v. *People*, 17 Ill. 17.

transaction, it only tends to intensify the partisan sympathies of those sacrificed with others, as they suppose, on behalf of a common cause, espoused by them with a zeal that overrides the judgment and suspends all reflective faculties. It would also violate the rule against the introduction of collateral offenses, and put the defendant on trial for two or more homicides instead of one. Even where this last objection would not apply, dying declarations of third persons stand in a different relation from the dying declarations of the one whose death is the subject of inquiry.[1] The declarations of the latter

[1] See *Poteete* v. *State,* 9 Baxt. 261, 40 Am. Rep. 90.

The general rule is supported by the following cases: *Rex* v. *Mead,* 2 Barn. & C. 605, 4 Dowl. & R. 120, 26 Revised Rep. 484; *Rex* v. *Loyd,* 4 Car. & P. 233; *Reynolds* v. *State,* 68 Ala. 502, 4 Am. Crim. Rep. 152; *People* v. *Hall,* 94 Cal. 595, 30 Pac. 7; *Mora* v. *People,* 19 Colo. 255, 35 Pac. 179; *North* v. *People,* 139 Ill. 81, 28 N. E. 966; *State* v. *Westfall,* 49 Iowa, 328, 3 Am. Crim. Rep. 343; *Leiber* v. *Com.* 9 Bush. 11, 1 Am. Crim. Rep. 309; *State* v. *Black,* 42 La. Ann. 861, 8 So. 594; *Binfield* v. *State,* 15 Neb. 484, 19 N. W. 607; *People* v. *Davis,* 56 N. Y. 95; *Railing* v. *Com.* 110 Pa. 100, 1 Atl. 314, 6 Am. Crim. Rep. 7; *State* v. *Lee,* 58 S. C. 335, 36 S. E. 706; *Wright* v. *State,* 41 Tex. 246.

And this rule applies so that where one made a statement exonerating the accused, but on trial for the killing of the other, the statement was not admissible. *Mora* v. *People,* 19 Colo. 255, 35 Pac. 179; *Wright* v. *State,* 41 Tex. 246; *Mitchell* v. *Com.* 12 Ky. L. Rep. 458, 14 S. W. 489.

The rule has been relaxed in the following cases; Where poison was administered to several at the same time, who died from the effects, their declarations were admitted on the trial for the death of the person to whom it was directly administered. *Rex* v. *Baker,* 2 Moody & R. 53; *State* v. *Terrell,* 12 Rich. L. 321. Distinguishing these two cases. See *Brown* v. *Com.* 73 Pa. 321, 13 Am. Rep. 740.

Also where two persons were wounded by the same shot, on the trial of the accused for the murder of one, the dying declarations of the other were admitted, the court recognizing the general rule, but saying: "But if it be shown as matter of fact that another person was mortally wounded in the same difficulty, or by the same shot which killed the other party for whose murder the accused is on trial, then and in such case, the rule above stated is so far relaxed as to admit in evidence on the trial the dying declarations of such third person."

Where offered on the trial of the husband for the murder of the wife,

may be often proved by parol, while the statements of third persons can be received only when made under oath. To remove this last restriction would be to substitute deathbeds for the witness box, and to make the dying hours the period in which all persons knowing anything about the case should be interviewed on the subject. Where such examinations are to be taken, they should be made by way of deposition before a competent officer, and not by visitors, often prejudiced and incapable of making exact and trustworthy examinations.[2]

§ 281. Must be made under solemn sense of dissolution.—To render his declarations admissible, the declarant must have uttered them under a sense of impending dissolution,[1] with a consciousness of the awful occasion.[2]

the wife's dying declarations are admitted on the same principle as that which allows her to testify against him in a matter of violence to her person. *People* v. *Green,* 1 Denio, 615; *Com.* v. *Stoops,* Addison (Pa.) 381; *State v. Belcher,* 13 S. C. 459. And, likewise, that of the husband is competent against his wife on her trial for his murder. *Moore* v. *State,* 12 Ala. 764, 46 Am. Dec. 276.

But it is not admissible for the accused to prove by the dying confession of a third party, that he, and not the accused, killed the deceased. *Davis* v. *Com.* 95 Ky. 19, 44 Am. St. Rep. 201, 23 S. W. 585.

The dying declarations of a child of four years old were not admitted, because it could not reasonably be supposed that it would have the idea of a future state and its retribution, which is the equivalent of the oath administered to witnesses. *Rex* v. *Pike,* 3 Car. & P. 598.

But where a child of ten had a comprehension of the nature of an oath, and the consequences of a future state, the declarations were admitted. *Reg* v. *Perkins,* 2 Moody, C. C. 135, 9 Car. & P. 395.

Likewise, declarations by persons disqualified by conviction of an infamous offense at common law are not admissible. *Rex* v. *Drummond,* 1 Leach, C. L. 337, 1 East. P. C. 353, note; 3 Russell, Crimes, 7th Eng. ed. p. 2085.

[2] See *Stobart* v. *Dryden,* 1 Mees. & W. 615, 626, 2 Gale. 146, 5 L. J. Exch. N. S. 218; Best, Ev. 5th ed. 637.

[1] *May* v. *State,* 55 Ala. 39; *Faire* v. *State,* 58 Ala. 74; *Moore* v. *State,* 12 Ala. 764, 46 Am. Dec. 276; *Hussey* v. *State,* 87 Ala. 121, 6 So. 420; *Pulliam* v. *State,* 88 Ala. 1, 6 So. 839; *Young* v. *State,* 95 Ala. 4, 10 So. 913; *Blackburn* v. *State,* 98 Ala. 63, 13 So. 274; *Gibson* v. *State,* 126 Ala. 59, 28 So. 673; *Wagoner* v.

Territory, 5 Ariz. 175, 51 Pac. 145; *Allen* v. *State,* 70 Ark. 337, 68 S. W. 28; *Newberry* v. *State,* 68 Ark. 355, 58 S. W. 351; *Dunn* v. *State,* 2 Ark. 229, 35 Am. Dec. 54; *People* v. *Taylor,* 59 Cal. 640; *People* v. *Lee Sara Bo,* 72 Cal. 623, 14 Pac. 310; *People* v. *Ramirez,* 73 Cal. 403, 15 Pac. 33; *People* v. *Lem Deo,* 132 Cal. 199, 64 Pac. 265; *State* v. *Smith,* 49 Conn. 376; *Dixon* v. *State,* 13 Fla. 636; *Roten* v. *State,* 31 Fla. 514, 12 So. 910; *Nesbit* v. *State,* 43 Ga. 238; *Mitchell* v. *State,* 71 Ga. 128; *Sutherland* v. *State,* 121 Ga. 190, 48 S. E. 915; *State* v. *Yee Wee,* 7 Idaho, 188, 61 Pac. 588; *Starkey* v. *People,* 17 Ill. 17; *Scott* v. *People,* 63 Ill. 508; *Westbrook* v. *People,* 126 Ill. 81, 18 N. E. 304; *Digby* v. *People,* 113 Ill. 123, 55 Am. Rep. 402; *Burchfield* v. *State,* 82 Ind. 580; *State* v. *Gillick,* 7 Iowa, 287; *State* v. *Nash,* 7 Iowa, 347; *State* v. *Perigo,* 80 Iowa, 37, 45 N. W. 399; *State* v. *Baldwin* 79 Iowa, 714, 45 N. W. 297, 8 Am. Crim. Rep. 566; *State* v. *Kuhn,* 117 Iowa, 216, 90 N. W. 733; *Vaughan* v. *Com.* 86 Ky. 431, 6 S. W. 153; *Peace* v. *Com.* 89 Ky. 204, 12 S. W. 271; *Starr* v. *Com.* 97 Ky. 193, 30 S. W. 397; *Luker* v. *Com.* 9 Ky. L. Rep. 386, 5 S. W. 354; *Hays* v. *Com.* 12 Ky. L. Rep. 611, 14 S. W. 833; *Norfeet* v. *Com.* 17 Ky. L. Rep. 1137, 33 S. W. 938; *Fuqua* v. *Com.* 24 Ky. L. Rep. 2204, 73 S. W. 782; *State* v. *Spencer,* 30 La. Ann. 362; *State* v. *Travis,* 32 La. Ann. 1086, 36 Am. Rep. 293; *State* v. *Keenan,* 38 La. Ann. 660; *State* v. *Jones,* 38 La. Ann. 792; *State* v. *Newhouse,* 39 La. Ann. 862, 2 So. 799; *State* v. *Jones,* 47 La. Ann. 1524, 18 So. 515; *State* v. *Sadler,* 51 La. Ann. 1397, 26 So. 390; *Com.* v. *Brewer,* 164 Mass. 577, 42 N. E. 92; *Com* v. *Densmore,* 12 Allen, 535; *People* v. *Simpson,* 48 Mich. 474, 12 N. W. 662; *Lambeth* v. *State,* 23 Miss. 322; *Brown* v. *State,* 32 Miss. 433; *McLean* v. *State,* — Miss. —, 12 So. 905; *Bell* v. *State,* 72 Miss. 507, 17 So. 232, 10 Am. Crim. Rep. 276; *Joslin* v. *State,* 75 Miss. 838, 23 So. 515; *Lipscomb* v. *State,* 75 Miss. 559, 23 So. 210, 230; *McDaniel* v. *State,* 8 Smedes & M. 401, 47 Am. Dec. 93; *State* v. *Simon,* 50 Mo. 370; *State* v. *McCanon,* 51 Mo. 160; *State* v. *Nelson,* 101 Mo. 464, 14 S. W. 712; *State* v. *Crabtree,* 111 Mo. 136, 20 S. W. 7; *State* v. *Reed,* 137 Mo. 125, 38 S. W. 574; *Rakes* v. *People,* 2 Neb. 157; *Fitzgerald* v. *State,* 11 Neb. 577, 10 N. W. 495; *Binfield* v. *State,* 15 Neb. 484, 19 N. W. 607; *Basye* v. *State,* 45 Neb. 261, 63 N. W. 811; *Kastner* v. *State,* 58 Neb. 767, 79 N. W. 713; *Peak* v. *State,* 50 N. J. L. 179, 12 Atl. 701; *People* v. *Sweeney,* 41 Hun, 332; *People* v. *Anderson,* 2 Wheeler, C. C. 390; *State* v. *Poll,* 8 N. C. (1 Hawks) 442, 9 Am. Dec. 655; *State* v. *Tilghman,* 33 N. C. (11 Ired. L.) 513; *State* v. *Moody,* 3 N. C. (2 Hayw.) 31, 2 Am. Dec. 616; *Montgomery* v. *State,* 11 Ohio, 424; *Robbins* v. *State,* 8 Ohio St. 131; *State* v. *Shaffer,* 23 Or. 555, 32 Pac. 545; *Com.* v. *Murray,* 2 Ashm. (Pa.) 41; *Com.* v. *Williams,* 2 Ashm. (Pa.) 69; *Kilpatrick* v. *Com.* 31 Pa. 198; *Com.* v. *Britton,* Campb. (Pa.) 513; *Kane* v. *Com.* 109 Pa. 541; *Com.* v. *Birriolo,* 197 Pa. 371, 47 Atl. 355; *Com.* v. *Winkelman,* 12 Pa. Super. Ct. 497; *State* v. *Sullivan,* 20 R. I. 114, 37 Atl. 673; *State* v. *Nance,* 25

S. C. 168; *Nelson* v. *State,* 7 Humph. 542; *King* v. *State,* 91 Tenn. 617, 20 S. W. 169; *Brakefield* v. *State,* 1 Sneed, 215; *Benavides* v. *State,* 31 Tex. 579; *Taylor* v. *State,* 38 Tex. Crim. Rep. 552, 43 S. W. 1019; *Lyles* v. *State,* 48 Tex. Crim. Rep. 119, 86 S. W. 763; *Wilson* v. *State,* 49 Tex. Crim. Rep. 50, 90 S. W. 312; *O'Boyle* v. *Com.* 100 Va. 785, 40 S. E. 121; *Bowles* v. *Com.* 103 Va. 816, 48 S. E. 527; *Thompson* v. *Territory,* 1 Wash. Terr. 548; *State* v. *Cameron,* 2 Chand. (Wis.) 172, 2 Pinney (Wis.) 490; *Rex* v. *Callaghan,* 1 MacNally, Ev. 385; *Reg.* v. *Smith,* 10 Cox, C. C. 82, Leigh & C. C. C. 607, 34 L. J. Mag. Cas. N. S. 153, 11 Jur N. S. 695, 12 L. T. N. S. 609, 13 Week. Rep. 816; *Reg.* v. *Forester,* 4 Fost. & F. 857, 10 Cox, C. C. 358; *Reg.* v. *Mackay,* 11 Cox, C. C. 565; *Reg.* v. *Osman,* 15 Cox, C. C. 1, 31 Moak, Eng. Rep. 739; *Reg.* v. *Mitchell,* 17 Cox, C. C. 503; *Reg.* v. *Qualter,* 6 Cox, C. C. 357; *Reg.* v. *Cleary,* 2 Fost. & F. 850; *Mattox* v. *United States,* 146 U. S. 140, 35 L. ed. 917, 13 Sup. Ct. Rep. 50; *Rex* v. *Woodcock,* 1 Leach, C. L. 500, 1 East, P. C. 354, 11 Eng. Rul. Cas, 294; *Welbourn's Case,* 1 East, P. C. 358; *Rex* v. *Von Butchell,* 3 Car. & P. 629; *Rex* v. *Pike,* 3 Car. & P. 598; *Rex* v. *Crockett,* 4 Car. & P. 544; *Rex* v. *Hayward,* 6 Car. & P. 157; *Rex* v. *Spilsbury,* 7 Car. & P. 187. And see *State* v. *Kessler,* 15 Utah, 142, 62 Am. St. Rep. 911, 49 Pac. 293; *Davis* v. *State,* 120 Ga. 843, 48 S. E. 305; *State* v. *Molisse,* 36 La. Ann. 920.

[2] This rule is so universal that there need be cited to it but the latest cases in all jurisdictions. *Rex* v. *Spilsbury,* 7 Car. & P. 187; *Reg.* v. *Forester,* 10 Cox, C. C. 368, 4 Fost. & F. 857; *Reg.* v. *Peel,* 2 Fost. & F. 21; *Carver* v. *United States,* 160 U. S. 553, 40 L. ed. 532, 16 Sup. Ct. Rep. 388; *Walker* v. *State,* 139 Ala. 56, 35 So. 1011; *Wilson* v. *State,* 140 Ala. 43, 37 So. 93; *Scott* v. *State,* 75 Ark. 142, 86 S. W. 1004; *Fogg* v. *State,* 81 Ark. 417, 99 S. W. 537; *Wogoner* v. *Territory,* 5 Ariz. 175, 51 Pac. 145; *People* v. *Glover,* 141 Cal. 233, 74 Pac. 745; *Brennan* v. *People,* 37 Colo. 256, 86 Pac. 79; *State* v. *Swift,* 57 Conn. 496, 18 Atl. 664; *State* v. *Fleetwood,* — Del. —, 65 Atl. 772; *Gardner* v. *State,* 55 Fla. 25, 45 So. 1028; *Sutherland* v. *State,* 121 Ga. 190, 48 S. E. 915; *People* v. *Buettner,* 233 Ill. 272, 84 N. E. 218, 13 A. & E. Ann. Cas. 235; *Williams* v. *State,* 168 Ind. 87, 79 N. E. 1079; *State* v. *Gillick,* 7 Iowa, 287; *State* v. *Knoll,* 69 Kan. 767, 77 Pac. 580; *Keith* v. *Com.* 29 Ky. L. Rep 158, 92 S. W. 599; *Johnson* v. *Com.* 32 Ky. L. Rep. 1117, 107 S. W. 768; *State* v. *Daniels,* 115 La. 59, 38 So. 894; *Hawkins* v. *State,* 98 Md. 355, 57 Atl. 27; *Ashley* v. *State,* — Miss. —, 37 So. 960; *State* v. *Monich,* 74 N. J. L. 522, 64 Atl. 1016; *People* v. *Brecht,* 120 App. Div. 769, 105 N. Y. Supp. 436; *State* v. *Teachey,* 138 N. C. 587, 50 S. E. 232; *Wade* v. *State,* 2 Ohio C. C. N. S. 189; *State* v. *Gray,* 43 Or. 446, 74 Pac. 927; *State* v. *Gallman,* 79 S. C. 229, 60 S. E. 682; *Lyles* v. *State,* 48 Tex. Crim. Rep. 119, 86 S. W. 763; *Wilson* v. *State,* 49 Tex. Crim. Rep. 50, 90 S. W. 312; *Bowles* v. *Com.* 103 Va. 816, 48 S. E. 527; *Com.* v. *Bishop,* 165 Mass. 148, 42 N. E. 560;

The principle is not affected by the fact that death does not ensue immediately.[3] Hence, where a party expressed an opinion that she would not recover, and made a declaration at that time, but afterwards, on the same day, asked a person whether he thought she would "rise again," it was held that this showed such a hope of recovery as to render the previous declaration inadmissible, the declarations being continuous.[4] But it is otherwise when, after a solemn declaration has been made under circumstances entitling it to be received in evidence, there is a subsequent fluttering hope of recovery intervening as a distinct condition.[5]

§ 282. Belief of immediate dissolution may be inferred from facts.—It is not necessary to prove expressions implying apprehension of death, if it be clear that the person does not expect to survive the injury,[1] which may be collected

Lipscomb v. *State,* 75 Miss. 559, 23 So. 210, 230; *State* v. *Garrison,* 147 Mo. 548, 49 S. W. 508; *Collins* v. *State,* 46 Neb. 37, 64 N. W. 432; *State* v. *Gay,* 18 Mont. 51, 44 Pac. 411; *State* v. *Vaughan,* 22 Nev. 285, 39 Pac. 733; *State* v. *Center,* 35 Vt. 378; *State* v. *Shaffer,* 23 Or. 555, 32 Pac. 545; *State* v. *Fletcher,* 24 Or. 298, 33 Pac. 575; *Com.* v. *Silcox,* 161 Pa. 484, 29 Atl. 105; *State* v. *Jeswell,* 22 R. I. 136, 46 Atl. 405, 12 Am. Crim. Rep. 260; *Lemons* v. *State,* 97 Tenn. 560, 37 S. W. 552; *Anthony* v. *State,* Meigs, 265, 33 Am. Dec. 143; *Swisher* v. *Com.* 26 Gratt. 963, 21 Am. Rep. 330; *State* v. *Eddon,* 8 Wash. 292, 36 Pac. 139. Also see *People* v. *Anderson,* 2 Wheeler, C. C. 390; *Reg.* v. *Pym,* 1 Cox, C. C. 339.

[3] *Rex* v. *Mosley,* 1 Moody, C. C. 97, 1 Lewin, C. C. 79; *Kehoe* v. *Com.* 85 Pa. 127; post, § 286; *Baxter* v. *State,* 15 Lea, 657; *State* v. *Medlicott,* 9 Kan. 257; *Carver* v. *United States,* 160 U. S. 553, 40 L. ed. 532, 16 Sup. Ct. Rep. 388; *North* v. *People,* 139 Ill. 81, 28 N. E. 966; *Brom* v. *People,* 216 Ill. 148, 74 N. E. 790; *Brown* v. *Com.* 26 Ky. L. Rep. 1269, 83 S. W. 645; *State* v. *Craig,* 190 Mo. 332, 88 S. W. 641.

[4] *Rex* v. *Fagent,* 7 Car. & P. 238; *State* v. *Center,* 35 Vt. 378. But see *State* v. *Kilgore,* 70 Mo. 546.

[5] *Reg.* v. *Hubbard,* 14 Cox, C. C. 565; post, § 284.

[1] See supra, § 275 (c) notes 3 and 7; *Rex* v. *Bonner,* 6 Car. & P. 386; 1 East, P. C. 385; *Rex* v. *Dingler,* 2 Leach, C. L. 561; *People* v. *Grunzig,* 1 Park. Crim. Rep. 299; *People* v. *Knickerbocker,* 1 Park. Crim. Rep. 302; *People* v. *Perry,* 3 Abb. Pr. N. S. 27; *Hill* v. *Com.*

from the circumstances of his condition,[2] or from his own acts, such as sending for a priest of his church, before making the declaration.[3]

This was the view taken in an English case, where a boy ten years was mortally wounded and died the following day. On the evening of the day on which he was wounded, the surgeon told him he could not recover; he made no reply; but appeared dejected. It appeared from his answers to questions put to him, that he was aware that he would be punished hereafter if what he said was untrue; and under the circumstances his declarations were admitted as being within the rule.[4] The question of consciousness of approaching death is one of fact, in deciding which all the circumstances of the particular case are to be considered.[5]

2 Gratt. 594; *Nelson* v. *State,* 7 Humph. 542; *Brakefield* v. *State,* 1 Sneed, 215; *Anthony* v. *State,* Meigs, 265, 33 Am. Dec. 143; *Dunn* v. *State,* 2 Ark. 229, 35 Am. Dec. 54; *Morgan* v. *People* 31 Ind. 193; *State* v. *Wilson,* 24 Kan. 189, 36 Am. Rep. 257; 2 Russell, Crimes, 7th Eng. ed. p. 2087.

[2] *Kilpatrick* v. *Com.* 31 Pa. 198; *Sullivan* v. *Com.* 93 Pa. 284; *Murphy* v. *People,* 37 Ill. 447; *People* v. *Gray,* 61 Cal. 164, 44 Am. Rep. 549; *Dumas* v. *State,* 62 Ga. 58. Though see *Reg.* v. *Cleary,* § 284, post.

[3] *Com* v. *Williams,* 2 Ashm. (Pa.) 69. See *Rex* v. *Minton,* 1 MacNally, Ev. 386.

[4] *Reg.* v. *Perkins,* 9 Car. & P. 395, 2 Moody, C. C. 135.

[5] Post, § 297; *Small* v. *Com.* 91 Pa. 304; *Sullivan* v. *Com.* 93 Pa. 284; *State* v. *Belcher,* 13 S. C. 459; *State* v. *Trivas,* 32 La. Ann. 1086, 36 Am. Rep. 293; *Roten* v. *State,* 31 Fla. 514, 12 So. 910; *State* v. *Monich,* 74 N. J. L. 522, 64 Atl. 1016.

For approved instruction in such case, see *Smith* v. *State,* 110 Ga. 255, 34 S. E. 204, 12 Am. Crim. Rep. 245; *Com.* v. *Murray,* 2 Ashm. (Pa.) 41; *Johnson* v. *State,* 47 Ala. 9; post, § 297; *Justice* v. *State,* 99 Ala. 180, 13 So. 658; *Moore* v. *State,* 12 Ala. 764, 46 Am. Dec. 276; *Faire* v. *State,* 58 Ala. 74; *Roten* v. *State,* 31 Fla. 514, 12 So. 910; *Richard* v. *State,* 42 Fla. 528, 29 So. 413; *Starkey* v. *People,* 17 Ill. 17; *Westbrook* v. *People,* 126 Ill. 81, 18 N. E. 304; *State* v. *Baldwin,* 79 Iowa, 714, 45 N. W. 297, 8 Am. Crim. Rep. 566; *State* v. *Kuhn,* 117 Iowa, 216, 90 N. W. 733; *State* v. *Trivas,* 32 La. Ann. 1086, 36 Am. Rep. 293; *State* v. *Molisse,* 36 La. Ann. 920; *State* v. *Cantieny,* 34 Minn. 1, 24 N. W. 458, 6 Am. Crim.

§ 283. The fact that physicians or friends had hope does not exclude.—If the deceased believed that he was dying, the admissibility of his declarations is not affected by the fact that his physician or his friends had hopes of his recovery.[1] Hence, on a case reserved, and coming before the twelve English judges,[2] it was held that the declarations of the deceased made the day he was wounded, and when he believed that he should not recover, were evidence, although he did not die until eleven days afterwards, and his physician did not think his case hopeless, and continued to tell him so till the day of his death.

The prevailing rule is that the fact that a physician is sent for does not indicate an absence of the solemn expectation of impending death,[3] or hope of recovery, but rather hope of temporary relief from present pain and suffering, and this does not render the declarations inadmissible.[4]

Rep. 418; *Lipscomb* v. *State,* 75 Miss. 559, 33 So. 210, 230; *State* v. *Simon,* 50 Mo. 370; *State* v. *Johnson,* 76 Mo. 121; *State* v. *Johnson,* 118 Mo. 491, 40 Am. St. Rep. 405, 24 S. W. 229; *State* v. *Reed,* 137 Mo. 125, 38 S. W. 574; *State* v. *Sexton,* 147 Mo. 89, 48 S. W. 452; *Basye* v. *State,* 45 Neb. 261, 63 N. W. 811; *Maine* v. *People,* 9 Hun, 113; *People* v. *Anderson,* 2 Wheeler, C. C. 390; *State* v. *Shaffer,* 23 Or. 555, 32 Pac. 545; *Com.* v. *Winkleman,* 12 Pa. Super. Ct. 497; *Kehoe* v. *Com.* 85 Pa. 127; *Com.* v. *Sullivan,* 13 Phila. 410; *State* v. *Quick,* 15 Rich. L. 342; *Smith* v. *State,* 9 Humph. 9; *State* v. *Center,* 35 Vt. 378; *Reg.* v. *Reaney,* 7 Cox, C. C. 209, 3 Jur. N. S. 191, Dears. & B. C. C. 151, 26 L. J. Mag. Cas. N. S. 43, 5 Week. Rep. 252; *Reg.* v. *Smith,* 10 Cox, C. C. 82, 11 Jur. N. S. 695, Leigh & C. C. C. 607, 34 L. J. Mag. Cas. N. S. 153, 12 L. T. N. S. 609, 13 Week. Rep. 816; *John's Case,* 1 East, P. C. 357; *Rex* v. *Woodcock,* 1 Leach, C. L. 500, 1 East, P. C. 354, 11 Eng. Rul. Cas. 294. And see *Anderson* v. *State,* 122 Ga. 161, 50 S. E. 46; *Donnelly* v. *State,* 26 N. J. L. 463.

[1] *People* v. *Simpson,* 48 Mich. 474, 12 N. W. 662; *Blackburn* v. *State,* 98 Ala. 63, 13 So. 316; *Brande* v. *State,* — Tex. Crim. Rep. —, 45 S. W. 17; *Sims* v. *State,* 139 Ala. 76, 101 Am. St. Rep. 17, 36 So. 138.

[2] *Rex* v. *Mosley,* 1 Moody, C. C. 97, 1 Lewin, C. C. 79; *Reg.* v. *Peel,* 2 Fost. & F. 21.

[3] But see *Mathedy* v. *Com.* 14 Ky. L. Rep. 182, 19 S. W. 977.

[4] *Reg.* v. *Howell,* 1 Den. C. C. 1, Car. & K. 689, 1 Cox, C. C. 151;

§ 283a. Physician's opinion as basis of declarant's belief.—The opinion of the attending physician is admissible in evidence as a foundation for the introduction of the declaration, as one of the facts that induced a belief in the mind of the declarant that he was about to die.[1] This rule applies with special force where the physician informed the declarant of his approaching death, and the declarant accepted the same and expressed an expectation of death;[2] or where the declar-

Reg. v. *Thomas,* 1 Cox, C. C. 52; *McQueen* v. *State,* 103 Ala. 12, 15 So. 824; *Justice* v. *State,* 99 Ala. 180, 13 So. 658; *State* v. *Evans,* 124 Mo. 397, 28 S. W. 8; *State* v. *Kilgore,* 70 Mo. 546; *Hunnicutt* v. *State,* 20 Tex. App. 632.

[1] *State* v. *Yee Wee,* 7 Idaho, 188, 61 Pac. 588. See also *People* v. *Lonsdale,* 122 Mich. 388, 81 N. W. 277, 12 Am. Crim. Rep. 256; *State* v. *Leeper,* 70 Iowa, 748, 30 N. W. 501; *Hagenow* v. *People,* 188 Ill. 545, 59 N. E. 242; *State* v. *Somnier,* 33 La. Ann. 237.

So, where it is in evidence that the physician told the declarant about the time of the declaration, that he thought his injuries were mortal, or he was in great danger, or could not recover, it is sufficient to admit the declaration on the ground that the declarant knew death was impending. *State* v. *Finley,* 118 N. C. 1161, 24 S. E. 495; *Oliver* v. *State,* 17 Ala. 587; *Jarvis* v. *State,* 138 Ala. 17, 34 So. 1025; *People* v. *Hawes,* 98 Cal. 648, 33 Pac. 791; *Boyd* v. *State,* 84 Miss. 414, 36 So. 525; *State* v. *Gay,* 18 Mont. 51, 44 Pac. 411; *State* v. *Gray,* 43 Or. 446, 74 Pac. 927; *Burrell* v. *State,* 18 Tex. 713; *Smith's Case,* 1 Lewin, C. C. 81; *Reg.* v. *Perkins,* 9 Car. & P. 395, 2 Moody, C. C. 135; *Morgan* v. *State,* 54 Tex. Crim. Rep. 542, 113 S. W. 934; *State* v. *Bridgham,* 51 Wash. 18, 97 Pac. 1096; *House* v. *State,* 94 Miss. 107, 21 L.R.A.(N.S.) 840, 48 So. 3; *State* v. *Quinn,* 56 Wash. 295, 105 Pac. 818; *Douglas* v. *State,* 58 Tex. Crim. Rep. 122, 137 Am. St. Rep. 930, 124 S. W. 933.

[2] *Johnson* v. *State,* 47 Ala. 9; *Stevens* v. *State,* 138 Ala. 71, 35 So. 122; *People* v. *Vernon,* 35 Cal. 49, 95 Am. Dec. 49; *People* v. *Dobbins,* 138 Cal. 694, 72 Pac. 339; *People* v. *Lem Deo,* 132 Cal. 199, 64 Pac. 265; *Scott* v. *People,* 63 Ill. 508; *State* v. *Murdy,* 81 Iowa, 603, 47 N. W. 867; *State* v. *Young,* 104 Iowa, 730, 74 N. W. 693; *State* v. *Morrison,* 64 Kan. 669, 68 Pac. 48, 13 Am. Crim. Rep. 347; *Polly* v. *Com.* 15 Ky. L. Rep. 502, 24 S. W. 7; *Pennington* v. *Com.* 24 Ky. L. Rep. 321, 68 S. W. 451, 12 Am. Crim. Rep. 238; *Fuqua* v. *Com.* 24 Ky. L. Rep. 2204, 73 S. W. 782; *State* v. *Draper,* 65 Mo. 335, 27 Am. Rep. 287; *State* v. *Umble,* 115 Mo. 452, 22 S. W. 378; *People* v. *Burt,* 51 App. Div. 106, 64 N. Y. Supp. 417; *Brotherton* v. *People,* 75 N.

ant was in a collapse or in such state that his condition must have been known to him.[3]

But where the declarant refuses to accept the opinion of his physician, and retains the opinion that he will recover, his declaration is inadmissible.[4]

§ 284. Expressions indicating belief in certainty of death.—While confined to his bed, a party said to the sur-

Y. 159, 3 Am. Crim. Rep. 218, affirming 14 Hun, 486; *State* v. *Blackburn,* 80 N. C. 474; *State* v. *Boggan,* 133 N. C. 761, 46 S. E. 111; *Allison* v. *Com.* 99 Pa. 17; *Com.* v. *Rhoads,* 23 Pa. Super. Ct. 512; *State* v. *McEvoy,* 9 S. C. 208; *Lemons* v. *State,* 97 Tenn. 560, 37 S. W. 552; *Jones* v. *State,* — Tex. Crim. Rep. —, 38 S. W. 992; *Sims* v. *State,* 36 Tex. Crim. Rep. 154, 36 S. W. 256; *Pierson* v. *State,* 21 Tex. App. 14, 17 S. W. 468; *Bull* v. *Com.* 14 Gratt. 613; *O'Boyle* v. *Com.* 100 Va. 785, 40 S. E. 121; *State* v. *Baldwin,* 15 Wash. 15, 45 Pac. 650; *Reg.* v. *Smith,* 23 U. C. C. P. 312; *Reg.* v. *Clarke,* 2 Fost. & F. 2; *Ashton's Case,* 2 Lewin, C. C. 147. And see *Oliver* v. *State,* 17 Ala. 587; *DuBose* v. *State,* 120 Ala. 300, 25 So. 185; *People* v. *Crews,* 102 Cal. 174, 36 Pac. 367; *State* v. *Weaver,* 57 Iowa, 730, 11 N. W. 675; *Doolin* v. *Com.* 16 Ky. L. Rep. 189, 27 S. W. 1; *Stephens* v. *Com.* 20 Ky. L. Rep. 544, 47 S. W. 229; *State* v. *Smith,* 48 La. Ann. 533, 19 So. 452; *State* v. *Mills,* 91 N. C. 581; *Small* v. *Com.* 91 Pa. 304; *Reg.* v. *Brooks,* 1 Cox, C. C. 6; *Reg.* v. *Peel,* 2 Fost. & F. 21; *Rex* v. *Mosley,* 1 Moody, C. C. 97, 1 Lewin, C. C. 79; *Craven's Case,* 1 Lewin, C. C. 77; *Simpson's Case,* 1 Lewin, C. C. 78.

[3] *Johnson* v. *State,* 47 Ala. 9; *State* v. *Johnson,* 26 S. C. 152, 1 S. E. 510, 7 Am. Crim. Rep. 366.

[4] *State* v. *Moore,* 8 Ohio S. & C. P. Dec. 674; *Stewart* v. *State,* 2 Lea, 598.

In the following cases, certain concurrent statements of the declarant were held not to so modify the belief induced by the physician's opinion as to render the declaration inadmissible: *Allison* v. *Com.* 99 Pa. 17 (inquiring as to the sufficiency of his will); *State* v. *Aldrich,* 50 Kan. 666, 32 Pac. 408 (hoping to live long enough to see his family); *State* v. *Craig,* 190 Mo. 332, 88 S. W. 641 (that he could not afford to die).

And where he rejects the opinion of his physician holding out hope that he may recover, and clings to his own belief that his death is certain, his belief controls, and the declaration is admissible. *Com.* v. *Latampa,* 226 Pa. 23, 74 Atl. 736; *Kirkham* v. *People,* 170 Ill. 9, 48 N. E. 465. See also *State* v. *Caldwell,* 115 N. C. 794, 20 S. E. 523.

geon, "I am afraid, doctor, I shall never recover," and the surgeon having said, "Your are in great danger," he replied "I fear I am," and this was held sufficient to admit his declarations.[1] On the other hand, two days before the death of the deceased, the surgeon had told her that she was in a very precarious state, and the day preceding her death, when she had grown much worse, she said to the surgeon that she was growing worse, although she had hoped to grow better, but, as she was getting worse, she thought it her duty to mention what had taken place, and then made a declaration. This was held inadmissible, because it did not sufficiently appear that when making it she was without hope of recovery.[2] In a case[3] where the deceased asked the surgeon if his wound was necessarily mortal, and, being told that recovery was possible, that there was an instance where a person had recovered after such a wound, he replied, "I am satisfied," and then made a declaration, it was held inadmissible, because it did not sufficiently appear that at the time of making it he thought himself at the point of death, because, being told that the wound was not necessarily mortal, he might have had a hope of recovery. In a case where the only evidence that the deceased comprehended his situation was the remark, "he should never recover," it was held insufficient.[4]

The following writing, made by deceased before his death, was offered in a prosecution for homicide by poisoning: "Darling: The doctor—I mean Medlicott—gave me a quinine powder Wednesday night, April 26. The effects are these: I have a terrible sensation of a rush of blood to the head, and my skin burns and itches. I am becoming numb and blind. I can hardly hold my pencil, and I cannot keep my mind steady.

[1] *Craven's Case,* 1 Lewin, C. C. 77; *Simpson's Case,* 1 Lewin, C. C. 78.

[2] *Reg.* v. *Megson,* 9 Car. & P. 418.

[3] *Rex* v. *Christie,* Car. Crim. Law, 232, O. B. 1821.

[4] *Rex* v. *Van Butchell,* 3 Car. & P. 631. See also *People* v. *Robinson,* 2 Park. Crim. Rep. 235.

Perspiration stands out all over my body, and I feel terribly The clock has just struck eleven, and I took the medicine at 10:30 P. M. I write this so that if I never see you again, you may have my body examined and see what the matter is. Good-by, and ever remember my last thoughts were of you. I cannot see to write more. God bless you, and may we meet in heaven. Your loving Hubbie, I. M. Ruth."

This was ruled out as insufficient on its face, there being no extrinsic evidence as to the condition of the defendant's mind.[5]

It has been held, in England, that a dying declaration cannot be admitted by the judge merely from his own notion of the nature of the wound described, without any evidence that the deceased at the time believed himself about to die, unless such knowledge is necessarily imputed to him, this rule being applied in a case where the deceased received a ball in the chest, and, having made a declaration charging the defendant, died in a few moments.[6]

A statement concluded with these words: "I have made this statement, believing that I shall not recover;" this was made at a time when the deceased was in such a state that his death seemed imminent, and he died seven days afterwards. But it also appeared that shortly prior to the declaration, in reply to a question asking how he was, he said: "I have seen Mr. Brooker, the surgeon, to-day, and he has given me some little hope that I am better; but I do not myself think I shall ultimately recover." Later, on the same occasion, he said he could not recover. The evidence was held sufficient to admit the statement under a consciousness of impending death.[7]

[5] *State* v. *Medlicott*, 9 Kan. 257.

[6] *Reg.* v. *Cleary*, 2 Fost. & F. 850. See discussion of this case in *Reg.* v. *Bedingfield*, 14 Cox, C. C. 341; post, § 295, supra, § 282. As doubting *Reg.* v. *Cleary*, see *Reg.* v. *Morgan*, 14 Cox, C. C. 337, noticed post, § 293; *Reg.* v. *Mitchell*, 17 Cox, C. C. 503.

[7] *Reg.* v. *Reaney*, 40 Eng. L. & Eq. Rep. 552; Dears & B. C. C. 151, 7 Cox, C. C. 209, 26 L. J. Mag. Cas. N. S. 43, 3 Jur. N. S. 191, 5 Week. Rep. 252; supra, § 281;

"I am dead; Mr. F. has killed me," uttered a few hours before dissolution, renders a declaration admissible.[8]

§ 285. Faint hope excludes declaration.—In a New York case it has been stated that dying declarations should not be excluded in all cases where there is a faint and lingering hope of recovery,[1] but any extension of the rule is perilous; while the evidence ought not to be ruled out merely because we conjecture that the deceased may at certain moments have held a transient hope, yet, in construing the deceased's own utterances, the rule should not be qualified, and the expression of hope should exclude the declaration.[2]

In an English case, a magistrate's clerk administered an oath to a dying person who made a statement, when, on being asked if she felt she was likely to die, she said, "I think so," and being asked for the reason she replied, "From my shortness of breath," when he asked, "Is it with the fear of death before you that you make these statements?" and "You have no present hope of recovery?" to which she replied, "None." He then wrote out her deposition; when finished, read it to her, and asked her to correct any mistake he might have made. She said, "No hope at present of my recovery," and he then inserted those words. The declaration was held admissible

Reg. v. *Hubbard,* 14 Cox, C. C. 565; post, § 298. See *Stewart* v. *State,* 2 Lea, 598.

R. v. *Pickersgill,* Leeds Summer Assizes, 1869; *Reg.* v. *Bernadotti,* 11 Cox, C. C. 316; Roscoe, Crim. Ev. 35; *Com.* v. *Haney,* 127 Mass. 455; post, §§ 295, 308.

[8] *State* v. *Freeman,* 1 Speers, L. 57.

[1] *People* v. *Anderson,* 2 Wheeler, C. C. 398.

[2] *Jackson* v. *Com.* 19 Gratt. 656; *State* v. *Moody,* 3 N. C. (2 Hayw.) 31, 2 Am. Dec. 616; *People* v. *Gray,* 61 Cal. 164, 44 Am. Rep. 549; *People* v. *Hodgdon,* 55 Cal. 72, 36 Am. Rep. 30; *People* v. *Taylor,* 59 Cal. 640; *Rex* v. *Fagent,* 7 Car. & P. 238. See *Johnson* v. *State,* 17 Ala. 618; also *Ex parte Myers,* 33 Tex. Crim. Rep. 204, 26 S. W. 196; *Swisher* v. *Com.* 26 Gratt. 963, 21 Am. Rep. 330.

as the words "at present," added by the deceased, qualified her previous statement that she had no hope of recovery.[3]

§ 286. To be admissible, declarations need not be made immediately previous to death.—It is not a prerequisite to admissibility, that the declaration offered should have been made immediately preceding death, provided that the declarant was conscious at the time of the declaration that he was in a dying condition.[1] It is the consciousness of the condition that controls, and not the fact that death ensued immediately.

§ 287. Prior declarations not admissible; admissible on subsequent affirmance.—Declarations not admissible be-

[3] *Reg.* v. *Jenkins,* 11 Cox, C. C. 250, L. R. 1 C. C. 187, 38 L. J. Mag. Cas. N. S. 82, 20 L. T. N. S. 372, 17 Week. Rep. 621.

[1] *Rex* v. *Mosley,* 1 Moody, C. C. 97, 1 Lewin, C. C. 79; *Reg.* v. *Megson,* 9 Car. & P. 418; *Reg.* v. *Reaney,* 40 Eng. L. & Eq. Rep. 552; *Com.* v. *Cooper,* 5 Allen, 495, 81 Am. Dec. 762; *Com.* v. *Roberts,* 108 Mass. 301; *Com.* v. *Haney,* 127 Mass. 455; *State* v. *Poll,* 8 N. C. (1 Hawks) 442, 9 Am. Dec. 655; *State* v. *Oliver,* 2 Houst. (Del.) 585; *Swisher* v. *Com.* 26 Gratt. 963, 21 Am. Rep. 330; *People* v. *Simpson,* 48 Mich. 474, 12 N. W. 662; *Reynolds* v. *State,* 68 Ala. 502, 4 Am. Crim. Rep. 152; *McDaniel* v. *State,* 8 Smedes & M. 401, 47 Am. Dec. 93; *Jones* v. *State,* 71 Ind. 66; *State* v. *Daniel,* 31 La. Ann. 91. But see *State* v. *Belcher,* 13 S. C. 459, where the interval between the making of the declarations and the death was three months. See *Com.* v. *Felch,* 132 Mass. 22; *North* v. *People,* 139 Ill. 81, 28 N. E. 966; *Rakes* v. *People,* 2 Neb. 157; *Fitzgerald* v. *State,* 11 Neb. 577, 10 N. W. 495; *State* v. *Nash,* 7 Iowa, 347; *Burton* v. *Com.* 24 Ky. L. Rep. 1162, 70 S. W. 831; *State* v. *Nocton,* 121 Mo. 537, 26 S. W. 551; *People* v. *Chase,* 79 Hun, 296, 29 N. Y. Supp. 376; *People* v. *Conklin,* 175 N. Y. 333, 67 N. E. 624; *State* v. *Center,* 35 Vt. 378; *State* v. *Sadler,* 51 La. Ann. 1397, 26 So. 390; *State* v. *Reed,* 53 Kan. 767, 42 Am. St. Rep. 322, 37 Pac. 174; *State* v. *Jones,* 38 La. Ann. 792; *People* v. *Weaver,* 108 Mich. 649, 66 N. W. 567; *State* v. *Banister,* 35 S. C. 290, 14 S. E. 678; *Rex* v. *Bonner,* 6 Car. & P. 386; *State* v. *Lee Wee,* 7 Idaho, 188, 61 Pac. 588; *Lowry* v. *State,* 12 Lea, 142; *Baxter* v. *State,* 15 Lea, 657; *Reg.* v. *Bernadotti,* 11 Cox, C. C. 316; *State* v. *Craine,* 120 N. C. 601, 27 S. E. 72. See *Pulliam* v. *State,* 88 Ala. 1, 6 So. 839; *State* v. *Wilson,* 121 Mo. 434, 26 S. W. 357; *Reg.* v. *Taylor,* 3 Cox, C. C. 84; 3

cause, at the time of making, the declarant did not believe he was going to die, may become admissible by subsequent affirmation, where they were referred to and affirmed as to their truth at the time when the declarant was conscious he was dying.[1] Such affirmation may be made by signs.[2] A prior written statement made under hope of recovery may become competent as a dying declaration, where it is reaffirmed by the declarant when he believes himself to be *in extremis,* and this even where the statement was merely shown to him, but not read to nor by him, at the time of the reaffirmance.[3]

§ 288. Admissible only where declarant's death is the subject of the charge.—The declarations are only admissible where the death of the one making them is the subject of the trial, and the circumstances of the death are the subject of the declaration.[1] Thus, they are rejected in abortion, be-

Russell, Crimes, 7th Eng. ed. p. 2087.

[1] *Reg.* v. *Steele,* 12 Cox, C. C. 168; *Young* v. *Com.* 6 Bush, 312; *State* v. *Evans,* 124 Mo. 397, 28 S. W. 8; *Bryant* v. *State,* 35 Tex. Crim. Rep. 394, 33 S. W. 978, 36 S. W. 79; *Sims* v. *State,* 139 Ala. 74, 101 Am. St. Rep. 17, 36 So. 138; *Brom* v. *People,* 216 Ill. 148, 74 N. E. 790; *Johnson* v. *State,* 102 Ala. 1, 16 So. 99; *People* v. *Crews,* 102 Cal. 174, 36 Pac. 367; *Mockabee* v. *Com.* 78 Ky. 380; *State* v. *Spencer,* 30 La. Ann. 362; *State* v. *Garth,* 164 Mo. 553, 65 S. W. 275; *State* v. *Ferguson,* 2 Hill, L. 619, 27 Am. Dec. 412; *Bull* v. *Com.* 14 Gratt. 613; *State* v. *McEvoy,* 9 S. C. 208. But see *People* v. *Taylor,* 59 Cal. 640.

[2] Post, § 293; *Jones* v. *State,* 71 Ind. 66; *State* v. *Morrison,* 64 Kan. 669, 68 Pac. 48, 13 Am. Crim. Rep. 347; *Worthington* v. *State.* 92 Md. 222, 56 L.R.A. 353, 84 Am. St. Rep. 506, 48 Atl. 355; *Pennington* v. *Com.* 24 Ky. L. Rep. 321, 68 S. W. 451, 12 Am. Crim. Rep. 238; *Baxter* v. *State,* 15 Lea, 657; *Com.* v. *Casey,* 11 Cush. 417, 59 Am. Dec. 150; *McHugh* v. *State,* 31 Ala. 317.

But it must appear that there was sufficient consciousness to comprehend the questions before assent by signs is admissible. *McBride* v. *People,* 5 Colo. App. 91, 37 Pac. 953.

[3] *Mockabee* v. *Com.* 78 Ky. 380; *Snell* v. *State,* 29 Tex. Crim. Rep. 236, 25 Am. St. Rep. 723, 15 S. W. 722.

[1] *McLean* v. *State,* 16 Ala. 672; *Oliver* v. *State,* 17 Ala. 587; *Johnson* v. *State,* 17 Ala. 618; *Mose* v. *State,* 35 Ala. 421; *Johnson* v. *State,*

47 Ala. 9; *Johnson* v. *State*, 50 Ala. 456; *Faire* v. *State*, 58 Ala. 74; *Reynolds* v. *State*, 68 Ala. 502, 4 Am. Crim. Rep. 152; *Sylvester* v. *State*, 71 Ala. 17; *Pulliam* v. *State*, 88 Ala. 1, 6 So. 839; *Kirby* v. *State*, 89 Ala. 63, 8 So. 110; *Blackburn* v. *State*, 98 *Ala.* 63, 13 So. 274; Sullivan v. State, 102 Ala. 135, 48 Am. St. Rep. 22, 15 So. 264; *Allen* v. *State*, 70 Ark. 337, 68 S. W. 28; *People* v. *Taylor*, 59 Cal. 640; *People* v. *Fong Ah Sing*, 70 Cal. 8, 11 Pac. 323; *People* v. *Hall*, 94 Cal. 595, 30 Pac. 7; *People* v. *Wong Chuey*, 117 Cal. 624, 49 Pac. 833; *McBride* v. *People*, 5 Colo. App. 91, 37 Pac. 953; *United State* v. *Heath*, 9 Mackey, 272; *Savage* v. *State*, 18 Fla. 909; *Parks* v. *State*, 105 Ga. 242, 31 S. E. 580; *North* v. *People*, 139 Ill. 81, 28 N. E. 966; *Binns* v. *State*, 46 Ind. 311; *Montgomery* v. *State*, 80 Ind. 338, 41 Am. Rep. 815; *Boyle* v. *State*, 105 Ind. 469, 55 Am. Rep. 218, 5 N. E. 203; *Archibald* v. *State*, 122 Ind. 122, 23 N. E. 758; *State* v. *Baldwin*, 79 Iowa, 714, 45 N. W. 297, 8 Am. Crim. Rep. 566; *State* v. *Perigo*, 80 Iowa, 37, 45 N. W. 399; *State* v. *O'Shea*, 60 Kan. 772, 57 Pac. 970; *Walston* v. *Com.* 16 B. Mon. 15; *Leiber* v. *Com.* 9 Bush, 11, 1 Am. Crim. Rep. 309; *Pace* v. *Com.* 89 Ky. 204, 12 S. W. 271; *Starr* v. *Com.* 97 Ky. 193, 30 S. W. 397; *Henderson* v. *Com.* 5 Ky. L. Rep. 244; *Luker* v. *Com.* 9 Ky. L. Rep. 385, 5 S. W. 354; *Owens* v. *Com.* 22 Ky. L. Rep. 514, 58 S. W. 422, 14 Am. Crim. Rep. 26; *State* v. *Black*, 42 La. Ann. 861, 8 So. 594; *People* v. *Olmstead*, 30 Mich. 431, 1 Am. Crim. Rep. 301; *Merrill* v. *State*, 58 Miss. 65; *Payne* v. *State*, 61 Miss. 161, 4 Am. Crim. Rep. 155; *Lipscomb* v. *State*, 75 Miss. 559, 23 So. 210, 230; *State* v. *Draper*, 65 Mo. 335, 27 Am. Rep. 827; *State* v. *Jefferson*, 77 Mo. 136; *State* v. *Vansant*, 80 Mo. 67; *State* v. *Chambers*, 87 Mo. 406; *State* v. *Parker*, 96 Mo. 382, 9 S. W. 728; *State* v. *Bowles*, 146 Mo. 6, 69 Am. St. Rep. 598, 47 S. W. 892; *State* v. *Sexton*, 147 Mo. 89, 48 S. W. 452; *Binfield* v. *State*, 15 Neb. 484, 19 N. W. 607; *People* v. *Davis*, 56 N. Y. 95; *State* v. *Shelton*, 47 N. C. (2 Jones, L.) 360, 64 Am. Dec. 587; *State* v. *Harper*, 35 Ohio St. 78, 35 Am. Rep. 596; *State* v. *Garrand*, 5 Or. 216; *Com.* v. *Gumpert*, 6 Luzerne Leg. Reg. 187; *Com.* v. *Murray*, 2 Ashm. (Pa.) 41; *Com.* v. *Keene*, 7 Pa. Super. Ct. 293; *State* v. *Johnson*, 26 S. C. 152, 1 S. E. 510, 7 Am. Crim. Rep. 366; *State* v. *Bradley*, 34 S. C. 136, 13 S. E. 315; *State* v. *Banister*, 35 S. C. 290, 14 S. E. 678; *State* v. *Faile*, 43 S. C. 52, 20 S. E. 798; *Nelson* v. *State*, 7 Humph. 542; *Warren* v. *State*, 9 Tex. App. 619, 35 Am. Rep. 745; *Ex parte Barber*, 16 Tex. App. 369; *Medina* v. *State*, 43 Tex. Crim. Rep. 52, 63 S. W. 331, 12 Am. Crim. Rep. 246; *Craven* v. *State*, 49 Tex. Crim. Rep. 78, 122 Am. St. Rep. 799, 90 S. W. 311; *State* v. *Kessler*, 15 Utah, 142, 62 Am. St. Rep. 911, 49 Pac. 293; *State* v. *Carrington*, 15 Utah, 480, 50 Pac. 526; *State* v. *Center*, 35 Vt. 378; *Crockham* v. *State*, 5 W. Va. 510; *State* v. *Cameron*, 2 Chand. (Wis.) 172, 2 Pinney (Wis.) 490; *State* v. *Dickinson*, 41 Wis. 299, 2 Am. Crim. Rep. 1; *Rex* v. *Hutchinson*, 2 Barn. & C.

cause such declarations are admissible in those cases only where the death of the party is the subject of the inquiry.[2] Such declarations are limited to criminal prosecutions when the subject-matter of the investigation is the declarant's death.[3]

608, note; *Reg.* v. *Hind,* 8 Cox, C. C. 300, Bell, C. C. 253, 29 L. J. Mag. Cas. N. S. 147, 6 Jur. N. S. 514, 2 L. T. N. S. 253, 8 Week. Rep. 421; *Rex* v. *Mead,* 4 Dowl. & R. 120, 2 Barn. & C. 605, 26 Revised Rep. 484; *Ashton's Case,* 2 Lewin, C. C. 147. And see *Richard* v. *State,* 42 Fla. 528, 29 So. 413.

[2] *Reg.* v. *Hind,* 8 Cox, C. C. 300, Bell, C. C. 253, 29 L. J. Mag. Cas. N. S. 147, 6 Jur. N. S. 514, 2 L. T. N. S. 253, 8 Week. Rep. 421; *People* v. *Davis,* 56 N. Y. 95; *State* v. *Harper,* 35 Ohio St. 78, 35 Am. Rep. 596. But see *Com.* v. *Gumpert,* 6 Luzerne Leg. Reg. 187.

[3] Wharton, Crim. Law. 7th ed. §§ 670, 671; 2 Russell, Crimes, 761; *North* v. *People,* 139 Ill. 81, 28 N. E. 966; *Hackett* v. *People,* 54 Barb. 370; *State* v. *Shelton,* 47 N. C. (2 Jones, L.) 360, 64 Am. Dec. 587; *Hudson* v. *State,* 3 Coldw. 355; *Stobart* v. *Dryden,* 1 Mees. & W. 615, 626, 2 Gale, 146, 5 L. J. Exch. N. S. 218; *Reg.* v. *Jenkins,* L. R. 1 C. C. 192, 38 L. J. Mag. Cas. N. S. 82, 20 L. T. N. S. 372, 17 Week. Rep. 621, 11 Cox, C. C. 250; *Reg.* v. *Peltier,* 4 Lower Can. Rep. (Dec. Des Tribunaux) 3; *Rex* v. *Hutchinson,* 2 Barn. & C. 608, note; *Reg.* v. *Newton,* 1 Fost. & F. 641; *Rex* v. *Baker,* 2 Moody & R. 53; *Aveson* v. *Kinnaird,* 6 East, 195, 2 Smith, 286, 8 Revised Rep. 455; *Doe ex dem. Sutton* v. *Ridgway,* 4 Barn. & Ald. 54; *Wooten* v. *Wilkins,* 39 Ga. 223, 99 Am. Dec. 456; *Duling* v. *Johnson,* 32 Ind. 155; *Spatz* v. *Lyons,* 55 Barb. 476; *Gray* v. *Goodrich,* 7 Johns. 95; *Wilson* v. *Boerem,* 15 Johns. 286; *Jackson ex dem. Coe* v. *Kniffen,* 2 Johns. 35, 3 Am. Dec. 390; *Pettiford* v. *Mayo,* 117 N. C. 27, 23 S. E. 252; *State* v. *Harris,* 112 La. 937, 36 So. 810.

Where, in an indictment for attempting to procure a miscarriage of a woman by means of instruments, in consequence of which she dies, there was a count for manslaughter, upon which the accused was acquitted, dying declarations of the woman are properly rejected on the second trial of the remaining issues of the case. *State* v. *Howard,* 32 Vt. 380; *Oliver* v. *State,* 17 Ala. 587; *Mose* v. *State,* 35 Ala. 421; *Johnson* v. *State,* 47 Ala. 9; *Reynolds* v. *State,* 68 Ala. 502, 4 Am. Crim. Rep. 152; *Pulliam* v. *State,* 88 Ala. 1, 6 So. 839; *Blackburn* v. *State,* 98 Ala. 63, 13 So. 274; *People* v. *Hall,* 94 Cal. 595, 30 Pac. 7; *McBride* v. *People,* 5 Colo. App. 91, 37 Pac. 953; *Daily* v. *New York & N. H. R. Co.* 32 Conn. 356, 87 Am. Dec. 176; *East Tennessee, V. & G. R. Co.* v. *Maloy,* 77 Ga. 237, 2 S. E. 941; *Parks* v. *State,* 105 Ga. 242, 31 S. E. 580; *North* v. *People,* 139 Ill. 81, 28 N. E. 966; *Marshall* v. *Chicago & G. E. R.* Co. 48 Ill. 475, 95 Am. Dec. 561; *Binns* v. *State,* 46 Ind. 311; *Montgomery* v. *State,* 80 Ind. 338, 41

§ 289. Admissible on prosecution of husband for murder of wife, and conversely.—As we have seen,[1] on the trial of the husband on charge of murdering his wife, her dying declarations are not excluded by the fact of their relations as husband and wife,[2] and, conversely, the declarations of the

Am. Rep. 815; *Middleton* v. *Middleton,* 31 Iowa, 151; *State* v. *O'Shea,* 60 Kan. 772, 57 Pac. 970; *Walston* v. *Com.* 16 B. Mon. 15; *Luker* v. *Com.* 9 Ky. L. Rep. 385 5 S. W. 354; *Mitchell* v. *Com.* 12 Ky. L. Rep 458, 14 S W. 489; *Bronn* v. *Louisville, C. & L. R. Co.* 7 Ky. L. Rep. 96; *State* v. *Black,* 42 La. Ann. 861, 8 So. 594; *Willis* v. *Kern,* 21 La. Ann. 749; *McDaniel* v. *State,* 8 Smedes & M. 401, 47 Am. Dec. 93; *Lipscomb* v. *State,* 75 Miss. 559, 23 So. 210, 230; *State* v. *Jefferson,* 77 Mo. 136; *State* v. *Pagels,* 92 Mo. 300, 4 S. W. 931; *State* v. *Welsor,* 117 Mo. 570, 21 S. W. 443; *Brownell* v. *Pacific R. Co.* 47 Mo. 239; *Binfield* v. *State,* 15 Neb. 484, 19 N. W. 607; *People* v. *Davis,* 56 N. Y. 95; *Hackett* v. *People,* 54 Barb. 370; *Waldele* v. *New York C. & H. R. R. Co.* 61 How. Pr. 350; *Jackson ex dem. Youngs* v. *Vredenbergh,* 1 Johns. 159; *Barfield v. Britt,* 47 N. C. (2 Jones, L.) 41, 62 Am. Dec. 190; *State* v. *Harper,* 35 Ohio St. 78, 35 Am. Rep. 596; *Cosgrove* v. *Shafer,* 9 Ohio. Dec. Reprint, 550; *State* v. *Fitzhugh,* 2 Or. 227; *Com.* v. *Murray,* 2 Ashm. (Pa.) 41; *Com.* v. *Reed,* 5 Phila. 528; *Friedman* v. *Railroad Co.* 7 Phila. 203; *Com.* v. *Gumpert,* 6 Luzerne Leg. Reg. 187; *Railing* v. *Com.* 110 Pa. 100, 1 Atl. 314, 6 Am. Crim. Rep. 7; *Com.* v. *Keene,* 7 Pa. Super. Ct. 293; *State* v. *Johnson,* 26 S. C. 152, 1 S. E. 510, 7 Am. Crim. Rep. 366; *State* v. *Bradley,* 34 S. C. 136, 13 S. E. 315; *State* v. *Banister,* 35 S. C. 290, 14 S. E. 678; *State* v. *Faile,* 43 S. C. 52, 20 S. E. 798; *Hudson* v. *State,* 3 Coldw. 355; *Wright* v. *State,* 41 Tex. 246; *Krebs* v. *State,* 3 Tex. App. 348; *State* v. *Carrington,* 15 Utah, 480, 50 Pac. 526; *State* v. *Center,* 35 Vt. 378; *Crookham* v. *State,* 5 W. Va. 510; *State* v. *Cameron,* 2 Chand. (Wis.) 172, 2 Pinney (Wis.) 490; *Miller* v. *State,* 25 Wis. 384; *State* v. *Dickinson,* 41 Wis. 299, 2 Am. Crim. Rep. 1; *Rex* v. *Hutchinson,* 2 Barn. & C. 608, note; *Rex* v. *Lloyd,* 4 Car. & P. 233; *Reg.* v. *Hind,* 8 Cox, C. C. 300, Bell, C. C. 253, 29 L. J. Mag. Cas. N. S. 147, 6 Jur. N. S. 514, 2 L. T. N. S. 253, 8 Week. Rep. 421; *Rex* v. *Mead,* 4 Dowl. & R. 120, 2 Barn. & C. 605, 26 Revised Rep. 484; *United States* v. *McGurk,* 1 Cranch, C. C. 71, Fed. Case No. 15,680; *Jack v. Mutual Reserve Fund Life Asso.* 51 C. C. A. 36, 113 Fed. 49. And see *Richard* v. *State,* 42 Fla. 528, 29 So. 413.

[1] Supra, § 280.

[2] *People* v. *Green,* 1 Denio, 614; *Com.* v. *Stoops,* Addison (Pa.) 381; *Moore* v. *State,* 12 Ala. 764, 46 Am. Dec. 276; *Arnett* v. *Com.* 114 Ky. 593, 71 S. W. 635; *State* v.

husband are competent evidence against the wife on trial on charge of murdering her husband.

§ 290. Competency of declarant as a witness.—Dying declarations cannot be used as a means of removing any disqualification that might have affected the competency of the declarant as a witness. Thus, the declarations of a child are not admissible where he was of such tender years that it could not be reasonably said that he could comprehend a future state;[1] but where he is of an intelligent mind, fully comprehending the nature of an oath, his declarations made under a sense of impending dissolution are admissible.[2] Likewise, if the declarant was insane, his declarations should be excluded; but in a doubtful case, the question of sanity should be left to a jury.[3]

And while the rule is settled that dying declarations must relate only to the transaction which resulted in the declarant's death,[4] yet, with this limitation, they are admissible as fully and to the same extent as the testimony of the declarant would have been, had he been called as a witness to the transaction.[5]

Belcher, 13 S. C. 459; *United States* v. *McGurk,* 1 Cranch, C. C. 71, Fed. Cas. No. 15,680; *Blalock* v. *State,* 40 Tex. Crim. Rep. 154, 49 S. W. 100; *Com.* v. *Spahr,* 211 Pa. 542, 60 Atl. 1084.

[1] *Rex* v. *Pike,* 3 Car. & P. 598; 3 Russell, Crimes, 7th Eng. ed. p. 2093.

[2] *Reg.* v. *Perkins,* 2 Moody, C. C. 135, s. c. 9 Car. & P. 395; 3 Russell, Crimes, 7th Eng. ed. p. 2093.

[3] *Bolin* v. *State,* 9 Lea, 516.

[4] Supra, § 275; *Gardner* v. *State,* 55 Fla. 25, 45 So. 1028; *Cleveland* v. *Com.* 31 Ky. L. Rep. 115, 101 S. W. 931; *Connell* v. *State,* 46 Tex. Crim. Rep. 259, 81 S. W. 746; *State* v. *Hood,* 63 W. Va. 182, 15 L.R.A. (N.S.) 448, 129 Am. St. Rep. 964, 59 S. E. 971.

[5] *Boyd* v. *State,* 84 Miss. 414, 36 So. 525; *Com.* v. *Spahr,* 211 Pa. 542, 60 Atl. 1084; *Hinton* v. *State,* — Tex. Crim. Rep. —, 100 S. W. 772; *Oliver* v. *State,* 17 Ala. 587; *Whitley* v. *State,* 38 Ga. 50; *Brock* v. *Com.* 92 Ky. 183, 17 S. W. 337; *People* v. *Knapp,* 26 Mich. 112; *State* v. *Reed,* 137 Mo. 125, 38 S. W. 574; *State* v. *Carrington,* 15 Utah, 480, 50 Pac. 526.

§ 291. The effect of disbelief on admissibility.—The disbelief in a future state of accountability, that will exclude the declarant's declarations, is the disbelief that would disqualify him as a witness at common law. If, while living, he was so insensible to an obligation of an oath, by reason of disbelief, that he would be incompetent to testify, then, on principle only, it may be said that he would also be insensible to the responsibilities of the solemn occasion of dissolution, which the law substitutes as the equivalent of a solemn oath, and, this qualifying condition being absent, the declaration, on principles of logic, must be excluded.

Upon like reasoning, in a number of cases dying declarations were held inadmissible because the person making them had no belief in a God and in a state of future accountability.[1]

But disbelief does not exclude in those courts, where the declarant, if called as a witness, would be competent.[2]

In a number of states it is provided by statute, that no person shall be rendered incompetent as a witness in consequence of his religious views, nor shall he be questioned in any court as to that belief with a view of affecting his testimony, and, where such statutes prevail, dying declarations are admissible without regard to the belief or disbelief of the declarant.[3]

The fact that the declarant was a disbeliever in a future state of rewards and punishments may be used to discredit his testimony,[4] though this inquiry must be confined solely to the question of belief or disbelief, and not as to the religion of the

[1] *Donnelly* v. *State,* 26 N. J. L. 463, s. c. 26 N. J. L. 601; *Brown* v. *State,* 78 Miss. 637, 84 Am. St. Rep. 641, 29 So. 519; *Hartigan* v. *Territory,* 1 Wash. Terr. 448.

[2] *People* v. *Sanford,* 43 Cal. 29; *State* v. *Elliott,* 45 Iowa, 486, 2 Am. Crim. Rep. 322; *People* v. *Chin Mook Sow,* 51 Cal. 597; *State* v. *Ah Lee,* 7 Or. 237; supra, § 276.

[3] *State* v. *Ah Lee,* 8 Or. 214; *People* v. *Sanford,* 43 Cal. 29; *State* v. *Elliott,* 45 Iowa, 486, 2 Am. Crim. Rep. 322; *People* v. *Chin Mook Sow,* 51 Cal. 597.

[4] *Goodall* v. *State,* 1 Or. 333, 80 Am. Dec. 396; *Hill* v. *State,* 64 Miss. 431, 1 So. 494; *State* v. *Elliott,* 45 Iowa, 486, 2 Am. Crim. Rep. 322.

declarant's race or country,[5] nor as to the particular church to which the declarant belonged.[6]

And it is competent to show, as bearing upon the question of his belief or disbelief, that he used profane lnaguage at the time of or after making the declarations.[7]

It is sufficient warrant for rejecting the declaration that the declarant was guilty of gross irreverence and blasphemy[8] in making his statements, or that he used profane language and made no preparations for death.[9]

Such disbelief must always affirmatively appear, for the law will always presume that such declarations were made under a belief of a state of future accountability.[10]

§ 292. Conviction of an infamous offense as affecting admissibility.—The dying declarations of persons disqualified by conviction of an infamous offense are inadmissible at common law,[1] but where this is urged, the state may show that a pardon was granted to the declarant in his lifetime.[2]

§ 293. Form of declarations does not affect their admissibility.—Dying declarations are not required to be in any particular form, unless so provided by statute, as in Texas, where it is provided that to become evidence such declarations must not be made in answer to interrogatories calculated to

[5] *People* v. *Chin Mook Sow,* 51 Cal. 597.

[6] *North* v. *People,* 139 Ill. 81, 28 N. E. 966.

[7] *Brown* v. *State,* 78 Miss. 637, 84 Am. St. Rep. 641, 29 So. 519; *Digby* v. *People,* 113 Ill. 123, 55 Am. Rep. 402.

[8] *Brown* v. *State,* 78 Miss. 637, 84 Am. St. Rep. 641, 29 So. 519.

[9] *Digby* v. *People,* 113 Ill. 123, 55 Am. Rep. 402.

[10] *Starkey* v. *People,* 17 Ill. 17; *Donnelly* v. *State,* 26 N. J. L. 463, s. c. 26 N. J. L. 601. See *Lewis* v. *State,* 9 Smedes & M. 115; *State* v. *Ah Lee,* 8 Or. 214.

[1] *Rex* v. *Drummond,* 1 Leach, C. L. 337, 1 East, P. C. 353, note; *Walker* v. *State,* 39 Ark. 221.

[2] *Hunnicutt* v. *State,* 18 Tex. App. 498, 51 Am. Rep. 330.

lead the deceased to make any particular statement.[1] It is not even essential that they should be formally expressed in words. Thus, T., being at the point of death, conscious of her condition, but unable to speak because of the nature of her wounds, was asked whether it was C. who inflicted the wounds, and if so, to indicate it by squeezing the hand of the person making the inquiry. It was held that, under all the circumstances of the case, there was proper evidence against C. for the consideration of the jury; they being the judges of its credibility and the effect to be given to it.[2] This also would hold true where signs were made in affirmation of a prior formal statement.[3]

But assent by such signs should not be received unless it affirmatively appear to the court that the weakness was physical only, and that there was sufficient consciousness to comprehend the questions asked and to indicate the correct answer.

Thus, where the physician said the declarant was in such a low condition that replies to the questions were indicated by nodding her head, meaning yes, the court rejected the testimony, because there was no evidence that she was sufficiently conscious to comprehend the questions.[4]

And where an attorney wrote a statement during the night on which the deceased died, and it appeared that questions were propounded which the deceased tried to answer, but was unable to do so, and his attendant friends then explained the

[1] Texas Code Crim. Proc. art. 748, construed in the following cases: *Hunnicutt* v. *State,* 18 Tex. App. 498, 51 Am. Rep. 330; *White* v. *State,* 30 Tex. Crim. Rep. 652, 18 S. W. 462; *Ledbetter* v. *State,* 23 Tex. App. 247, 5 S. W. 226.

[2] *Jones* v. *State,* 71 Ind. 66; *State* v. *Morrison,* 64 Kan. 669, 68 Pac. 48, 13 Am. Crim. Rep. 347; *Worthington* v. *State,* 92 Md. 222, 56 L.R.A. 353, 84 Am. St. Rep. 506, 48 Atl. 355; *Pennington* v. *Com.* 24 Ky. L. Rep. 321, 68 S. W. 451, 12 Am. Crim. Rep. 238; *Com.* v. *Casey,* 11 Cush. 417, 59 Am. Dec. 150.

[3] Supra, § 287; *Mockabee* v. *Com.* 78 Ky. 380.

[4] *McHugh* v. *State,* 31 Ala. 317; *McBride* v. *People,* 5 Colo. App. 91, 37 Pac. 953.

questions to him and made the answers, to which he assented only by nodding his head; that the statement consisting of the answers thus made was, when finished, "read over to him by the attorney, slowly and distinctly, and he signified his assent thereto by nodding his head;" that he spoke but a few words afterwards, and had frequently to be aroused; and that he seemed, while the statement was being read to him, to be in a stupor, it was properly rejected as a dying declaration.[5] The fact that the declarations were made in response to questions asked the declarant, in the absence of statute, does not affect their admissibility,[6] nor the fact that they consisted of direct answers to leading questions;[7] but they must consist

[5] *McHugh* v. *State,* 31 Ala. 317. See also *Barnett* v. *People,* 54 Ill. 325.

[6] *Park* v. *State,* 126 Ga. 575, 55 S. E. 489; *Hawkins* v. *State,* 98 Md. 355, 57 Atl. 27. See *State* v. *Fleetwood,* — Del. —, 65 Atl. 772; *Com.* v. *Haney,* 127 Mass. 455; *State* v. *Foot You,* 24 Or. 61, 32 Pac. 1031, 33 Pac. 537; *Baxter* v. *State,* 15 Lea, 657; *Worthington* v. *State,* 92 Md. 222, 56 L.R.A. 353, 84 Am. St. Rep. 506, 48 Atl. 355.

[7] *Vass* v. *Com.* 3 Leigh, 786, 24 Am. Dec. 695; *Maine* v. *People,* 9 Hun, 113; *Com.* v. *Casey,* 11 Cush. 417, 59 Am. Dec. 150; *Reg.* v. *Smith,* 10 Cox, C. C. 82, Leigh & C. C. C. 607, 34 L. J. Mag. Cas. N. S. 153, 11 Jur. N. S. 695, 12 L. T. N. S. 609, 13 Week. Rep. 816; *Rex* v. *Fagent,* 7 Car. & P. 238; *White* v. *State,* 30 Tex. Crim. Rep. 652, 18 S. W. 462; *Hunnicutt* v. *State,* 18 Tex. App. 498, 51 Am. Rep. 330. But see *Mitchell* v. *State,* 71 Ga. 128.

The rule established by the Texas statutes commends itself as providing a means of securing a declaration without suggesting the kind of declaration desired. As a rule, it is unsafe to admit declarations made in answer to questions, because these questions are suggested by interested friends and sympathizers, and also have in view a natural revenge upon the accused.

In *Com.* v. *Haney,* 127 Mass. 455, it is said that when the declaration is made in answer to questions, it is not necessary that the interrogatories should be set forth. This does not commend itself as a rule of practice. The contrary is held in *Reg.* v. *Mitchell,* 17 Cox, C. C. 503. Here a summary of the questions and answers were held inadmissible, the court saying: "If questions are put, the questions and answers must both be given, in order that it may appear how much was suggested by the examiner, and how much produced by the person making the declaration."

And out of proper caution the

of such a statement as the declarant, if living, might have given, and not mere utterances, as of pain or exclamations.[6]

They may be made at any time between the injury and the death of the declarant;[9] they may be made to any person who will be competent as a witness;[10] to the district attorney,[11] to the physician,[12] to a reporter,[13] through an interpreter,[14] and to several persons, and not necessarily one only.[15] There may be more than one declaration, and, if so, the state may introduce such of them as it deems proper,[16] and that different declarations conflict does not affect their admissibility, but only goes to their weight and credibility.[17]

same case further says: "A declaration should be taken down in the exact words which the person who makes it uses, in order that it may be possible, from those words, to arrive precisely at what the person making the declaration meant. When a statement is not the *ipsissima verba* of the person making it, but is composed of a mixture of questions and answers, there are several objections open to its reception in evidence, which it is desirable should not be open in cases in which the person has no opportunity of cross-examination. In the first place, the questions may be leading questions, and in the condition of a person making a dying declaration, there is always very great danger of leading questions being answered without their force and effect being fully comprehended."

[8] *People* v. *Olmstead,* 30 Mich. 431, 1 Am. Crim. Rep. 301; *State* v. *Harris,* 112 La. 937, 36 So. 810.

[9] *People* v. *Beverley,* 108 Mich. 509, 66 N. W. 379; *Williams* v. *State,* 168 Ind. 87, 79 N. E. 1079.

[10] *State* v. *Eddon,* 8 Wash. 292, 36 Pac. 139.

[11] *State* v. *Wilmbusse,* 8 Idaho, 608, 70 Pac. 849.

[12] *State* v. *Parham,* 48 La. Ann. 1309, 20 So. 727.

[13] *State* v. *Eddon,* 8 Wash. 292, 36 Pac. 139.

[14] *State* v. *Foot You,* 24 Or. 61, 32 Pac. 1031, 33 Pac. 537; *People* v. *Lem Deo,* 132 Cal. 199, 64 Pac. 265; *Garza* v. *State,* 3 Tex. App. 286.

[15] *Hendrickson* v. *Com.* 24 Ky. L. Rep. 2173, 73 S. W. 764.

[16] *Morrison* v. *State,* 42 Fla. 149, 28 So. 97; *People* v. *Simpson,* 48 Mich. 474, 12 N. W. 662; *Dunn* v. *People,* 172 Ill. 582, 50 N. E. 137, 11 Am. Crim. Rep. 447; *Hendrickson* v. *Com.* 24 Ky. L. Rep. 2173, 73 S. W. 764; *State* v. *Ashworth,* 50 La. Ann. 94, 23 So. 270; *Pate* v. *State,* 150 Ala. 10, 43 So. 343; *Harper* v. *State,* 129 Ga. 770, 59 S. E. 792; *State* v. *Gianfala,* 113 La. 463, 37 So. 30.

[17] *Richards* v. *State,* 82 Wis. 172, 51 N. W. 652; *White* v. *State,* 30 Tex. Crim. Rep. 652, 18 S. W. 462;

§ 294. The declaration is limited to facts; matters of opinion inadmissible.—The rules of evidence are not changed or modified by the admission of dying declarations, so as to admit in evidence anything that would be irrelevant if the declarant was sworn as a witness. The exception under which the declaration is admitted only relaxes the testimonial qualifications required in presenting the declaration to the court, but the declaration itself must declare matters relevant to the issues.

The declaration is receivable as to facts, but not as to matters of opinion, belief, nor conclusion.[1] Hence, where the declaration was, "It was E. W. who shot me, though I did not see him," it was inadmissible as stating a conclusion, and not a fact.[2] This rule was also applied in a case where it was physically impossible for the deceased to have seen who it was shot or injured him;[3] likewise, where the deceased was

People v. *Bemmerly*, 87 Cal. 117, 25 Pac. 266.

[1] *Rex* v. *Sellers*, O. B. 1796, Car. Crim. Law, 233; *Shaw* v. *People*, 3 Hun, 272; *People* v. *Shaw*, 63 N. Y. 36; *Binns* v. *State*, 46 Ind. 311; *Montgomery* v. *State*, 80 Ind. 338, 41 Am. Rep. 815; *Moeck* v. *People*, 100 Ill. 242, 39 Am. Rep. 38; *McPherson* v. *State*, 22 Ga. 478; *Whitley* v. *State*, 38 Ga. 50; *Johnson* v. *State*, 17 Ala. 618; *Ben* v. *State*, 37 Ala. 103; *Collins* v. *Com.* 12 Bush, 271, 2 Am. Crim. Rep. 282; *Savage* v. *State*, 18 Fla. 909; *People* v. *Taylor*, 59 Cal. 640; *Allen* v. *State*, 70 Ark. 337, 68 S. W. 28; *People* v. *Lanagan*, 81 Cal. 142, 22 Pac. 482; *McBride* v. *People*, 5 Colo. App. 91, 37 Pac. 953; *Darby* v. *State*, 79 Ga. 63, 3 S. E. 663; *White* v. *State*, 100 Ga. 659, 28 S. E. 423; *State* v. *Donnelly*, 69 Iowa, 705, 58 Am. Rep. 324, 27 N. W. 369; *State* v. *Perigo*, 80 Iowa, 37, 45 N. W. 399; *State* v. *O'Shea*, 60 Kan. 772, 57 Pac. 970; *Com.* v. *Matthews*, 89 Ky. 287, 12 S. W. 333; *Lipscomb* v. *State*, 75 Miss. 559, 23 So. 210, 230; *State* v. *Elkins*, 101 Mo. 344, 14 S. W. 116; *State* v. *Jefferson*, 125 N. C. 712, 34 S. E. 648; *Medina* v. *State*, 43 Tex. Crim. Rep. 52, 63 S. W. 331, 12 Am. Crim. Rep. 246; *State* v. *Carrington*, 15 Utah, 480, 50 Pac. 526; *United States* v. *Veitch*, 1 Cranch, C. C. 115, Fed. Cas. No. 16,614.

[2] *State* v. *Williams*, 68 N. C. 62; *Walker* v. *State*, 39 Ark. 221.

[3] *State* v. *Arnold*, 35 N. C. (13 Ired. L.) 184. See *Green* v. *Com.* 13 Ky. L. Rep. 897, 18 S. W. 515. See also *Jones* v. *State*, 79 Miss. 309, 30 So. 759.

shot through a window, even though based on the fact that the accused had threatened to shoot her through the window;[4] and where the accused had poisoned deceased, because, as deceased stated, the accused gave him a drink of whisky that tasted bad.[5]

But a statement by the declarant of the identity of the party shooting him has been admitted.[6]

§ 294a. Admissible where statement of fact separable from conclusion.—Where the statement of the fact is clearly separable from the conclusion or inference, it will be admitted. Thus, the direct statement that the accused poisoned him is not a conclusion.[1] The direct statement that the accused shot him is not rendered inadmissible by adding, "Ain't I right?"[2] The direct statement, "He operated on me," is admissible as stating a fact peculiarly within the knowledge of the declarant,[3] but the statement that the purpose of the operation was to cause an abortion is a matter of opinion, and inadmissible for that reason.[4]

Nor are mere expressions of opinion admissible, even though they are in favor of the accused. Hence, where the declarant stated that the wound was an accident,[5] or the ac-

[4] *Jones* v. *State,* 52 Ark. 345, 12 S. W. 704; *Binns* v. *State,* 46 Ind. 311.

[5] *Berry* v. *State,* 63 Ark. 382, 38 S. W. 1038.

[6] *Allen* v. *State,* 70 Ark. 337, 68 S. W. 28; *Darby* v. *State,* 79 Ga. 63, 3 S. E. 663; *Henderson* v. *Com.* 24 Ky. L. Rep. 1985, 72 S. W. 781; *State* v. *Teachey,* 138 N. C. 587, 50 S. E. 232; *State* v. *Freeman,* 1 Speers, L. 57. See *Sims* v. *State,* 36 Tex. Crim. Rep. 154, 36 S. W. 256.

[1] *State* v. *Kuhn,* 117 Iowa, 216, 90 N. W. 733; *Shenkenberger* v. *State,* 154 Ind. 630, 57 N. E. 519. But see *Berry* v. *State,* 63 Ark. 382, 38 S. W. 1038.

[2] *State* v. *Clemons,* 51 Iowa, 274, 1 N. W. 546.

[3] *Maine* v. *People,* 9 Hun, 113.

[4] *Montgomery* v. *State,* 80 Ind. 338, 41 Am. Rep. 815; *State* v. *Carrington,* 15 Utah, 480, 50 Pac. 526.

[5] *Com.* v. *Dunan,* 128 Mass. 422; *Kearney* v. *State,* 101 Ga. 803, 65 Am. St. Rep. 344, 29 S. E. 127; *State* v. *Wright,* 112 Iowa, 436, 84

cused did not intend to hurt him,[6] or it was declarant's fault,[7] or that accused was crazy,[8] it was expression of opinion, and inadmissible.

§ 294b. Declaration containing relevant and irrelevant matter.—Where the declaration contains both relevant and irrelevant evidence, the court cannot be asked to exclude it on that ground.

Where the court points out the illegal testimony to the jury, and characterizes it as such, so that the jury can identify it, it is all that can be required.[1]

Where it is sought to exclude the declaration on the ground that a portion of it is inadmissible, the objection should be confined to the inadmissible portion.[2]

§ 295. Written declarations; production; proof of; parol evidence.—Where the declaration has been reduced to writing, read over, and approved by the declarant, the document becomes primary evidence.[1] Hence, a copy of such writing will not be received as evidence,[2] and parol proof of it will not be received without first accounting for the written document.[3] The rule that the best evidence the case admits

N. W. 541; *Com.* v. *Matthews,* 89 Ky. 287, 12 S. W. 333.

Compare *Young* v. *State,* 70 Ark. 156, 66 S. W. 658.

[6] *McPherson* v. *State,* 22 Ga. 478.

[7] *Sweat* v. *State,* 107 Ga. 712, 33 S. E. 422; *State* v. *Sale,* 119 Iowa, 1, 92 N. W. 680, 95 N. W. 193. See *State* v. *Harris,* 112 La. 937, 36 So. 810.

[8] *Smith* v. *Com.* 13 Ky. L. Rep. 612, 17 S. W. 868; *State* v. *Wright,* 112 Iowa, 436, 84 N. W. 541.

[1] *Ex parte Barber,* 16 Tex. App. 369; *Freeman* v. *State,* 112 Ga. 48, 37 S. E. 172.

[2] *Richard* v. *State,* 42 Fla. 528, 29 So. 413.

[1] Viner's Abr. Ev. 38 A b; *Com.* v. *Haney,* 127 Mass. 455; *Beets* v. *State,* Meigs, 106; *State* v. *Sullivan,* 51 Iowa, 142, 50 N. W. 572; *Epperson* v. *State,* 5 Lea, 291; *Kelly* v. *State,* 52 Ala. 361; *Turner* v. *State,* 89 Tenn. 547, 15 S. W. 838.

[2] *Rex* v. *Gay,* 7 Car. & P. 230; *Collier* v. *State,* 20 Ark. 36; *Binns* v. *State,* 46 Ind. 311; *Beets* v. *State,* Meigs, 106.

[3] *Collier* v. *State,* 20 Ark. 36; *State* v. *Fraunburg,* 40 Iowa, 555; *State* v. *Tweedy,* 11 Iowa, 350;

of, within the power of the party, must be produced, applies in such case.[4] Also, where the declaration was put into writing by the witness as soon as made and signed by the declarant, such writing must be produced or accounted for. Its place cannot be supplied by the witness narrating what the declarant said before it was reduced to writing.[5] But where the declaration has been repeated at different times, and at one time informally written down, oral evidence will be received of the independent declaration.[6] It is as proper to admit evidence of the circumstances under which the declaration was made, as to admit the document itself.[7]

And where the declaration was in the form of a deposition, and for some defect incompetent, the facts may be proved as the dying declaration of the deponent;[8] and likewise, in case of loss of the deposition, parol evidence of its contents can

Krebs v. *State,* 8 Tex. App. 1; *Drake* v. *State,* 25 Tex. App. 297, 7 S. W. 868; *Boulden* v. *State,* 102 Ala. 78, 15 So. 341; *Rex* v. *Trowter,* 1 East, C. L. 356; *State* v. *Ferguson,* 2 Hill, L. 619, 27 Am. Dec. 412; *Dunn* v. *People,* 172 Ill. 582, 50 N. E. 137, 11 Am. Crim. Rep. 447; *Hines* v. *Com.* 90 Ky. 64, 13 S. W. 445; *Herd* v. *State,* 43 Tex. Crim. Rep. 575, 67 S. W. 495; *Gardner* v. *State,* 55 Fla. 25, 45 So. 1028; *Cleveland* v. *Com.* 31 Ky. L. Rep. 115, 101 S. W. 931; *Long* v. *State,* 48 Tex. Crim. Rep. 175, 88 S. W. 203.

[4] *Hines* v. *Com.* 90 Ky. 64, 13 S. W. 445; *Freeman* v. *State,* 112 Ga. 48, 37 S. E. 172; *Dunn* v. *People,* 172 Ill. 582, 50 N. E. 137, 11 Am. Crim. Rep. 447; *King* v. *State,* 91 Tenn. 617, 20 S. W. 169.

[5] *Drake* v. *State,* 25 Tex. App. 293, 7 S. W. 868; *Turner* v. *State,* 89 Tenn. 547, 15 S. W. 838.

[6] *Epperson* v. *State,* 5 Lea, 291; *People* v. *Vernon,* 35 Cal. 49, 95 Am. Dec. 49. Compare *Kelly* v. *State,* 52 Ala. 361; *Fuqua* v. *Com.* 24 Ky. L. Rep. 2204, 73 S. W. 782.

[7] *People* v. *Knapp,* 26 Mich. 112; *Green* v. *State,* 154 Ind. 655, 57 N. E. 637.

[8] *State* v. *Finley,* 118 N. C. 1161, 24 S. E. 495. See *Foley* v. *State,* 11 Wyo. 464, 72 Pac. 627; *Rex* v. *Callaghan,* 1 MacNally, Ev. 385; *Rex* v. *Woodcock,* 1 Leach, C. L. 500, 1 East, P. C. 354, 11 Eng. Rul. Cas. 294; Roscoe, Crim. Ev. 13th ed. 29–34.

be given.[9] The admission of the writing is not affected by the fact that it was not signed by the declarant.[10]

In this connection oral testimony may be used for corroboration,[11] to prove other declarations not reduced to writing,[12] and to show oral affirmation of his written declaration by the declarant,[13] and to show the fact of impending dissolution where the writing itself is silent as to that fact.[14]

Where the statute does not authorize the taking of depositions in the case of dying declarations, and for that reason the writing is inadmissible as a deposition, nevertheless it may be used as secondary evidence, to refresh the witness's memory;[15] the oath does not give the declaration any added force.[16] A deposition has been received where, upon being read to the deponent, he said it was "as nigh right as he could recollect

[9] *Collier* v. *State,* 20 Ark. 36; *People* v. *Glenn,* 10 Cal. 32; *Lane* v. *State,* 151 Ind. 511, 51 N. E. 1056; *State* v. *Walton,* 92 Iowa, 455, 61 N. W. 179; *State* v. *Tweedy,* 11 Iowa, 350; *Epperson* v. *State,* 5 Lea, 291; *Herd* v. *State,* 43 Tex. Crim. Rep. 575, 67 S. W. 495; *Krebs* v. *State,* 8 Tex. App. 1; *Rex* v. *Reason,* 1 Strange, 500; *State* v. *Patterson,* 45 Vt. 308, 12 Am. Rep. 200; *Merrill* v. *State,* 58 Miss. 65.

[10] *Rex* v. *Reason,* 1 Strange, 500, 16 How. St. Tr. 1; *Freeman* v. *State,* 112 Ga. 48, 37 S. E. 172. See *Beets* v. *State,* Meigs, 106.

[11] *Bailey* v. *Com.* 2 Ky. L. Rep. 436; *State* v. *Parker,* 96 Mo. 382, 9 S. W. 728; *Reg.* v. *Sparham,* 25 U. C. C. P. 143.

[12] Supra, note 9; *Dunn* v. *People,* 172 Ill. 582, 50 N. E. 137, 11 Am. Crim. Rep. 447.

[13] *People* v. *Glenn,* 10 Cal. 32; *State* v. *Hendricks,* 172 Mo. 654, 73 S. W. 194.

[14] *Reg.* v. *Hunt,* 2 Cox, C. C. 239; *Com.* v. *Haney,* 127 Mass. 455.

[15] *Beets* v. *State,* Meigs, 106; *State* v. *Fraunburg,* 40 Iowa, 555; *State* v. *Whitson,* 111 N. C. 695, 16 S. E. 322; *State* v. *Wilson,* 24 Kan. 189, 36 Am. Rep. 257; *Rex* v. *Callaghan,* 1 MacNally, Ev. 385; *Rex* v. *Woodcock,* 2 Leach, C. L. 563, note; *Rex* v. *Reason,* 16 How. St. Tr. 1 (which see); *Robinson* v. *Vaughton,* 8 Car. & P. 252; *Rex* v. *Bell,* 5 Car. & P. 162; *Reg.* v. *Christopher,* 1 Den. C. C. 536, 4 New Sess. Cas. 139, 2 Car. & K. 994, Temple & M. 225, 19 L. J. Mag. Cas. N. S. 103, 14 Jur. 203, 4 Cox, C. C. 76; *Reg.* v. *Clarke,* 2 Fost. & F. 2.

[16] *State* v. *Frazier,* Houst. Crim. Rep. (Del.) 176.

the circumstances;" [17] and when a deposition is put in evidence, the whole of it must be read.[18]

In England, where three several declarations had been made by the deceased in the course of the same day, at the successive intervals of one hour each; the second had been made before a magistrate and reduced into writing, but the others had not; the original statement taken before a magistrate was not produced, and a copy of it was rejected; a question then arose whether the first and third declarations could be received, and Pratt, C. J., was of the opinion that they could not, since he considered all three statements as parts of the same narrative, of which the written examination was the best proof; but the other judges held that the three declarations were three distinct facts, and that the inability to prove the second did not exclude the first and third, and evidence of those declarations was accordingly admitted.[19]

§ 296. Statements of the injured party as part of the res gestæ.—It is well to state again the difference between *res gestæ* and dying declarations. The *res gestæ* may precede, or accompany, or follow as events occurring as a part of the principal act; dying declarations are confined to matters occurring after the homicidal act.[1]

Hence, where the statements of the injured party are given as part of the *res gestæ,* they are admissible without proof of being stated under a sense of impending dissolution,[2] and as

[17] *State* v. *Ferguson,* 2 Hill, L. 619, 27 Am. Dec. 412; *Mockabee* v. *Com.* 78 Ky. 380.

[18] *State* v. *Martin,* 30 Wis. 216, 11 Am. Rep. 567.

[19] *Rex* v. *Reason,* 1 Strange, 499; see s. c. 16 How. St. Tr. 1.

[1] Supra, 275c.

[2] Supra, § 263; *State* v. *Wagner,* 61 Me. 178; *Com.* v. *M'Pike,* 3 Cush. 181, 50 Am. Dec. 727; *Com.* v. *Hackett,* 2 Allen, 136; *State* v. *Porter,* 34 Iowa, 131; *Burns* v. *State,* 61 Ga. 192; *Jackson* v. *State,* 52 Ala. 305; *People* v. *Brown,* 59 Cal. 345. See *Reg.* v. *Edwards,* 12 Cox, C. C. 230.

Where the dying declarations and statements which are a part of the *res gestæ* are interwoven, they may

res gestæ they are not to be construed as extending beyond the immediate emanations of the litigated act.[3]

But when offered as dying declarations, they must not relate to anything beyond the *corpus delicti*. Hence, where death was caused by wounding, the declarations have been confined to statements necessary to give information on the subject of the wound,[4] and in death by poisoning, to details of the deceased's health.[5]

§ 296a. What constitutes a declaration per se; review.—Whether the statement offered constitutes a dying declaration *per se* is a question of law for the court.[1] The question being one of law, it is a proper subject for review on appeal or upon writ of error.[2] It is not sufficient if the evidence only tends to show that they were dying declarations, and they are admitted as such, it being left to the jury to decide whether they are dying declarations or not. It is the duty of the court to satisfy itself that they are dying declarations, in the first instance, to justify their admission in evidence.[3] Should the court permit the declarations of the de-

go in together, *West* v. *State*, 7 Tex. App. 150; *Stagner* v. *State*, 9 Tex. App. 440. See *Reg.* v. *Bedingfield*, 14 Cox, C. C. 341.

Declarations as *res gestæ*, see *Rex* v. *Foster*, 6 Car. & P. 325, and *Thompson* v. *Trevanion*, Skinner, 402; *Reg.* v. *Lunny*, 6 Cox, C. C. 477; *Com.* v. *M'Pike*, 3 Cush. 181, 50 Am. Dec. 727, cited supra, §§ 262, 263; *Field* v. *State*, 57 Miss. 474, 34 Am. Rep. 476. See *Jones* v. *State*, 71 Ind. 66; *Johnson* v. *State*, 65 Ga. 94; *Dumas* v. *State*, 65 Ga. 471; *Warren* v. *State*, 9 Tex. App. 619, 35 Am. Rep. 745.

Declarations in poisoning cases, see *Field* v. *State*, 57 Miss. 474; *Patterson* v. *State*, 66 Ind. 185.

[3] *State* v. *Frazier*, Houst. Crim. Rep. (Del.) 176; *Jackson* v. *State*, 52 Ala. 305; *Steele* v. *State*, 61 Ala. 213. See *Crookham* v. *State*, 5 W. Va. 510, for circumstances too remote for *res gestæ*.

[4] *Denton* v. *State*, 1 Swan, 279. See *Donnelly* v. *State*, 26 N. J. L. 463, 601, 607.

[5] *Reg.* v. *Johnson*, 2 Car. & K. 354.

[1] *Donnelly* v. *State*, 26 N. J. L. 463.

[2] Ibid.

[3] *State* v. *Center*, 35 Vt. 378;

ceased to go before the jury as dying declarations, where the proof does not satisfactorily show that they are such, the conviction will be reversed on that ground, even if they were not objected to.[4]

§ 296b. Determination of questions of law and questions of fact.—What constitutes a dying declaration *per se* is a question of law for the court to decide. And whether the declarant was in the article of death, and conscious of the fact, at the time he made the declaration, is a question for the judge, and not for the jury, to determine;[1] likewise, the judge must determine whether the declaration itself is one of

Starkey v. *People,* 17 Ill. 17; *Westbrook* v. *People,* 126 Ill. 81, 18 N. E. 304; *Com.* v. *Birriolo,* 197 Pa. 371, 37 Atl. 355. See *State* v. *Burns,* 33 Mo. 483.

[4] *Smith* v. *State,* 9 Humph. 9.

[1] *Justice* v. *State,* 99 Ala. 180, 13 So. 658; *Moore* v. *State,* 12 Ala. 764, 46 Am. Dec. 276; *Faire* v. *State,* 58 Ala. 74; *Roten* v. *State,* 31 Fla. 514, 12 So. 910; *Richard* v. *State,* 42 Fla. 528, 29 So. 413; *Starkey* v. *People,* 17 Ill. 17; *Westbrook* v. *People,* 126 Ill. 81, 18 N. E. 304; *State* v. *Baldwin,* 79 Iowa, 714, 45 N. W. 297, 8 Am. Crim. Rep. 566; *State* v. *Kuhn,* 117 Iowa, 216, 90 N. W. 733; *State* v. *Trivas,* 32 La. Ann. 1086, 36 Am. Rep. 293; *State* v. *Molisse,* 36 La. Ann. 920; *State* v. *Cantieny,* 34 Minn. 1, 24 N. W. 458, 6 Am. Crim. Rep. 418; *Lipscomb* v. *State,* 75 Miss. 559, 23 So. 210, 230; *State* v. *Simon,* 50 Mo. 370; *State* v. *Johnson,* 76 Mo. 121; *State* v. *Johnson,* 118 Mo. 491, 40 Am. St. Rep. 405, 24 S. W. 229; *State* v. *Reed,* 137 Mo. 125, 38 S. W. 574; *State* v. *Sexton,* 147 Mo. 89, 48 S. W. 452; *Basye* v. *State,* 45 Neb. 261, 63 N. W. 811; *Maine* v. *People,* 9 Hun, 113; *People* v. *Anderson,* 2 Wheeler, C. C. 390; *State* v. *Shaffer,* 23 Or. 555, 32 Pac. 545; *Com.* v. *Winkelman,* 12 Pa. Super. Ct. 497; *Kehoe* v. *Com.* 85 Pa. 127; *Com.* v. *Sullivan,* 13 Phila. 410; *State* v. *Quick,* 15 Rich. L. 342; *Smith* v. *State,* 9 Humph. 9; *State* v. *Center,* 35 Vt. 378; *Reg.* v. *Reaney,* 7 Cox, C. C. 209, 3 Jur. N. S. 191, Dears. & B. C. C. 151, 26 L. J. Mag. Cas. N. S. 43, 5 Week. Rep. 252, 40 Eng. L. & Eq. Rep. 552; *Reg.* v. *Smith,* 10 Cox, C. C. 82, 11 Jur. N. S. 695, Leigh & C. C. C. 607, 34 L. J. Mag. Cas. N. S. 153, 12 L. T. N. S. 609, 13 Week. Rep. 816; *John's Case,* 1 East, P. C. 357; *Rex* v. *Woodcock,* 1 Leach, C. L. 500, 1 East, P. C. 354, 11 Eng. Rul. Cas. 294. See *Anderson* v. *State,* 122 Ga. 161, 50 S. E. 46; *Donnelly* v. *State,* 26 N. J. L. 463; 1 Greenl. Ev. § 160; *Rex* v. *Hucks,* 1 Starkie, 522, 1 Leach, C. L. 503, note; *Rex* v.

fact, and therefore admissible, or whether it is one of conclusion, and therefore inadmissible;[2] because the preliminary proof of the document and the competency of the witness is always addressed to, and in the exclusive province of, the court,[3] and where there is evidence to support it, his finding of the facts will not be overturned.[4]

This is also the rule in England. All the judges agreed at a conference in Easter term, 1790, that it ought not to be left to the jury to say whether the deceased thought he was dying or not; for that must be decided by the judge before he receives the evidence.[5] And where on trial for murder, in Ireland, a dying declaration was received in evidence, and the judge left it to the jury to say whether the deceased knew when he made it that he was at the point of death, the question as to the propriety of the course adopted in that case was sent over for the opinion of English judges, who answered that the course taken was not the right one, and that the judge

VanButchell, 3 Car. & P. 629; *Reg.* v. *Jenkins,* L. R. 1 C. C. 187, 38 L. J. Mag. Cas. N. S. 82, 20 L. T. N. S. 372, 17 Week. Rep 621, 11 Cox, C. C. 250; *Com.* v. *Murray,* 2 Ashm. (Pa.) 41; *State* v. *Elliott,* 45 Iowa, 486, 2 Am. Crim. Rep. 322; *Jones* v. *State,* 71 Ind. 66; *Hill* v. *Com.* 2 Gratt. 594; *State* v. *Poll,* 8 N. C. (1 Hawks) 442, 9 Am. Dec. 655; *State* v. *Williams,* 68 N. C. 62; *McDaniel* v. *State,* 8 Smedes & M. 401, 47 Am. Dec. 93; *Lambeth* v. *State,* 23 Miss. 322; *Owens* v. *State,* 59 Miss. 547; *Dixon* v. *State,* 13 Fla. 636; *People* v. *Glenn,* 10 Cal. 32. But contra, *Campbell* v. *State,* 11 Ga. 354; *Jackson* v. *State,* 56 Ga. 235; *Dumas* v. *State,* 62 Ga. 58 (under statute). See *State* v. *Ah Lee,* 7 Or. 237.

[2] *Lipscomb* v. *State,* 75 Miss. 559, 23 So. 210, 230.

[3] *Lambeth* v. *State,* 23 Miss. 322; *Owens* v. *State,* 59 Miss. 547; *Lester* v. *State,* 37 Fla. 382, 20 So. 232; *People* v. *Smith,* 104 N. Y. 491, 58 Am. Rep. 537, 10 N. E. 873; *Rex* v. *Van Butchell,* 3 Car. & P. 629.

[4] *Newberry* v. *State,* 68 Ark. 355, 58 S. W. 351; *Gipe* v. *State,* 165 Ind. 433, 1 L.R.A.(N.S.) 419, 112 Am. St. Rep. 238, 75 N. E. 881; *State* v. *Ah Lee,* 7 Or 239. See *State* v. *Bennett,* 14 La. Ann. 661; *State* v. *Ross,* 18 La. Ann. 340; *State* v. *Brown,* 111 La. 696, 35 So. 818 (where evidence is not before the court on appeal).

[5] *John's Case,* 1 East, P. C. 357; *Welbourn's Case,* 1 East, P. C. 357, 1 Leach, C. L. 503, note; *Rex* v.

ought to have decided the question himself.[6] The judge has to deal with the matter as a preliminary question of fact.[7] The practice has long been in accord with these rulings, and most of the modern cases are mere illustrations of the mode in which the judges have dealt with particular sets of facts.

But there are a number of cases, and in Georgia these cases prevail, that, while recognizing the rule that admissibility is primarily a question for the court, yet, if the court is not satisfied that the declarant was in the article of death, and conscious of it, through the prima facie proof, he will allow it to go to the jury, who will look to all the evidence, and determine for themselves the question of extremity and consciousness of condition.[8] In Georgia this seems to depend on the provision of the statute.[9]

But after admission, it is the province of the jury to decide whether or not they will consider the evidence,[10] and where there is a conflict of evidence as to whether or not a declaration was made, it is a question of fact for the jury.[11]

Hucks, 1 Starkie, 523; *Reg.* v. *Smith,* 10 Cox, C. C. 82, Leigh & C. C. C. 607, 34 L. J. Mag. Cas. N. S. 153, 11 Jur. N. S. 695, 12 L. T. N. S. 609, 13 Week. Rep. 816.

[6] *Campbell's Case* as cited by Parke, B., in 11 Mees. & W. 486.

[7] *Reg.* v. *Goddard,* 15 Cox, C. C. 7, Hawkins, J.

[8] *Bush* v. *State,* 109 Ga. 120, 34 S. E. 298; *Smith* v. *State,* 118 Ga. 61, 44 S. E. 817; *Com.* v. *Brewer,* 164 Mass. 577, 42 N. E. 92. See *State* v. *Thawley,* 4 Harr. (Del.) 562; *Com.* v. *Britton,* Campb. (Pa.) 513; *State* v. *Brewster,* 63 Ga. 639; *State* v. *Banister,* 35 S. C. 290, 14 S. E. 678; *Com.* v. *Murray,* 2 Ashm. (Pa.) 41; *State* v. *Cameron,* 2 Chand. (Wis.) 172; *People* v. *Wood,* 2 Edm. Sel. Cas. 71.

[9] *Johnson* v. *State,* 72 Ga. 679. See note 8, above.

[10] *Whitaker* v. *State,* 79 Ga. 87, 3 S. E. 403; *Walton* v. *State,* 79 Ga. 446, 5 S. E. 203; *Bryant* v. *State,* 80 Ga. 272, 4 S. E. 853; *Bush* v. *State,* 109 Ga. 120, 34 S. E. 298; *Smith* v. *State,* 110 Ga. 255, 34 S. E. 204, 12 Am. Crim. Rep. 245.

[11] *Com.* v. *Lawson,* 119 Ky. 765, 80 S. W. 206; *State* v. *Hendricks,* 172 Mo. 654, 73 S. W. 194; *People* v. *Thomson,* 145 Cal. 717, 79 Pac. 435.

§ 297. Reversible error in admission.—It has been ruled that where the prosecution offers evidence of the dying declarations of the deceased, and the defendant objects to their admissibility and moves to exclude them, if the court refuses to decide on the motion until all the evidence in the case is closed, and compels the defendant to proceed with his defense, and then, after the evidence is closed, decides the defendant's motion and erroneously admits a part of the dying declarations objected to, and the defendant is convicted, the judgment will be reversed.[1]

§ 298. Impeachment of declarations.—The same tests to determine their trustworthiness are applicable to the statements of persons *in extremis*, as are applied to the statements of a witness under examination on oath.[1] The declarations are to be admitted, if they are relevant,[2] and where irrelevant the jury may be directed to disregard them.[3]

To affect their credibility it is competent to show feelings of hostility on the part of the declarant toward the accused,[4] to show the condition of his mind subsequent to the declarations,[5] to show his want of religious belief,[6] to prove his bad char-

[1] *Johnson* v. *State*, 47 Ala. 9.

[1] *Rex* v. *Sellers*, supra, § 294; *People* v. *Knapp*, 1 Edm. Sel. Cas. 177; *Com.* v. *Lenox*, 3 Brewst. (Pa.) 249; *M'Pherson* v. *State*, 9 Yerg. 279; *People* v. *Lawrence*, 21 Cal. 368; *Hurd* v. *People*, 25 Mich. 405; *People* v. *Knapp*, 26 Mich. 112. But see *Maine* v. *People*, 9 Hun, 113; *State* v. *Tilghman*, 33 N. C. (11 Ired. L.) 513; *State* v. *Thawley*, Harr. (Del.) 562; *Nordgren* v. *People*, 211 Ill. 425, 71 N. E. 1042; *Com.* v. *Lawson*, 119 Ky. 765, 80 S. W. 206.

[2] *West* v. *State*, 7 Tex. App. 150; post, § 304.

[3] *Scott* v. *People*, 63 Ill. 508.

[4] *Tracy* v. *People*, 97 Ill. 101; *Nordgren* v. *People*, 211 Ill. 425, 71 N. E. 1042. But see *State* v. *Varney*, 8 Boston L. Rep. 542, post, § 376.

[5] *State* v. *Jeswell*, 22 R. I. 136, 46 Atl. 405, 12 Am. Crim. Rep. 260; *Donnelly* v. *State*, 26 N. J. L. 463.

[6] *Goodall* v. *State*, 1 Or. 333, 80 Am. Dec. 396. See *Carver* v. *United States*, 164 U. S. 694, 41 L. ed. 602, 17 Sup. Ct. Rep. 228; *Com.* v. *Cooper*, 5 Allen, 495, 81 Am. Dec. 762; *Hill* v. *State*, 64 Miss. 431, 1 So. 494.

acter,[7] and to prove contradictory and conflicting statements.[8]

Many early cases hold that dying declarations cannot be impeached by contradictory statements, because it is a violation of that rule of evidence that requires, as a foundation for impeachment by contradictory statements, that, on cross-examination, witness's attention must be called to the matter, and he must be asked whether he has or has not made the statement.[9] To this it is replied that necessity governs the admission of such declarations, and a like necessity governs

[7] *Perry* v. *State,* 102 Ga. 365, 30 S. E. 903; *Redd* v. *State,* 99 Ga. 210, 25 S. E. 268; *Hagenow* v. *People,* 188 Ill. 545, 59 N. E. 242; *State* v. *Burt,* 41 La. Ann. 787, 6 L.R.A. 79, 6 So. 631; *Com.* v. *Cooper,* 5 Allen, 495, 81 Am. Dec. 762; *Felder* v. *State,* 23 Tex. App. 477, 59 Am. Rep. 777, 5 S. W. 145; *Hall* v. *State,* 124 Ga. 649, 52 S. E. 891. See *State* v. *Tomassi,* 75 N. J. L. 739, 69 Atl. 214, where bad character for truth and veracity was held admissible, but not general bad character.

Declarant may be impeached by showing conviction for felony, but not for misdemeanor, and pardon for such cannot be shown. *Martin* v. *Com.* 25 Ky. L. Rep. 1928, 78 S. W. 1104. But see *Hunnicutt* v. *State,* 18 Tex. App. 498, 51 Am. Rep. 330; *State* v. *Burt,* 41 La. Ann. 787, 6 L.R.A. 79, 6 So. 631; *Lester* v. *State,* 37 Fla. 382, 20 So. 232.

[8] *Carver* v. *United States,* 164 U. S. 694, 41 L. ed. 602, 17 Sup. Ct. Rep. 228; *Moore* v. *State,* 12 Ala. 764, 46 Am. Dec. 276; *People* v. *Brady,* 72 Cal. 490, 14 Pac. 202; *State* v. *Lodge,* 9 Houst. (Del.) 542, 33 Atl. 312; *Morrison* v. *State,* 42 Fla. 149, 28 So. 97; *Green* v. *State,* 154 Ind. 655, 57 N. E. 637; *State* v. *Burt,* 41 La. Ann. 787, 6 L.R.A. 79, 6 So. 631; *Nelms* v. *State,* 13 Smedes & M. 500, 53 Am. Dec. 94. See *State* v. *Craine,* 120 N. C. 601, 27 S. E. 72, and *State* v. *Thomason,* 46 N. C. (1 Jones, L.) 274; *Morelock* v. *State,* 90 Tenn. 528, 18 S. W. 258; *Felder* v. *State,* 23 Tex. App. 477, 59 Am. Rep. 777, 5 S. W. 145. See *Leigh* v. *People,* 113 Ill. 372; *Gregory* v. *State,* 140 Ala. 16, 37 So. 259; *McCorquodale* v. *State,* 54 Tex. Crim. Rep. 344, 98 S. W. 879; *Coyle* v. *Com.* 122 Ky. 781, 93 S. W. 584. See *State* v. *Fleetwood,* — Del. —, 65 Atl. 772.

And it seems that in impeaching such declarations, the witness testifying to them may be asked directly what statements the declarant made. *State* v. *Mayo,* 42 Wash. 540, 85 Pac. 251, 7 A. & E. Ann. Cas. 881.

[9] *Wroe* v. *State,* 20 Ohio St. 460; *State* v. *Taylor,* 56 S. C. 360, 34 S. E. 939; *Maine* v. *People,* 9 Hun, 113; *Stacy* v. *Graham,* 14 N. Y. 492.

the admission of the contradictions of the same; that, if public policy demands the admission of the declarations to advance public justice, the like policy must be exercised in favor of life and liberty, to admit the conflicting statements,[10] and that hence they are admissible, and it is error for the court to refuse to permit such impeaching testimony to be introduced.[11] It is for the court to determine the competency of the impeaching evidence, and for the jury to pass on its credibility.[12]

§ 299. Fragmentary declarations inadmissible.—If it be shown that the declarations were uttered by the dying man, to be connected with and qualified by other statements, and with them to form an entire, complete narrative, and before the purposed disclosure was fully made, they had been interrupted and the narrative left unfinished, such partial declarations, it is held, would not be competent evidence.[1] Likewise, they may be excluded where the witness who proposes to prove them did not hear and understand all that was said.[2]

[10] See note 8, supra; *Shell* v. *State,* 88 Ala. 14, 7 So. 40; *Gregory* v. *State,* 140 Ala. 16, 37 So. 259; *People* v. *Lawrence,* 21 Cal. 368; *Battle* v. *State,* 74 Ga. 101; *Dunn* v. *People,* 172 Ill. 582, 50 N. E. 137, 11 Am. Crim. Rep. 447; *Hurd* v. *People,* 25 Mich. 405; *M'Pherson* v. *State,* 9 Yerg. 279; *Rex* v. *Sellers,* O. B. 1796, Car. Crim. Law, 233. See *State* v. *McGowan,* 66 Conn. 392, 34 Atl. 99; *Green* v. *State,* 154 Ind. 655, 57 N. E. 637.

[11] *Herd* v. *State,* 43 Tex. Crim. Rep. 575, 67 S. W. 495.

As to absence of witness to impeach by contradictory statements as ground for continuance, see *Wyatt* v. *Com.* 8 Ky. L. Rep. 55, 1 S. W. 196.

[12] *Nelms* v. *State,* 13 Smedes & M. 500, 53 Am. Dec. 94; *Moore* v. *State,* 12 Ala. 764, 46 Am. Dec. 276; *Starkey* v. *People,* 17 Ill. 17.

[1] *Vass* v. *Com.* 3 Leigh, 786, 24 Am. Dec. 695; *Luby* v. *Com.* 12 Bush, 1; *Finn* v. *Com.* 5 Rand. (Va.) 701; *McLean* v. *State,* 16 Ala. 672; *Rex* v. *Fagent,* 7 Car. & P. 238. See *Jackson* v. *Com.* 19 Gratt. 656; *State* v. *Nettlebush,* 20 Iowa, 257; *State* v. *Johnson,* 118 Mo. 491, 40 Am. St. Rep. 405, 24 S. W. 229. See *State* v. *Patterson,* 45 Vt. 308, 12 Am. Rep. 200; *Brown* v. *State,* 32 Miss. 433; *Park* v. *State,* 126 Ga. 575, 55 S. E. 489 (as to interruption where the statement was subsequently finished).

[2] *State* v. *Center,* 35 Vt. 378;

But if it appear that the deceased stated all he desired to say, the fact that the narrative of what occurred is not complete does not render the declaration incompetent,[3] for it is only necessary that his expression as to any given fact should express all he intended to say and convey his meaning as to such fact.[4]

But such a declaration is not sufficient where it does not state who did the injury, although it was stated at the time of the injury, but not repeated as a part of the dying declaration.[5]

§ 300. In answer to questions.—As we have shown,[1] it is not an objection to the declaration that it was made in answer to leading questions, if it appear that the declarant spoke intelligently, and did not torpidly assent to what was said by his questioner;[2] but it is not a dying declaration where it is a mere passive acquiescence in such questions as, "Do you

State v. *Mace,* 118 N. C. 1244, 24 S. E. 798; *Drake* v. *State,* 25 Tex. App. 293, 7 S. W. 868; *Brown* v. *State,* 32 Miss. 433.

[3] *Boyle* v. *State,* 97 Ind. 322; *State* v. *Patterson,* 45 Vt. 308, 12 Am. Rep. 200; *People* v. *Chin Mook Sow,* 51 Cal. 597; *McLean* v. *State,* 16 Ala. 672; *Vass* v. *Com.* 3 Leigh, 786, 24 Am. Dec. 695; *State* v. *Nettlebush,* 20 Iowa, 257.

[4] *State* v. *Patterson,* 45 Vt. 308, 12 Am. Rep. 200; *State* v. *Nettlebush,* 20 Iowa, 257; *McLean* v. *State,* 16 Ala. 672; *Vass* v. *Com.* 3 Leigh, 786, 24 Am. Dec. 695; *Brande* v. *State,* — Tex. Crim. Rep. —, 45 S. W. 17. See *Leigh* v. *People,* 113 Ill. 372; *State v. Ashworth,* 50 La. Ann. 94, 23 So. 270; *State* v. *Mace,* 118 N. C. 1244, 24 S. E. 798. See *Powers* v. *State,* 74 Miss. 777, 21 So. 657; *Worthington* v. *State,* 92 Md. 222, 56 L.R.A. 353, 84 Am. St. Rep. 506, 48 Atl. 355; *People* v. *Chin Mook Sow,* 51 Cal. 597.

[5] *State* v. *Johnson,* 118 Mo. 491, 40 Am. St. Rep. 405, 24 S. W. 229.

[1] Supra, § 293.

[2] *Rex* v. *Fagent,* 7 Car. & P. 238; *Reg.* v. *Smith,* Leigh & C. C. C. 607, 34 L. J. Mag. Cas. N. S. 153, 11 Jur. N. S. 695, 12 L. T. N. S. 609, 13 Week. Rep. 816, 10 Cox, C. C. 82; *Com.* v. *Casey,* 11 Cush. 417, 59 Am. Dec. 150; *Com.* v. *Haney,* 127 Mass. 455; *Jones* v. *State,* 71 Ind. 66; *Ingram* v. *State,* 67 Ala. 67; *State* v. *Wilson,* 24 Kan. 189, 36 Am. Rep. 257; *People* v. *Sanchez,* 24 Cal. 17; *State* v. *Trivas,* 32 La. Ann. 1086, 36 Am. Rep. 293.

think you are in bodily danger?" and, "Are you aware that you are to die?" [3]

§ 301. The substance of the declaration may be proved.—It is not necessary to repeat the declaration in the language of the declarant, but the substance of it may be given.[1] But if the witness undertakes to give the exact words of the declaration, it is for the jury to judge of their import, and the witness cannot be asked as to what the declarant meant.[2] And if the necessity arises, it may be stated through the medium of an interpreter.[3]

§ 302. Character of the declarant; nature of the declaration.—As testimony, the dying declaration stands upon the same footing as though uttered by a witness called into court and then examined;[1] hence its trustworthiness depends upon the character of the declarant, no less than the trustworthiness of the reporter. In one case where dying declarations were admitted to show that accused had given medicine to declarant with intent to produce an abortion upon her, which medicine was the cause of her death, accused was allowed to

[3] *Reg.* v. *Osman,* 15 Cox, C. C. 1. See supra, § 293.

[1] *Black* v. *State,* 1 Tex. App. 368; *Krebs* v. *State,* 8 Tex. App. 1; *Ward* v. *State,* 8 Blackf. 101; *Worthington* v. *State,* 92 Md. 222, 56 L.R.A. 353, 84 Am. St. Rep. 506, 48 Atl. 355; *Montgomery* v. *State,* 11 Ohio, 424; *Starkey* v. *People,* 17 Ill. 17; *Nelms* v. *State,* 13 Smedes & M. 500, 53 Am. Dec. 94.

[2] *Castillo* v. *State,* — Tex. Crim. Rep. —, 69 S. W. 517; *Nelms* v. *State,* 13 Smedes & M. 500, 53 Am. Dec. 94.

[3] *Montgomery* v. *State,* 11 Ohio, 424; *Starkey* v. *People,* 17 Ill. 17; *Ward* v. *State,* 8 Blackf. 101; *Nelms* v. *State,* 13 Smedes & M. 500, 53 Am. Dec. 94; supra, § 295.

[1] *Donnelly* v. *State,* 26 N. J. L. 496; *Nesbit* v. *State,* 43 Ga. 238; Roscoe, Crim. Ev. 37; *State* v. *Burt,* 41 La. Ann. 787, 6 L.R.A. 79, 6 So. 631; *Lester* v. *State,* 37 Fla. 382, 20 So. 232; *Redd* v. *State,* 99 Ga. 210, 25 S. E. 268; *People* v. *Knapp,* 1 Edm. Sel. Cas. 177; *Carter* v. *People,* 2 Hill, 317.

show that declarant was considered a woman of loose character and light reputation.[2]

It may be shown that declarant was insane,[3] or an unbeliever,[4] or was in the habit of making mistakes as to the identity of others.[5] It may be shown that they were made under improper suggestions, or procured through the agency of others, and that they present only a partial or erroneous state of facts.[6]

It has been held, however, that it is not competent for the accused to prove that, before the affray, the deceased had expressed a violent hatred towards him and a disposition to do him injury, or was very hostile to him.[7] The reason for this plainly appears. The alleged hatred, disposition to do injury, and hostility afford no justification nor excuse for the homicidal act.

§ 303. Conflicting declarations; weight of declaration.—Where dying declarations are inconsistent with each other, it is the duty of the jury to weigh them, and to determine which, if either, is to be believed; and if the charge of the court takes this duty from the jury, or if the court undertakes to determine these questions, it is error.[1] The jury are to judge of the credit to be given to dying declarations, as in the case of all other testimony, by all the circumstances

[2] *People* v. *Knapp*, 1 Edm. Sel. Cas. 117. See *Carter* v. *People*, 2 Hill, 317; supra, § 60.

[3] *Donnelly* v. *State*, 26 N. J. L. 469. See *Bolin* v. *State*, 9 Lea, 516; *State* v. *Ah Lee*, 8 Or. 214; supra, § 290.

[4] Supra, § 291.

[5] *Com.* v. *Cooper*, 5 Allen, 495, 81 Am. Dec. 762.

[6] *Brown* v. *State*, 32 Miss. 433. See *State* v. *Murdy*, 81 Iowa, 603, 47 N. W. 867; *Com.* v. *Casey*, 11 Cush. 417, 59 Am. Dec. 150; *State* v. *Banister*, 35 S. C. 290, 14 S. E. 678; *Ledbetter* v. *State*, 23 Tex. App. 247, 5 S. W. 226; *Craven* v. *State*, 49 Tex. Crim. Rep. 78, 122 Am. St. Rep. 799, 90 S. W. 311.

[7] *State* v. *Varney*, 8 Boston L. Rep. 542; post, § 376.

[1] *Moore* v. *State*, 12 Ala. 764, 46 Am. Dec. 276; *Starkey* v. *People*, 17 Ill. 17; supra, § 276.

that surround the declarations.[2] The court should instruct the jury that, to enable them to decide upon the credit to give to dying declarations, they are entitled to consider them in the light of all the evidence in the case,[3] the absence of opportunity for cross-examination,[4] any inconsistency in them,[5] conduct of the declarant,[6] the mental condition of the declarant, and all the circumstances under which they were made.[7]

Although the law recognizes the necessity for their admission when made in the article of death, as equivalent to the sanction of an oath, yet the law does not regard them as of the same weight and value as the testimony of a witness given in open court under the safeguards provided for the discovery of the truth,[8] holding that the testimony of the witness, where he is seen, heard, and cross-examined, is of greater weight than the statements of a dying man, whose condition the jury could not observe and whose statement was not subjected to the corrective and explanatory test of cross-examination.[9]

[2] *Com.* v. *Casey,* 11 Cush. 417, 59 Am. Dec. 150; *Donnelly* v. *State,* 26 N. J. L. 483, 601.

[3] *Jones* v. *State,* 70 Miss. 401, 12 So. 444; *Murphy* v. *People,* 37 Ill. 447; *Wyatt* v. *Com.* 8 Ky. L. Rep. 55, 1 S. W. 196; *United States* v. *Gleason,* Woolw. 128, Fed. Cas. No. 15,216. See *State* v. *Pearce,* 56 Minn. 226, 57 N. W. 652, 1065.

[4] *Brown* v. *State,* 32 Miss. 433.

People v. *Kraft,* 148 N. Y. 631, 43 N. E. 80, s. c. 91 Hun, 474, 36 N. Y. Supp. 1034; *State* v. *Davis,* 134 N. C. 633, 46 S. E. 722. See *State* v. *Eddon,* 8 Wash. 292, 36 Pac. 139, and *Zipperian* v. *People,* 33 Colo. 134, 79 Pac. 1018.

[5] *Moore* v. *State,* 12 Ala. 764, 46 Am. Dec. 276; *Richards* v. *State,* 82 Wis. 172, 51 N. W. 652.

[6] *Donnelly* v. *State,* 26 N. J. L. 463.

[7] *Brown* v. *State,* 32 Miss. 433; *State* v. *Crawford,* 31 Wash. 260, 71 Pac. 1030; *State* v. *Cameron,* 2 Chand. (Wis.) 172.

[8] *People* v. *Kraft,* 148 N. Y. 631, 43 N. E. 80, s. c. 91 Hun, 474, 36 N. Y. Supp. 1034; *Nordgren* v. *People,* 211 Ill. 425, 71 N. E. 1042; *Railing* v. *Com.* 110 Pa. 100, 1 Atl. 314, 6 Am. Crim. Rep. 7. But see *Hill* v. *State,* 41 Ga. 484.

[9] *State* v. *Vansant,* 80 Mo. 67; *State* v. *Mathes,* 90 Mo. 571, 2 S. W. 800. See *People* v. *Amaya,* 134 Cal. 531, 66 Pac. 794, where a verdict was upheld based only on the dying declaration of the deceased and silence of defendant when accused.

It has been held that no greater weight should be given to dying declarations than would be given to any sworn testimony in the absence of cross-examination.[10]

Although the sanction is the same, the opportunity for investigation is very different, and therefore the accused is entitled to every allowance and benefit that he may have lost by the absence of the opportunity of a fuller investigation by the means of cross-examination.[11]

§ 304. Admissible on behalf of accused.—Dying declarations are admissible in favor of, as well as against, the accused,[1] but they must be made under a sense of impending dissolution,[2] and must be relevant to the immediate fact of the killing.[3] It is said in an English case[4] that a declaration in favor of the accused must ever be taken to be more likely to be true, as it is not probable that a person should make a statement favorable to the person who has inflicted a mortal injury upon him, but rather the contrary.

It is also said that the rules of evidence ought not to be so rigorously applied when the fact satisfactorily appears that they favor the accused, as where they are urged against him.[5]

[10] *State* v. *Eddon,* 8 Wash. 292, 36 Pac. 139; *Zipperian* v. *People,* 33 Colo. 134, 79 Pac. 1018.

[11] *Rex* v. *Ashton,* 2 Lewin, C. C. 147; 3 Russell, Crimes, 7th ed. p. 2094.

[1] *Rex* v. *Scaife,* 1 Moody & R. 551, 2 Lewin, C. C. 150; *United States* v. *Taylor,* 4 Cranch, C. C. 338, Fed. Cas. No. 16,436; *Moore* v. *State,* 12 Ala. 764, 46 Am. Dec. 276; *Brock* v. *Com.* 92 Ky. 183, 17 S. W. 337; *State* v. *Ashworth,* 50 La. Ann. 94, 23 So. 270; *People* v. *Knapp,* 26 Mich. 112; *Mattox* v. *United States,* 146 U. S. 140, 36 L. ed. 917, 13 Sup. Ct. Rep. 50; *People* v. *Southern,* 120 Cal. 645, 53 Pac. 214; *Re Orpen,* 86 Fed. 760; *State* v. *Saunders,* 14 Or. 300, 12 Pac. 441; *State* v. *Uzzo,* — Del. —, 65 Atl. 775; *Green* v. *State,* 89 Miss. 331, 42 So. 797. Contra. *Adams* v. *People,* 47 Ill. 376; *Moeck* v. *People,* 100 Ill. 242, 39 Am. Rep. 38.

[2] *Com.* v. *Densmore,* 12 Allen, 535; *People* v. *McLaughlin,* 44 Cal. 435; *Jones* v. *State,* 52 Ark. 345, 12 S. W. 704.

[3] *Sayres* v. *Com.* 88 Pa. 291.

[4] *Rex* v. *Scaife,* 1 Moody & R. 551, 2 Lewin, C. C. 150.

[5] *State* v. *Ashworth,* 50 La. Ann. 94, 23 So. 270.

The general rule that dying declarations speak only to the facts, and not to matters of opinion, has been relaxed where the opinion expressed by the deceased was favorable to the accused, in explanation of the conduct of the deceased,[6] and hence the declaration that the accused would not have struck him if deceased had not provoked him is competent,[7] as also the direct declaration by the deceased showing that the killing was done by another person.[8]

XII. Threats of Deceased.

§ 305. Threats admissible in homicide.—Another exception to the rule excluding hearsay is to be found in the reception, in homicide cases, when a prima facie case of self defense is set up, of proof of threats made by deceased pointed at the defendant. This exception will be hereafter distinctively discussed.[1]

XIII. Depositions.

§ 306. Depositions in criminal cases regulated by statute.—Depositions can only be admitted in criminal cases under local statute, and in submission to the constitutional guaranties as to the personal examination of witnesses.[1]

[6] *Haney* v. *Com.* 5 Ky. L. Rep. 203; *State* v. *Ashworth,* 50 La. Ann. 94, 23 So. 270.

[7] *Rex* v. *Scaife,* 1 Moody & R. 551, s. c. 2 Lewin, C. C. 150; *United States* v. *Taylor,* 4 Cranch, C. C. 338, Fed. Cas. No. 16,436; *Moore* v. *State,* 12 Ala. 464, 46 Am. Dec. 276.

[8] *People* v. *Southern,* 120 Cal. 645, 53 Pac. 214.

But where it was a physical impossibility for the deceased to know who shot him, and in his dying declaration he stated that some person other than the accused shot him, it was rejected as a mere expression of opinion. *Jones* v. *State,* 52 Ark. 345, 12 S. W. 704.

[1] Post, § 757.

[1] *People* v. *Murphy,* 1 N. Y. Crim. Rep. 102; *People* v. *Gannon,* 61 Cal. 467; supra, § 230.

CHAPTER VI.

JUDICIAL NOTICE.

§ 308. Similar rules in both criminal and civil issues.
309. Takes the place of proof and is of equal force.
309a. The power to be exercised with caution.
309b. Generality of judicial notice.
309c. Judicial notice of statutes, etc.
309d. Judicial notice in support of proof of venue.
309e. Judicial notice of the relation of localities to each other.
309f. Public officers.
309g. Judicial notice of money values in criminal cases.
309h. Judicial notice of jurisdictional limits.
309i. Judicial notice of former jeopardy.
310. Judicial notice of executive orders, acts, and regulations.
310a. Attorney generals ordered to prosecute.
310b. When judicial knowledge may be exercised by the jury.
310c. Judicial notice of larceny initiated in another state.
310d. Private knowledge of court.
310e. Knowledge of court in aid of pleadings.
310f. Judicial notice in United States courts of location of postoffices, mails, and Federal census.
310g. Judicial notice of venue.
310h. Judicial notice of local option laws.
310i. Matters of judicial notice need not be averred.
310j. Judicial notice of pardon and amnesty where made by general proclamation.
310k. Age, census returns as evidence of.
310l. Judicial notice of enrolled attorneys.
310n. Age determined by inspection.
310o. Judicial notice; change of venue.

§ 308. Similar rules in both criminal and civil issues.—'As the law as to judicial notice in criminal as in civil issues

is similar, there are few distinctive features to notice. The topic in its general relations will be found discussed in Wharton's Evidence in Civil Issues under the following heads:[1]

[1] I. General Rules.
- Courts cannot take notice of evidential facts not in issue, § 276.
- Non-evidential facts may be judicially noticed, § 277. (See State v. Intoxicating Liquors, 73 Me. 278).
- Reason a co-ordinate factor with evidence, § 278.
- Judge may on his own motion interrogate witness and state points of law, § 281.
- May consult other than legal literature, § 282.
- May of his own motion take notice of law, § 283.
- Law of God, natural and revealed, § 284.
- Law of nations, § 285.
- Domestic law, § 286.

II. Codes and Their Proof.
- Federal laws not "foreign" to the states, or state laws to Federal courts.
- Particular states foreign to each other, § 288.
- State laws may be proved from printed volumes, § 289.
- Court may determine whether statute has passed, § 290.
- Judicial notice taken of laws of prior sovereign, § 291.
- Private laws not noticed by court, § 292.
- Distinction between public and private laws, § 293.
- Courts take notice of mode of authenticating laws; and herein of legislative action generally, § 295.
- Subsidiary systems noticed, § 296.
  - Equity, § 296.
  - Military laws, § 297.
  - Law merchant and maritime, § 298.
  - Ecclesiastical law, § 299.
- Foreign law must be proved, § 300.
- Proof must be by parol, § 302.
- Experts admissible for this purpose, § 305.
- Experts may verify books and authorities, § 308.
- Foreign statutes may be proved by exemplification, § 309.
- Printed volumes are prima facie proof, § 310.
- Judicial construction of one state is adopted by another, § 311.
- Statute must be put in evidence, § 312.
- Foreign elementary jurisprudence can be noticed, § 313.
- Foreign law presumed not to be different from *lex fori*, § 314.
- But not so as to local peculiarities, § 315.
- *Lex fori* determines rules of evidence, § 316.

§ 309. Takes the place of proof and is of equal force.—Judicial notice takes the place of proof, and is of equal force with any fact shown in evidence. As a means of establishing facts it is therefore superior to evidence. In its appropriate field it displaces evidence, since, as it stands for proof, it fulfils the object which evidence is designed to fulfil, and makes evidence unnecessary. If, in regard to any subject of judicial notice, the court should permit documents to be referred to, or testimony, it would not be in any proper sense the admission of evidence, but simply a resort to a convenient means of refreshing the memory, or making the trier aware of that which everybody ought to know.[1]

III. Executive and Judicial Documents.
- Court takes notice of executive documents, § 317.
- Public seal of state self proving, § 318.
- So of seals of notaries, § 320.
- So of seals of court, § 321.
- So of handwriting of executive, § 322.
- So of existence of foreign sovereignties, § 323.
- So of judicial officers and practice, § 324.
- So of proceedings in a particular case, § 325.
- So of records of court, § 326.

IV. Notoriety.
- Notoriety in Roman law, § 327.
- Canon law, § 328; General characteristics of notoriety, § 329.
- Of notoriety no proof need be offered, § 330.
- Notorious customs need not be proved, § 331.

Instances:
- Courses of season, § 332.
- Limitations of human life as to age, § 333.
- Limitations of human life as to gestation, § 334.
- Conclusions of science and political economy, § 335.
- Ordinary psychological and physical law, § 336.
- Leading domestic political appointments, § 337.
- Leading public events, § 339. See as to "Sherman's March to the Sea," *Williams* v. *State*, 67 Ga. 260.
- Leading features of Geography, § 340.

[1] *State* v. *Main*, 69 Conn. 123, 36 L.R.A. 623, 61 Am. St. Rep. 30, 37 Atl. 80; *Com.* v. *Marzynski*, 149 Mass. 68, 21 N. E. 228; *State* v. *Morris*, 47 Conn. 179; *State* v. *Downs*, 148 Ind. 324, 47 N. E. 670. See also *Brown* v. *Piper*, 91 U. S. 37, 23 L. ed. 200; *North Hempstead* v. *Gregory*, 53 App. Div. 350, 65 N. Y. Supp. 867.

The process of taking judicial notice does not necessarily imply that the judge at the moment actually knows and feels sure of the truth of the matter submitted; it merely relieves the party from offering evidence, because the matter is one which the judge either knows or can easily discover.[2]

Facts of universal notoriety need never be proved, if they are matters which must have happened according to the constant and invariable course of nature, or are of such general and public notoriety that everyone may fairly be presumed to be acquainted with them.[3]

§ 309a. The power to be exercised with caution.—This power, however, is to be exercised with caution,[a] and care must be taken that the necessary notoriety exists. Every reasonable doubt should be resolved promptly in the negative.[1] As the common knowledge of man ranges far and wide, so this doctrine, as applied to criminal prosecutions, embraces matters curiously diverse; as, that vaccination prevents the spread of smallpox,[2] that a nickel is lawful money representing 5 cents,[3] the intoxicating properties of whisky[4] and beer,[5] ordi-

[2] *Sun Ins. Office* v. *Western Woolen-Mill Co.* 72 Kan. 41, 82 Pac. 513; *Ball* v. *Flora,* 26 App. D. C. 394.

[3] *People* v. *Mayes,* 113 Cal. 618, 45 Pac. 860; *State* v. *Braskamp,* 87 Iowa, 588, 54 N. W. 532; *State* v. *Brooks,* 8 Kan. App. 344, 56 Pac. 1127; *State* v. *Lingle,* 128 Mo. 528, 31 S. W. 20; *State ex rel. Thayer* v. *Boyd,* 34 Neb. 435, 51 N. W. 964; *Austin* v. *State,* 101 Tenn. 563, 50 L.R.A. 478, 70 Am. St. Rep. 703, 48 S. W. 305; *State* v. *Goyette,* 11 R. I. 592, 3 Am. Crim. Rep. 282; *Watson* v. *State,* 55 Ala. 158; *Boullemet* v. *State,* 28 Ala. 83; 12 Am. & Eng. Enc. Law, p. 199.

a *Gunning* v. *People,* 189 Ill. 165, 82 Am. St. Rep. 433, 59 N. E. 494, 15 Am. Crim. Rep. 454.

[1] *Brown* v. *Piper,* 91 U. S. 37, 23 L. ed. 200.

[2] *Com.* v. *Pear,* 183 Mass. 242, 67 L.R.A. 935, 66 N. E. 719.

[3] *Barddell* v. *State,* 144 Ala. 54, 39 So. 975.

[4] *Loveless* v. *State,* — Tex. Crim. Rep. —, 49 S. W. 602; *Rau* v. *People,* 63 N. Y. 277; *Hodge* v. *State,* 116 Ga. 852, 43 S. E. 255; *Fears* v. *State,* 125 Ga. 740, 54 S. E. 661; *Wall* v. *State,* 78 Ala. 417; *State* v. *York,* 74 N. H. 125, 65 Atl. 685, 13 A. & E. Ann. Cas. 116; *Frese* v. *State,* 23 Fla. 267, 2 So. 1; *State* v. *Murphy,* 23 Nev. 390, 48 Pac. 628.

[5] *Wiles* v. *State,* 33 Ind. 206;

nary period of gestation in man,[6] the nauseating effect of tobacco,[7] color of natural butter,[8] natural appearance of oleomargarin.[9]

§ 309b. Generality of judicial notice.—As we have seen,[1] judicial notice supplies the proof of facts, or, in other words, dispenses with the proof of those things of which knowledge is well-nigh universal. Judicial notice, then, being based upon a recognition of facts of almost universal knowledge, cannot for that reason be treated logically or as the development of a topic, as its universality is such that it cannot be subjected to any other than a general classification.

Sothman v. *State,* 66 Neb. 302, 92 N. W. 303.

[6] *State* v. *Sexton,* 10 S. D. 127, 72 N. W. 84.

[7] *State* v. *Johnson,* 118 Mo. 491, 40 Am. St. Rep. 405, 24 S. W. 229.

[8] *People* v. *Hillman,* 58 App. Div. 571, 69 N. Y. Supp. 66.

[9] *People* v. *Meyer,* 44 App. Div. 1, 60 N. Y. Supp. 415.

The court will take notice of a decision of the United States Supreme Court declaring unconstitutional a state law as to a certain class of cases. *State* v. *Bates,* 22 Utah, 65, 83 Am. St. Rep. 768, 61 Pac. 905.

That the manufacture of clothing in unsanitary apartments will promote disease. *State* v. *Hyman,* 98 Md. 596, 64 L.R.A. 637, 57 Atl. 6, 1 A. & E. Ann. Cas. 742.

What vaccination is. *Com.* v. *Pear,* 183 Mass. 242, 67 L.R.A. 935, 66 N. E. 719.

Population of county. *State ex rel. Crow* v. *Evans,* 166 Mo. 347, 66 S. W. 355.

Population of a city. *State ex rel. Crow* v. *Page,* 107 Mo. App. 213, 80 S. W. 912.

Land never assessed at its full cash value for purposes of taxation. *State ex rel. Blee Bldg. Co.* v. *Savage,* 65 Neb. 714, 91 N. W. 716.

Speed of automobiles. *People* v. *Schneider,* 139 Mich. 673, 69 L.R.A. 345, 103 N. W. 172, 5 A. & E. Ann. Cas. 790.

Appellate courts will notice judicially what has been noticed judicially in the court below. *Harvey* v. *Territory,* 11 Okla. 156, 65 Pac. 837; *People ex rel. Atty. Gen.* v. *Michigan C. R. Co.* 145 Mich. 140, 108 N. W. 772.

So, where it is alleged that a river is navigable, the court cannot, on demurrer, take judicial notice that it is non-navigable, and so prevent proof to be introduced showing the fact of navigability. *State ex rel. Atty. Gen.* v. *Norcross,* 132 Wis. 534, 122 Am. St. Rep. 998, 112 N. W. 40.

[1] Supra, § 309.

§ 309c. Judicial notice of statutes, etc.—Courts and juries will take judicial notice of general statutes, rules of the common law, and decisions of superior courts;[1] also of local acts that are public in their nature;[2] also of public incorporation acts;[3] and state courts will take judicial notice that an act of Congress is operative within the jurisdiction of such courts;[4] and while courts will take judicial notice of the passage of local laws, they cannot take judicial notice that such laws are in operation in any particular locality.[5]

§ 309d. Judicial notice in support of proof of venue.—Courts take judicial notice of the location, population, divisions and boundaries of towns, cities, and municipalities generally.[1] Thus proof that crime was committed in Chicago is proof that it was committed in the limits of Cook county,[2] that the city of St. Louis is in the county of St. Louis.[3]

[1] *Lenahan* v. *People*, 3 Hun, 164. See *Puckett* v. *State*, 71 Miss. 192, 14 So. 452; *Davis* v. *State*, 141 Ala. 84, 109 Am. St. Rep. 19, 37 So. 454; *Bessette* v. *People*, 193 Ill. 334, 56 L.R.A. 558, 62 N. E. 215; *State* v. *Scampini*, 77 Vt. 92, 59 Atl. 201.

[2] *State* v. *Piner*, 141 N. C. 760, 53 S. E. 305; *State* v. *Olinger*, — Iowa, —, 72 N. W. 441; *Crigler* v. *Com.* 120 Ky. 512, 87 S. W. 276.

[3] *State* v. *Webb's River Improv. Co.* 97 Me. 559, 55 Atl. 495.

[4] *Bink* v. *State*, 48 Tex. Crim. Rep. 598, 89 S. W. 1075; *Davenport* v. *State*, 49 Tex. Crim. Rep. 11, 89 S. W. 1078.

[5] *Ellison* v. *Com.* 6 Ky. L. Rep. 306; *State* v. *Macy*, 72 Mo. App. 427; *Craddick* v. *State*, 48 Tex. Crim. Rep. 385, 88 S. W. 347. See also *State* v. *Burkett*, 83 Miss. 301, 35 So. 689.

[1] *Gunning* v. *People*, 189 Ill. 165, 82 Am. St. Rep. 433, 59 N. E. 494, 15 Am. Crim. Rep. 454; *State* v. *Arthur*, 129 Iowa, 235, 105 N. W. 422; *State* v. *Brooks*, 8 Kan. App. 344, 56 Pac. 1127; *Com.* v. *Patterson*, 10 Ky. L. Rep. 167, 8 S. W. 694; *Hendrickson* v. *Com.* 15 Ky. L. Rep. 542; *State* v. *Anslinger*, 171 Mo. 600, 71 S. W. 1041; *State* v. *Buralli*, 27 Nev. 41, 71 Pac. 532; *State* v. *Southern R. Co.* 141 N. C. 846, 53 S. E. 294; *Com.* v. *Kaiser*, 184 Pa. 493, 39 Atl. 299; *Seibright* v. *State*, 2 W. Va. 591; *State* v. *Powers*, 25 Conn. 48; *State* v. *Jordan*, 12 Tex. 205.

[2] *Sullivan* v. *People*, 122 Ill. 385, 13 N. E. 248; *Com.* v. *Salawich*, 28 Pa. Super. Ct. 330; *People* v. *Etting*, 99 Cal. 577, 34 Pac. 237; *Huston* v. *People*, 53 Ill. App. 501; *State* v. *Reader*, 60 Iowa, 527, 15 N. W. 423; *People* v. *Curley*, 99 Mich. 238, 58 N. W. 68.

[3] *State* v. *Burns*. 48 Mo. 438.

§ 309e. Judicial notice of the relation of localities to each other.—Courts also take judicial notice that St. Louis and Chicago are great marts of trade for stock;[1] of the distance between well-known cities in the United States; of the ordinary speed of railway trains between the same;[2] of the situation of a foreign town and that a bar exists in the river, which vessels cannot cross;[3] of the fact that a certain county joins another and that there are facilities for communication by railroad and telephone between two certain places;[4] of the distance of a place from the seat of government;[5] of the result of an election on the question of a removal of the county seat;[6] of the limits of the county and of the fact that the place proved was within such limits;[7] of the lines of counties and towns embraced therein;[8] of the county in which a town created by law is situated.[9]

§ 309f. Public officers.—Courts do not judicially know that the presiding judge and the district attorney are one and the same person,[1] or of any person as an officer unless enumerated in the Code;[2] they will, however, take cognizance of who are justices of the peace in the county,[3] and when their terms terminate,[4] and office of treasurer of a school district,[5] that

[1] *White* v. *Missouri P. R. Co.* 19 Mo. App. 400,

[2] *Pearce* v. *Langfit,* 101 Pa. 507, 47 Am. Rep. 737.

[3] *The Peterhoff,* Blatchf. Prize Cas. 463, Fed. Cas. No. 11,024.

[4] *Evans* v. *Kilby,* 81 Ga. 278, 7 S. E. 226.

[5] *Hoyt* v. *Russell,* 117 U. S. 401, 29 L. ed. 914, 6 Sup. Ct. Rep. 881.

[6] *Andrews* v. *Knox County,* 70 Ill. 65.

[7] *Indianapolis & C. R. Co.* v. *Case,* 15 Ind. 42.

[8] *Ham* v. *Ham,* 39 Me. 263; *State* v. *Jackson,* 39 Me. 291; *Brown* v. *Elms,* 10 Humph. 135.

[9] *Martin* v. *Martin,* 51 Me. 366; *Vanderwerker* v. *People,* 5 Wend. 530; *Hoffman* v. *State,* 12 Tex. App. 406. Compare *Clayton* v. *May,* 67 Ga. 769.

[1] *Shropshire* v. *State,* 12 Ark. 190.

[2] *Alford* v. *State,* 8 Tex. App. 545.

[3] *Chambers* v. *People,* 5 Ill. 351; *Graham* v. *Anderson,* 42 Ill. 514, 92 Am. Dec. 89.

[4] *Stubbs* v. *State,* 53 Miss. 437.

[5] *State ex rel. Ackerman* v. *Dahl,* 65 Wis. 510, 27 N. W. 343.

a township trustee acts as trustee of a school township;[6] registers of counties;[7] the authority and signature of a constable.[8] But not of attorneys,[9] of the appointment or election of sheriffs as well as of other executive and administrative officers;[10] that one who signs as a "notary public" is a notary for the county,[11] and of the notarial certificate as proof of presentment and nonpayment.[12]

§ 309g. Judicial notice of money values in criminal cases.—Courts also will notice judicially the meaning of words used to designate the circulating medium, its value, and also that of all moneys, foreign or domestic, whose value is established by law;[1] that "bank notes" are considered and treated as money, and the correct value of the same as respects the graduating of the offense of stealing is the sum which, upon their face, they promise to pay;[2] also of the different coins made at the United States mints pursuant to law, and such foreign coins as are made current by law; hence in prosecutions for counterfeiting, it is not necessary to prove

[6] *State* v. *McDonald,* 106 Ind. 233, 6 N. E. 607.

[7] *Fancher* v. *De Montegre,* 1 Head, 40. And this embraces sheriffs and marshals.

[8] *Cannon* v. *Cannon,* 66 Tex. 682, 3 S. W. 36.

[9] *Masterson* v. *LeClaire,* 4 Minn. 163, Gil. 108.

[10] *Thompson* v. *Haskell,* 21 Ill. 215, 74 Am. Dec. 98; *Alexander* v. *Burnham,* 18 Wis. 200; *Ingram* v. *State,* 27 Ala. 17.

[11] *Stoddard* v. *Sloan,* 65 Iowa, 680, 22 N. W. 924.

[12] *Pierce* v. *Indseth,* 106 U. S. 546, 27 L. ed. 254, 1 Sup. Ct. Rep. 418.

Of a notary seal. *The Gallego,* 30 Fed. 271.

[1] Underhill, Ev. § 237; Underhill, Crim. Ev. § 298.

[2] 2 Wharton, Crim. Law, § 1765; *Jones* v. *State,* 39 Tex. Crim. Rep. 387, 46 S. W. 250; *Bagley* v. *State,* 3 Tex. App. 163; *Duvall* v. *State,* 63 Ala. 12; *Barddell* v. *State,* 144 Ala. 54, 39 So. 975; *Menear* v. *State,* 30 Tex. App. 475, 17 S. W. 1082; *Re Sanderson,* 74 Cal. 199, 15 Pac. 753; *Hart* v. *State,* 55 Ind. 599; *Dillard* v. *Evans,* 4 Ark. 175; *Grant* v. *State,* 55 Ala. 201.

Reference to Confederate money. *Buford* v. *Tucker,* 44 Ala. 89.

But Canadian currency not no-

that there are genuine coins, of which those alleged to have been made are imitations.[3]

§ 309h. Judicial notice of jurisdictional limits.—In prosecutions for crimes also the fact of cession and segregation of a portion of the territory of a state to exclusive foreign jurisdiction and control is the exercise of one of the highest acts of sovereignty and one that affects the people of the state at large. Courts will take judicial notice of the fact of cession and that crimes committed within the ceded territory are beyond the jurisdiction of state courts.[1] That such crimes thus committed are triable in the courts of the United States, but punished as provided by the state law.[2]

§ 309i. Judicial notice of former jeopardy.—In criminal prosecutions, where the defense is former jeopardy, based on a former trial, the court will judicially know and determine from an inspection of the record what took place at such trial.[1] The court can take judicial notice that the offense

ticed. *Kermott* v. *Ayer,* 11 Mich. 181.

[3] *United States* v. *Burns,* 5 McLean, 23, Fed. Cas. No. 14,691.

Depreciation of paper currency not judicially noticed, but must be proved. *Bell* v. *Waggener,* 7 T. B. Mon. 524.

[1] *Lasher* v. *State,* 30 Tex. App. 387, 28 Am. St. Rep. 922, 17 S. W. 1064; *United States* v. *Cornell,* 2 Mason, 60, Fed. Cas. No. 14,867; *United States* v. *Davis,* 5 Mason, 356, Fed. Cas. No. 14,930; *People* v. *Snyder,* 41 N. Y. 397.

[2] *United States* v. *Davis,* 5 Mason, 356, Fed. Cas. No. 14,930; *Wills* v. *State,* 3 Heisk. 141; *Gordon* v. *Tweedy,* 74 Ala. 232, 49 Am. Rep. 813; 1 Greenl. Ev. § 6; *Com.* v. *Clary,* 8 Mass. 72; *Conner* v. *State,* 23 Tex. App. 378, 5 S. W. 189; *Boston* v. *State,* 5 Tex. App. 383, 32 Am. Rep. 575.

[1] *Richardson* v. *State,* 47 Tex. Crim. Rep. 592, 85 S. W.282; *Robinson* v. *State,* 21 Tex. App. 160, 17 S. W. 632; *Foster* v. *State,* 25 Tex. App. 543, 8 S. W. 664.

"By reference to the former proceedings in the case, the court may have ascertained that the plea was not true; that the record showed the contrary to the allegations of the plea." *Richardson* v. *State,* 47 Tex. Crim. Rep. 592, 85 S. W. 282.

"The trial court must take judicial notice that an appeal was

charged in the different counts is the same, varied so as to meet the proof; and a conviction on one would bar a future prosecution for the same offense.[2]

§ 310. Judicial notice of executive orders, acts, and regulations.—Orders of the executive department, either of the state,[1] or of the Federal government,[2] are noticed judicially by the courts. Hence, where the executive of a state, either under statutory provision or by virtue of his inherent power, calls upon the attorney general to institute certain prosecutions in certain courts of the state, those courts will take judicial notice of such executive order, and it need not be recited in the indictment which such prosecuting officer signs.[3] Likewise, where the principal departments of the Federal government establish regulations, carrying into effect public laws, the courts having jurisdiction of questions arising under such laws must take judicial notice of the existence of such regulations.[4]

§ 310a. Attorney generals ordered to prosecute.—Frequently in criminal proceedings under statutory or inherent power, executive order upon attorney generals commands

pending in another case between the same parties on the same transaction, and no evidence was necessary to show this fact when a plea of former conviction had been interposed in the case on trial between the same parties on the same transaction." *Dupree* v. *State,* 56 Tex. Crim. Rep. 562, 23 L.R.A.(N.S.) 596, 12 S. W. 871.

[2] *United States* v. *Keen,* 1 McLean, 429, Fed. Cas. No. 15,510.

[1] *Prince* v. *Skillin,* 71 Me. 361, 36 Am. Rep. 325.

[2] *Jones* v. *United States,* 137 U. S. 202, 34 L. ed. 691, 11 Sup. Ct. Rep. 80; *Armstrong* v. *United States,* 13 Wall. 154, 20 L. ed. 614; *Dowdell* v. *State,* 58 Ind. 333; *United States* v. *Beebe,* 2 Dak. 292, 11 N. W. 505.

[3] *State* v. *Bowles,* 70 Kan. 821, 69 L.R.A. 176, 79 Pac. 726; *Choen* v. *State,* 85 Ind. 209; *Territory* v. *Harding,* 6 Mont. 323, 12 Pac. 750; *State ex rel. Nolan* v. *District Ct.* 22 Mont. 25, 55 Pac. 916.

[4] *Prather* v. *United States,* 9 App. D. C. 82; *State* v. *Southern R. Co.* 141 N. C. 846, 54 S. E. 294.

them to appear and prosecute such causes in the circuit or district courts of the states, and in such instances the courts take judicial notice of such order, and such authority need not be expressed on the face of an indictment which he signs.[1]

§ 310b. When judicial knowledge may be exercised by the jury.—A jury may exercise a species of judicial notice or knowledge in the determination of facts submitted to them, in the trial of both civil and criminal issues, although in the abstract such facts must be finally determined from the testimony of the witnesses, and not from their own judgment, experience, or knowledge.[1] However, they are permitted to draw such inferences as common knowledge will suggest, respecting negligence in lying down and going to sleep in a barn upon hay or straw, with a lighted pipe in one's mouth.[2]

§ 310c. Judicial notice of larceny initiated in another state.—Under the doctrine of judicial notice, the courts will so far take notice of what constitutes larceny that, if goods stolen in one state are brought by the thief into another, it is an act constituting a continuing larceny in the latter state, where the thief may be convicted and punished.[1]

[1] *State* v. *Bowles,* 70 Kan. 821, 69 L.R.A. 176, 79 Pac. 726, 23 Am. & Eng. Enc. Law, 2d ed. p. 268; *Choen* v. *State,* 85 Ind. 209; *Territory* v. *Harding,* 6 Mont. 323, 12 Pac. 750; *State ex rel. Nolan* v. *District Ct.* 22 Mont. 25, 55 Pac. 916.

[1] *Burrows* v. *Delta Transp. Co.* 106 Mich. 582, 29 L.R.A. 468, 64 N. W. 501.

[2] *Lillibridge* v. *McCann,* 117 Mich. 84, 41 L.R.A. 381, 72 Am. St. Rep. 553, 75 N. W. 288.

Jurors may take into account their experience and relations among men, in determining the credibility of witnesses. *Jenney Electric Co.* v. *Branham,* 145 Ind. 314, 33 L.R.A. 395, 41 N. E. 448; *Lafayette Bridge Co.* v. *Olsen,* 54 L.R.A. 33, 47 C. C. A. 367, 108 Fed. 335.

[1] *Com.* v. *Andrews,* 2 Mass. 14, 3 Am. Dec. 17; *Com.* v. *Cullins,* 1 Mass. 116; *Com.* v. *Holder,* 9 Gray, 7.

§ 310d. Private knowledge of court.—The judge before whom the case is heard, cannot take an advantage of his private knowledge of the facts in issue. If he has personal knowledge of the facts it is his duty to call in another judge to preside, and to retire from the case and testify as a witness. Nor should either of the parties take advantage of the judge's private knowledge of the facts. If those facts are not a proper subject of judicial notice, they should be proved the same as if the judge had no knowledge of their existence.[1] But an exception exists in cases of contempt committed in the immediate view and presence of the court.[2]

§ 310e. Knowledge of court in aid of pleadings.—The knowledge of the court may aid, on demurrer, a defective indictment,[1] and in passing on the constitutionality of a statute, courts can judge of its operations only through facts of which it can take judicial notice;[2] it cannot take testimony to determine the operation of such statute and thereby declare it unconstitutional.[3]

§ 310f. Judicial notice in United States courts of location of postoffices, mails, and Federal census.—In prosecutions involving alleged infraction of the postal laws, judicial notice will be taken of the location of postoffices in the district;[1] that in the usual course of the mails, matter carried

[1] Hammon, Ev. § 125; *Marks* v. *Sullivan*, 8 Utah, 406, 20 L.R.A. 593, 32 Pac. 668.

[2] *Myers* v. *State*, 46 Ohio St. 473, 15 Am. St. Rep. 638, 22 N. E. 43.

[1] *United States* v. *Johnson*, 2 Sawy. 482, Fed. Cas. No. 15,488.

[2] *State* v. *Nelson*, 52 Ohio St. 88, 26 L.R.A. 320, 39 N. E. 22.

[3] Ibid.

Courts in construing statutes will take notice of what is generally known and matters of common knowledge within their jurisdiction. *Redell* v. *Moores*, 63 Neb. 219, 55 L.R.A. 740, 93 Am. St. Rep. 431, 88 N. W. 243; *Stout* v. *Grant County*, 107 Ind. 343, 8 N. E. 222; *United States* v. *Union P. R. Co.* 91 U. S. 72, 23 L. ed. 224; *State ex rel. Thayer* v. *Boyd*, 34 Neb. 435, 51 N. W. 964; *State ex rel. Utick* v. *Polk County*, 87 Minn. 325, 60 L.R.A. 178, 92 N. W. 216; *Lanfear* v. *Mestier*, 18 La. Ann. 497, 89 Am. Dec. 658.

[1] *Smitha* v. *Flournoy*, 47 Ala. 345.

reaches its destination.[2] It will also be noticed judicially those facts shown by state or Federal census,[3] and the time required to complete it, and that the state legislature would adjourn before the enumeration was completed.[4]

§ 310g. Judicial notice of venue.—In venue, a space left blank in the name of a county, in a complaint for selling liquor in a village named, is not ground for a plea in abatement, courts taking judicial notice of municipalities within their jurisdiction.[1] So courts will take judicial notice of who are its officers,[2] of who is its clerk,[3] but not those of other courts.[4] It will also notice who has been appointed a deputy clerk when necessary that such appointment should be confirmed by the court.[5]

§ 310h. Judicial notice of local option laws.—Statutes frequently provide that the court shall take judicial notice of

[2] *Gamble* v. *Central R. & Bkg. Co.* 80 Ga. 595, 12 Am. St. Rep. 276, 7 S. E. 315.

[3] *Parker* v. *State,* 133 Ind. 178, 18 L.R.A. 567, 32 N. E. 836, 33 N. E. 119; *Denney* v. *State,* 144 Ind. 503, 31 L.R.A. 726, 42 N. E. 929; *State ex rel. Atty. Gen.* v. *Cunningham,* 81 Wis. 440, 15 L.R.A. 561, 51 N. W. 724.

[4] *People ex rel. Carter* v. *Rice,* 135 N. Y. 473, 16 L.R.A. 846, 31 N. E. 921.

[1] *People* v. *Telford,* 56 Mich. 541, 23 N. W. 213; *Olive* v. *State,* 4 L.R.A. 33, and note, 86 Ala. 88, 5 So. 653.

[2] *Norvell* v. *McHenry,* 1 Mich. 227; *Dyer* v. *Last,* 51 Ill. 179.

[3] *Hammann* v. *Mink,* 99 Ind. 279.

[4] *Morse* v. *Hewett,* 28 Mich. 481.

[5] *State* v. *Barrett,* 40 Minn. 65, 41 N. W. 459.

And of their signatures as such officers. *Alderson* v. *Bell,* 9 Cal. 315.

Also that a person present in a grand-jury room was an assistant United States district attorney. *People* v. *Lyman,* 2 Utah, 30.

All appellate courts should take notice of the inferior courts and who are their judges. *Tucker* v. *State,* 11 Md. 322; *Ex parte Peterson,* 33 Ala. 74; *Kilpatrick* v. *Com.* 31 Pa. 198.

Also of the jurisdiction of the county court. *Meshke* v. *Van Doren,* 16 Wis. 320.

And of their own authority. *Platter* v. *Elkhart County,* 103 Ind. 360, 2 N. E. 544.

the result of an election on the submission of the question of local option; and in such cases it is not necessary, in a prosecution for violation of the local option law, to allege that the election was held and the result thereof.[1] But in the absence of some such provision, judicial notice cannot be taken of such facts.[2]

§ 310i. Matters of judicial notice need not be averred.—In criminal cases all matters of which the court has judicial notice need not be averred in an indictment any more than in ordinary pleadings in civil issues,[1] and where an indictment in arson described the property burned as "the jail of Wilcox county," it was held to be sufficient, it being declared that the court judicially knew that the county jails in the state were the property of the several counties in which they were situated.[2] But in a prosecution for violation of a city ordinance by engaging in the business of a ticket broker without a license, it was held that judicial notice of a city ordinance cannot be taken.[3]

§ 310j. Judicial notice of pardon and amnesty where made by general proclamation.—Where in criminal prosecutions the defendant has been pardoned of the offense under a general grant of pardon and amnesty, it is not necessary to

[1] 2 McClain, Crim. Law, § 1232; *State* v. *Bertrand,* 72 Miss. 516, 17 So. 235.

[2] *Whitman* v. *State,* 80 Md. 410, 31 Atl. 325; *Croom* v. *Stack,* 25 Tex. App. 556, 8 S. W. 661; *Ninenger* v. *State,* 25 Tex. App. 449, 8 S. W. 480.

[1] Joyce, Indictments, § 276; *Sands* v. *State,* 80 Ala. 201; *People* v. *Breese,* 7 Cow. 429; *People* v. *Fadner,* 10 Abb. N. C. 462; *Owen* v. *State,* 5 Sneed, 493.

[2] Joyce, Indictments, § 276; *Sands* v. *State,* 80 Ala. 201.

That a "public road" is a "public place." *State* v. *Warren,* 57 Mo. App. 502.

[3] *Garland* v. *Denver,* 11 Colo. 534, 19 Pac. 460.

All ordinances should be pleaded. *State* v. *Olinger,* 109 Iowa, 669, 80 N. W. 1060; *Green* v. *Indianapolis,* 22 Ind. 192; *Winona* v. *Burke,* 23 Minn. 254.

plead the same; for if the pardon and amnesty were made by a public proclamation of the President of the United States, it has the force and effect of public law, and of which all courts and officers must take notice whether especially called to their attention or not;[1] and in the ascertainment of any facts of which the courts are bound to take judicial notice, as in the decision of matters of law which it is their office to know, the judges may refresh their memory and inform their conscience from such sources as they deem most trustworthy.[2]

§ 310k. Age, census returns as evidence of.—As we have seen, courts take judicial knowledge of the census authorized by the laws of the state or the United States; certified copies of census returns of the Federal government are admissible in evidence upon the question of the age of a citizen deceased since the return was made.[1] So, under statutes, these documents, being official registers, are admissible in evidence in so far as they contain statements which the law requires should be inquired into, reported upon, and then recorded,[2] on the ground that examination of such statutes will disclose that as to each census the enumerator was required by the law itself, and not merely by the direction of his superior officer, to investigate and record the particular matters which are shown

[1] *Jenkins* v. *Collard,* 145 U. S. 546, 36 L. ed. 812, 12 Sup. Ct. Rep. 868; *Jones* v. *United States,* 137 U. S. 202, 212, 215, 34 L. ed. 691, 695, 696, 11 Sup. Ct. Rep. 80.

"All courts of justice are bound to take judicial notice of the territorial extent of the jurisdiction exercised by the government whose laws they administer, or of its recognition or denial of the sovereignty of a foreign power, as appearing from the public acts of the legislature and executive, although those acts are not formally put in evidence, nor in accord with the pleadings." *Jones* v. *United States,* supra.

[2] *Jones* v. *United States,* 137 U. S. 202, 34 L. ed. 691. 11 Sup. Ct. Rep. 80.

[1] *Priddy* v. *Boice,* 201 Mo. 309, 9 L.R.A.(N.S.) 718, 119 Am. St. Rep. 762, 99 S. W. 1055, 9 A. & E. Ann. Cas. 874.

[2] 1 Greenl. Ev. § 483; Stephen's Digest of Ev. art. 34.

in the abstract for that census, and that this investigation was to be made, where practicable, by inquiry from the head of the household in question. These records, therefore, are not simply public records, made for the express purpose of ascertaining and preserving proof of the facts there contained, but are records made by an officer, under his official oath, of declarations as to matters of pedigree, by persons whose declarations are competent proof upon that subject.[3]

[3] *Priddy* v. *Boice,* supra.

Admissibility of record kept by the United States signal service station. *Evanston* v. *Gunn,* 99 U. S. 666, 25 L. ed. 307.

To entitle them to admission it is not necessary that a statute required them to be kept. It is sufficient that they are kept in the discharge of a public duty. 1 Greenl. Ev. § 496.

"It is contended that the court erred in admitting in evidence the certificate of the superintendent above mentioned. We do not think so. The records of this census were under the care and in the custody of that officer, and on common-law principles, as the record could not be taken from his custody, a copy of such census or any part of it could be proved by a certified copy." *People ex rel. Stoddard* v. *Williams,* 64 Cal. 91, 27 Pac. 939.

"A register as required by that statute was kept by the teacher of the school, which Hattie attended for the term beginning September 4th, 1899, and that register shows that her first attendance was on November 6th, 1899, and her age then seventeen years. Defendant offered that register in evidence, and it was excluded on objection of plaintiff. The court erred in excluding the evidence. The register was a record which the law required to be kept, and the evidence showed that it was kept in strict conformity to the requirement of the law."

"It was not record evidence in the strict sense of conclusiveness, but, like the school enumeration lists and the United States census lists, it was competent evidence to be weighed in the balance with other evidence." *State* v. *Austin,* 113 Mo. 538, 21 S. W. 31; *Van Riper* v. *Morton,* 61 Mo. App. 440; *Reynolds* v. *Prudential Ins. Co.* 88 Mo. App. 679; *Ohmeyer* v. *Supreme Forest W. C* 91 Mo. App. 189, 201; 1 Greenl. Ev. 16th ed. § 483; 9 Am. & Eng. Enc. Law, 2d ed. p. 883.

See also *Battles* v. *Tallman,* 96 Ala. 403, 11 So. 247; *Edwards* v. *Logan,* 114 Ky. 312, 70 S. W. 852, 75 S. W. 257.

In *Campbell* v. *Everhart,* 139 N. C. 503, 52 S. E. 201, it was held that census reports are competent to prove facts of a public nature; but that they are incompetent to prove the age of a particular per-

§ 3101. Judicial notice of enrolled attorneys.—So judicial notice will be taken of enrolled attorneys, advocates, etc., as officers of the court,[1] and that an attorney at law is at least twenty-one years old.[2]

§ 310n. Age determined by inspection.—According to some authorities the personal appearance of a party or witness cannot be considered by court or jury on the question of age.[1] And certificates of baptism and marriage which only show that certain entries were in a register of baptism, but do not purport to be true copies of the entries, are not competent to show age,[2] and family reputation to establish age is inadmissible as hearsay,[3] but one of the parents can testify as to the age of a child, although he or she may have entered such age in the family Bible.[4]

§ 310o. Judicial notice; change of venue.—Courts, also, in exercising their discretion on an application for a change of venue, will take judicial notice of certain things connected with the application, where the application is made on account of the alleged prejudice of the inhabitants of the county, but

son, or that a particular person was not *in esse* at a given time. This case cites 3 Wigmore, Ev. § 1671, in which section that author says: "The details as to individual persons, factories, farms, and the like are noted only as a necessary basis for the general and anonymous summaries. Hence the census reports are not receivable to show the age of a particular person, or the product of a particular factory, or the area of a particular farm."

[1] *Strippelmann* v. *Clark,* 11 Tex. 296; *Symmes* v. *Major,* 21 Ind. 443.

[2] *Booth* v. *Kingsland Ave. Bldg. Asso.* 18 App. Div. 407, 46 N. Y. Supp. 457; 1 Enc. Ev. p. 732.

[1] 16 Am. & Eng. Enc. Law, p. 818; *Robinius* v. *State,* 63 Ind. 237; *Stephenson* v. *State,* 28 Ind. 272; *Ihinger* v. *State,* 53 Ind. 251.

Contra: *Williams* v. *State,* 98 Ala. 52, 13 So. 333; *State* v. *Arnold,* 35 N. C. (13 Ired. L.) 184.

[2] 1 Enc. Ev. p. 733; *Tessmann* v. *Supreme Commandery, U. F.* 103 Mich. 185, 61 N. W. 261.

[3] *People* v. *Colbath,* 141 Mich. 189, 104 N. W. 633.

[4] *Bynum* v. *State,* 46 Fla. 142, 35 So. 65.

not where the application is made on the ground of the partiality and bias on the part of the judge.

Statutes which use the word "may" are construed, in the first instance, as permitting the exercise of a judicial discretion in ordering such change to another forum, or the refusing it.[1]

In the latter instance, where the removal is sought on the ground of the alleged prejudice of the judge himself, or where the statute gives the right, on such ground, to make the change to another county, or to call in another judge to sit in the trial of the case, the word "may" is to be construed as mandatory,[2] and the judge cannot pass on the question of his own alleged disqualification.

[1] *Dunn* v. *People,* 109 Ill. 635, 4 Am. Crim. Rep. 52; *Droneberger* v. *State,* 112 Ind. 105, 13 N. E. 259; *State* v. *Hudspeth,* 150 Mo. 12, 51 S. W. 483; Hughes, Crim. Law & Proc. § 2815; *Ransbottom* v. *State,* 144 Ind. 250, 43 N. E. 218; *Hunnel* v. *State,* 86 Ind. 431; *Manly* v. *State,* 52 Ind. 215; *Cantwell* v. *People,* 138 Ill. 602, 28 N. E. 964.

[2] Hughes, Crim. Law & Proc. § 2813; *Cantwell* v. *People,* 138 Ill. 602, 28 N. E. 964; *Barrows* v. *People,* 11 Ill. 121; *Higgins* v. *Com.* 94 Ky. 54, 21 S. W. 231, 9 Am. Crim. Rep. 20; *Pertee* v. *People,* 65 Ill. 230; *Greer* v. *Com.* 111 Ky. 93, 63 S. W. 443, 14 Am. Crim. Rep. 234; *Freleigh* v. *State,* 8 Mo. 606; *Rafferty* v. *People,* 72 Ill. 37.

When the affidavits state all that is required by law, as reasons for the change of venue, the accused is entitled to the change as a matter of right. However, where the court has a right to exercise his discretion in the matter, a refusal to make the change cannot be assigned as reversible error, except, of course, in case of abuse of the discretion. *Gray* v. *People,* 26 Ill. 345; *Clark* v. *People,* 2 Ill. 119; *State* v. *Westfall,* 49 Iowa, 328, 3 Am. Crim. Rep. 349; *Edwards* v. *State,* 25 Ark. 444; Hughes, Crim. Law & Proc. § 2816.

"Affidavits for a change of venue because a fair trial cannot be had in the county cannot, by denying that such trial can be had in certain other counties, prevent the judge from exercising his right under the statute to act on his own personal knowledge in sending the case to an adjoining county, or some other county most convenient, in which the court is of the opinion that a fair and impartial trial may be had." *Adkins* v. *Com.* 98 Ky. 539, 32 L.R.A. 108, 33 S. W. 948.

"The supreme court will reverse the refusal of the trial court to grant a change of venue, in a prosecution for murder, where the abuse

In the former instance, under judicial notice he may take cognizance of the inflamed state of the public mind, of adverse criticisms in the press, or that an armed mob had attacked the jail in an effort to lynch the prisoner.

In such instance the granting or refusal of the application is entirely within the judicial discretion. In the latter instance, where the application is based on the showing, as provided by the various statutes, generally by affidavit, of the alleged prejudice of the judge himself, the order must be made, and the judge has no discretion in refusing it.

of discretion plainly appears." *Shipp* v. *Com.* 124 Ky. 643, 10 L.R.A.(N.S.) 335, 99 S. W. 945.

CHAPTER VII.

INSPECTION.

§ 311. Inspection is evidence to eye and touch.
312. Inspection valuable as an ingredient of circumstantial evidence.
313. Inspection not to be accepted when better evidence could be had.
314. Instruments may be tested in court.
315. Results of compulsory exhibition of person may be given.

§ 311. Inspection is evidence to eye and touch.—The mode of inspection to be first noticed is that which is incidental to persons or things already before the court. The appearance of a defendant, for instance, so as to make up a basis of comparison in cases of identity, need not be proved by testimony, when the defendant is present in person at the trial. By the Romans this method of proof is frequently noticed.[1] By the glossarists the *evidentia facti* is spoken of as a species *probationis adeo clara, ut nihil magis, nec judex aliud quam illam requirat.*[2] Under the title *Probatio per aspectum,* it is mentioned as one of the most effective modes of conviction.[3] Nor is it only the immediate object presented to the eye that is thus proved. Inferences naturally springing from such appearances are to be accepted, age and bodily strength being thus inferred.[4] Yet the inference is not to be regarded as

[1] See Cic. top. c. 2, § 29; L. 32 de minor, iv. 4; L. 3. Cod. fin. reg. iii. 39; Endemann, 82.

[2] See Masc. i. qu. 8.

[3] Durant, ii. 2, de prob. § 4, nr. 9, who extends proof by inspection to include the logical consequences of inspection, *e. g., ex eo quod clericus parvam habet filiam, probatur non diu continuisse.* See Endemann, 83.

[4] Alciat. De praes, ii. 14, nr. 3; Menoch. De praes, ii. 50, nr. 38, 39.

certain, *nam aspectus facile decipit.*[5] But a footprint, when duly proved, is an *indicium.*[6] Whether the court, at its own motion, could direct an inspection, or, as we call it, a view, was much discussed, and by the later practice conceded.[7]

Inspection, it will be therefore seen, is of three kinds: (1) That which is incidental to the reception of proof, as when a witness when testifying is inspected with reference to his credibility, and when a document is inspected after it has been put in evidence for other purposes;[8] (2) When a party is inspected with reference to capacity (*e. g.,* age, strength)[9] this being incidental to his presence in court; and (3) where a thing is offered primarily for inspection, which is the sense usually applied to the term in this chapter. It is also to be observed that inspection includes perception by any of the senses; *quæ cerni tangive possunt,*[10] as where a weapon is exhibited to a jury in order that its weight may be felt.

§ 312. Inspection valuable as an ingredient of circumstantial evidence.—The inspection of documents already in evidence for other purposes has been elsewhere discussed.[1] Another illustration is to be found in cases in which, under statute, juries are taken to view the place where the events in litigation occurred, when such a visit shall be deemed by the court important for an elucidation of the testimony, the presence of the parties on both sides, however, being a prerequisite

[5] Bart. Const. i. 92, nr. 3; Menoch. ii. 51, nr. 61; Endemann, 83.

[6] Masc. i. c. nr. 21.

[7] See Endemann, 84; Schmid. p. 309, note 5; Seuffer, Arch. iv. nr. 88.

[8] For inspection in cases of forgery, see post, § 845. In cases of comparison of hands, post, §§ 557 et seq.

[9] See, as to proof of age, 3 Wharton & S. Med. Jur. 4th ed. §§ 665, 666. See supra, § 236; post, § 459.

[10] Cic. top. c. 2, § 27. As to force of proof by inspection, see *Ingram* v. *Plasket,* 3 Blackf. 450.

[1] See *Ingram* v. *Plasket,* 3 Blackf. 450. As to inspection of documents by jury, see *Howell* v. *Hartford F. Ins. Co.* 6 Biss. 163, Fed. Cas. No. 6,779. See Wharton, Ev. § 81; post § 845.

in such cases to the validity of the procedure.[2] The remains of a deceased person may be produced, when in a fit condition, for the purpose of showing the nature of an injury.[3] So, all instruments by which an offense is alleged to have been committed;[4] all clothes of parties concerned, from which inference may be drawn; all materials in any way part of the *res gestæ* may be produced at the trial of the case.[5] Injury to the

[2] See Wharton, Crim. Pl. & Pr. § 707; *Reg.* v. *Martin,* L. R. 1 C. C. 78, 36 L. J. Mag. Cas. N. S. 20, 15 L. T. N. S. 541, 15 Week. Rep. 358, 10 Cox. C. C. 383; *Mossan* v. *Ivy,* 10 How. St. Tr. 562; *State* v. *Knapp,* 45 N. H. 148; *Ruloff* v. *People,* 18 N. Y. 179; *Eastwood* v. *People,* 3 Park. Crim. Rep. 25; *Fleming* v. *State,* 11 Ind. 234; *Chute* v. *State,* 19 Minn. 271, Gil. 230; *State* v. *Bertin,* 24 La. Ann. 46.

Under the English statutes, see *Stones* v. *Menhem,* 2 Exch. 382; 17 L. J. Exch. N. S. 215; *Morley* v. *Great Central Gas Co.* 2 Fost. & F. 373. In *Bostock* v. *State,* 61 Ga. 635, a proposition by the court that a view should be taken was held error. It is clearly error to permit the jury to go out by themselves, in the defendant's absence, to view a disputed object. *State* v. *Bertin,* 24 La. Ann. 46; *Smith* v. *State,* 42 Tex. 444. It has, however, been held not error to permit this when the defendant or his counsel, knowing of the application, do not apply to be present. *State* v. *Adams,* 20 Kan. 311; *People* v. *Bonney,* 19 Cal. 426; *State* v. *Ah Lee,* 8 Or. 214. In *Doud* v. *Guthrie,* 13 Ill. App. 659, it was held that a view could only (at least in a civil suit) be ordered in cases where authorized by statute. See Brightly's Troubat & H. Pr. § 639; Tidd, Pr. 795.

[3] *Guiteau's Case* (1882) 10 Fed. 161; *Com.* v. *Brown,* 14 Gray, 419; *State* v. *Wieners,* 66 Mo. 13; *State* v. *Garrett,* 71 N. C. 85, 17 Am. Rep. 1; *State* v. *Vincent,* 24 Iowa, 570, 95 Am. Dec. 753.

As to admission in evidence of portions of body of deceased, in trial for homicide, see note in 12 L.R.A.(N.S.) 238.

[4] *Wynne* v. *State,* 56 Ga. 113.

[5] See post, §§ 795, et seq. See also *Com.* v. *Brown,* 121 Mass. 69; *La-Beau* v. *People,* 34 N. Y. 223; *People* v. *Gonzalez,* 35 N. Y. 49; *Gardiner* v. *People,* 6 Park. Crim. Rep. 155; *State* v. *Mordecai,* 68 N. C. 207; *State* v. *Graham,* 74 N. C. 646, 21 Am. Rep. 493, 1 Am. Crim. Rep. 182.

In *State* v. *Blair,* tried at Newark, New Jersey, October, 1879, before Depue, J., where the question was whether Blair, the defendant, shot Armstrong, his coachman, in self-defense, we have the following:

"Albert Honvidtz, of the sheriff's office (called for the prosecution), testified that he had tried a number of experiments with a pistol on the

person may also be proved by inspection. Thus, in an action to recover damages for an injury to a limb, the injured limb may be exhibited on trial, to be inspected by the court and jury, while the surgeon who was employed to set it testifies as to the

same kind of stuff as that of which Armstrong's outer garments were made.

"The witness spread a piece of checked gingham before him, and produced a pistol.

"'I tried the experiment,' said the witness, 'with the same kind of a pistol as that of Blair's in the courthouse cellar. At nine different distances,—close, and at ½ an inch, 1, 2, 3, 4, 5, 6, and 12 inches.'

"The witness exhibited a cloth with a large ragged hole and a scorch of powder around it, and the others in succession. On each the mark of the powder burn became less distinct as the distance of the range was increased. On the 12-inch rag, as it may be termed, the powder was scarcely perceptible.

"The purpose of this testimony was quickly appreciated by the defense. It was offered in anticipation of Blair's statement that he was engaged in a struggle with Armstrong at the time of the shooting, and wrested the rusty pistol from the coachman's grasp."

For the defense, Mr. Marsh, a lawyer in court, was called, and at the request of the counsel for the defense "personated Armstrong reaching forward for the pistol, one foot forward, and his back half turned to Mr. Blair. Judge Titsworth held the lawyer by the left shoulder as Blair is supposed to have held Armstrong, and, with a pistol pressed against the lawyer's body, showed how Blair had shot him then in the back or the side." N. Y. Evening Post, Oct. 9, 1879. See *Brown* v. *Foster*, 113 Mass. 136, 18 Am. Rep. 463.

Even an article proved to be of the same pattern of one the subject of litigation can be produced before the jury, to illustrate the nature of an injury by or to such article. *American Exp. Co.* v. *Spellman*, 90 Ill. 455.

In *State* v. *McCafferty*, 63 Me. 223, the jury were permitted to take with them a bottle of ale which was part of the same manufacture as that which was the subject of the trial.

But experiments by a jury, on articles not committed to them, and in the absence of the parties, vitiate the verdict. *State* v. *Sanders*, 68 Mo. 202, 30 Am. Rep. 782. See post, § 314.

Magnifying glasses may be used in the inspection of documents. *Hatch* v. *State*, 6 Tex. App. 384.

And of jewelry. *Short* v. *State*, 63 Ind. 376.

As to reproduction of sounds, see 26 Alb. L. J. 61, where it is said that, on a suit for the infringment of a copyright of a song, Chief Justice Taney permitted the two airs to be sung to the jury.

injury.[6] When the issue is infancy, on an indictment, the court and jury may decide by inspection,[7] and so when the question arises as to the color of a person.[8] On an issue of bastardy, the jury may judge of likenesses by inspection;[9] and so on an issue of adultery, for the purpose of connecting a child with a putative father.[10] It is inadmissible, however, to

[6] *Mulhado* v. *Brooklyn City R. Co.* 30 N. Y. 370. In *State* v. *Wieners,* 66 Mo. 13, the bones of the deceased were exhibited in court for the purpose of illustrating his position at the encounter. As to inspection of remains in alcohol, see *State* v. *Vincent,* 24 Iowa, 570, 95 Am. Dec. 753; post, § 326; *State* v. *Garrett,* 71 N. C. 85, 17 Am. Rep. 1.

As to exhibiting a ferrotype showing the injuries received by plaintiff, see *Reddin* v. *Gates,* 52 Iowa, 210, 2 N. W. 1079; post, § 544.

[7] *State* v. *Arnold,* 35 N. C. (13 Ired. L.) 184. See, however, *Ihinger* v. *State,* 53 Ind. 251, in which it was held error, on an indictment for selling liquor to a minor, to permit the jury to determine age by inspection.

[8] *Warlick* v. *White,* 76 N. C. 175; *Garvin* v. *State,* 52 Miss. 207;

[9] *State ex rel. Stubblefield* v. *Woodruff,* 67 N. C. 89. See also *State* v. *Britt,* 78 N. C. 439, and note in 52 L.R.A. 500.

[10] *Stumm* v. *Hummel,* 39 Iowa, 478. But not on an issue of seduction as part of proof against the alleged seducer. *State* v. *Danforth,* 48 Iowa, 43, 30 Am. Rep. 387; citing *Keniston* v. *Rowe,* 16 Me. 38; *Risk* v. *State,* 19 Ind. 152.

In *State* v. *Smith,* 54 Iowa, 104, 37 Am. Rep. 192, 6 N. W. 153, it was held admissible on a prosecution for bastardy to exhibit a child of ten years and a half to the jury to show likeness to the defendant; and the reason of the refusal of inspection in *State* v. *Danforth,* 48 Iowa, 43, 30 Am. Rep. 387, is stated to be that in that case the child was only three months old, and consequently had the "peculiar immaturity of features" of that age.

In Sergeant Ballantyne's "Experiences of a Barrister" he tells the following of Mr. Broderip, a magistrate: "I was then in some criminal practice, and appeared before him for a client who was suggested to be the father of an infant, and about which there was inquiry. Mr. Broderip very patiently heard the evidence, and, notwithstanding my endeavors, determined the case against my client. Afterward, calling me to him he was pleased to say: You made a very good speech, and I was inclined to decide in your favor, but you know I am a bit of a naturalist, and while you were speaking I was comparing the child with your client, and there could be no mistake, the likeness was most striking.' 'Why, good heavens!' said I, 'my client was not in court. The

resort, on such issues, to the inspection of pictures,[11] On an issue of pregnancy, a jury of matrons is impaneled to decide the issue by inspection.[12]

person you saw was the attorney's clerk.' And such truly was the case."

In the same volume we have the following:

"I had the honor of having him (Sir Edwin Landseer) upon one occasion as a client; it is as far back as 1862; the question involved was undoubtedly one of art, although not of such a character as might have been expected. The plaintiff's profession was that of a tailor, a very eminent one at the west end of London; and he sued Sir Edwin for the payment for a work that he had executed by that gentleman's order. It was a coat which Sir Edwin declared violated every principle of high art, and he refused to countenance such a deviation from its true principles. The case was tried in the exchequer, before (I believe) Mr. Baron Martin. The plaintiff entered the witness box, and a very distinguished looking personage he was. The coat was produced, and the judge suggested that Sir Edwin should try it on; he made a wry face, but consented, and took off his own upper garment. He then put an arm into one of the sleeves of that in dispute, and made an apparently ineffectual endeavor to reach the other, following it round amidst roars of laughter from all parts of the court. It was a common jury, and I was told that there was a tailor upon it, upon which I suggested that there was a gentleman of the same profession as the plaintiff in court, who might assist Sir Edwin. This was acceded to, and out hopped a little Hebrew slop-seller from the Minories, to whom the defendant submitted his body. With difficulty he got it into the coat, and then stood as if spitted, his back one mass of wrinkles. The tableau was truly amusing; the indignant plaintiff looking at the performance with mingled horror and disgust; Sir Edwin, as if he were choking; whilst the jury, with the air of a *connoisseur,* was examining the coat with profound gravity. At last the judge, when able to stifle his laughter, addressing the little Hebrew, said, 'Well, Mr. Moses, what do you say?' 'Oh!' cried he, holding up a pair of hands not over clean, and very different from those incased in lavender gloves which graced the plaintiff. 'It ish poshitively shocking, my lord; I should have been ashamed to turn out such a thing from my establishment.' The rest of the jury accepted his view, and Sir Edwin, apparently relieved from suffocation, entered his own coat with a look of relief, which again convulsed the court, bowed and departed."

[11] *Beers* v. *Jackman,* 103 Mass. 192.

[12] *Baynton's Case,* 14 How. St. Tr. 630; *Reg.* v. *Wycherley,* 8 Car. & P. 262.

But, while identity is frequently an inference from inspection, it has been ruled that a defendant not under oath is not entitled to repeat something in the presence of the jury, to rebut evidence of a witness for the government who testified that he identified the defendant by his voice.[13]

Animals may be brought into court for inspection, when their size or other qualities are at issue.[14]

§ 313. Inspection not to be accepted when better evidence could be had.—When, however, more exact proof can be produced, inspection does not afford a sufficient basis on which to rest a judgment. Thus in Indiana, where, under a statute, it was necessary to prove that the defendant was

[13] *Com.* v. *Scott,* 123 Mass. 222, 25 Am. Rep. 81.

[14] *Line* v. *Taylor,* 3 Fost. & F. 731; *Wood* v. *Peel,* cited in Taylor, Ev. § 500; *Lewis* v. *Hartley,* 7 Car. & P. 405. In an English case passing through the English daily papers in the spring of 1876, it is stated that "Mrs. Priscilla Wolfe, a widow lady of independent means, residing at Kilsby, near Rugby, sued Richard Jones, butcher, of the same place for £5 damages, for illegally killing a cockatoo parrot belonging to the plaintiff. The defense was that the defendant shot the cockatoo, mistaking it for an owl. The fellow bird of the deceased cockatoo was brought into court, and afforded great amusement by strongly recommending the parties to 'shake hands,' 'shut up,' and asking for 'sugar.'"

In *Thurman* v. *Bertram,* before the exchequer division, on July 21, 1879, a "baby elephant" was produced in evidence. The report in the London Mall, reprinted in 20 Alb. L. J. 151, says: "The baby elephant walked into court, with bells on his head, following his keeper in the most perfect way. He threaded his way through the 'mazes of the law,' in the body of a crowded court, in the most wonderful and clever fashion, like the most accomplished Q. C., and caused some consternation by making his exit at the other side, where no passage had been cleared in the crowd." For notice to produce a dog in court, see *Lewis* v. *Hartley,* 7 Car. & P. 405. In 20 Alb. L. J. 104, will be found an interesting article on litigation as to animals.

It is said in North Carolina that the qualities of a stallion for foal-getting cannot be judged by inspection, but may be proved by reputation. *McMillan* v. *Davis,* 66 N. C. 539.

fourteen years old, it was held that in a case open to doubt this proof must be, if possible, supplied by witnesses or records, and cannot be determined by inspection alone.[1]

§ 314. Instruments may be tested in court.—As we have seen, it is one of the necessary incidents of bringing into court instruments by which an act is alleged to have been done, that such instruments should be tested in open court.[1] It is only where this is done by the jury, after retiring, when

[1] *Stephenson* v. *State,* 28 Ind. 272; *Ihinger* v. *State,* 53 Ind. 251.

In a suit for injury to chattels, the plaintiff, it has been ruled in Maryland, is not entitled to produce the chattel in court. The injury, it has been said, must be proved by witnesses. *Jacobs* v. *Davis,* 34 Md. 204.

Experiments not applicable to conditions existing on the trial cannot be proved by experts. *Hawks* v. *Charlemont,* 110 Mass. 110; *Com.* v. *Piper,* 120 Mass. 185. See post, § 756.

In patent cases, it should be remembered, experiments before the jury are constantly resorted to.

In *Belt* v. *Lawes,* in London, 1883, the question being as to the plaintiff's capacity as a sculptor, he was permitted to mold a bust in court before the jury.

Whether a witness can be called upon to write his name in court, on questions of identity of hands, is elsewhere considered. Post, § 550.

[1] In *Jumpertz* v. *People,* 21 Ill. 375, a series of experiments was made by the jury for the purpose of determining the strength of certain screws and other instruments. The court held that, though this might be objectionable, it was no ground for a new trial. But see *Bouldin* v. *State,* 8 Tex. App. 332, where the court held it to be error to permit the jury to take with them into their room when they retired to consider of their findings, the rifle gun and balls which had been exhibited and testified about by the witnesses. As was said in *Smith* v. *State,* 42 Tex. 444: "If, by this means, they, the jury, or either of them, did obtain a personal knowledge of a material fact in the cause before finding their verdict, and it was considered by them in finding their verdict, then they acted upon a fact known to themselves, not developed publicly on the trial as to how they understood it, concerning which defendant has had no opportunity to cross-examine them as witnesses, and upon which, being unknown, the defendant or his counsel have not been heard, and of which the judge, trying the cause, had no information either on the trial, in giving his charge, or on motion for a new trial."

the parties have no opportunity of revising the process, that objection can be made.[2] When the process is conducted openly, as part of the trial of the case, it is a valuable auxiliary in the discovery of truth.[3]

[2] *People* v. *Hope*, 62 Cal. 291. See *Moon* v. *State*, 68 Ga. 687.

[3] The late Rev. F. W. Robertson, in a letter printed by his biographer (Life and letters of F. W. Robertson, ii. 139), gives the following vivid sketch of a trial before Sir John Jervis: "One was a very curious one, in which a young man of large property had been fleeced by a gang of blacklegs on the turf, and at cards. Nothing could exceed the masterly way in which Sir John Jervis untwined the web of sophistries with which a very clever counsel had bewildered the jury. A private notebook, with initials for names, and complicated gambling accounts, was found on one of the prisoners. No one seemed to be able to make head or tail of it. The chief justice looked it over, and most ingeniously explained it all to the jury. Then there was a pack of cards which had been pronounced by the London detectives to be a perfectly fair pack. They were examined in court; everyone thought them to be so, and no stress was laid upon the circumstance. However, they were handed to the chief justice. I saw his keen eye glance very inquiringly over them while the evidence was going on. However, he said nothing, and quietly put them aside. When the trial was over, and the charge began, he went over all the circumstances till he got to the objects found upon the prisoners. 'Gentleman,' said he, 'I will engage to tell you without looking at the faces, the name of every card upon this pack.' A strong exclamation of surprise went through the court. The prisoners looked aghast. He then pointed out that on the backs, which were figured with wreaths and flowers in dotted lines all over, there was a small flower in the right-hand corner of each like this: 

"The number of dots in this flower was the same on all the kings, and so on, in every card through the pack. A knave would be perhaps marked thus:  An ace thus:  and so on; the difference being so slight, and the flowers on the back so many, that even if you had been told the general principle, it would have taken a considerable time to find out which was the particular flower which differed. He told me afterwards that he recollected a similar expedient in Lord De Ros's Case, and therefore set to work to discover the trick. But he did it while the evidence was going on, which he himself had to take down in writing." Whether a rule will be granted to exhume a body is discussed in *Grangers' L. Ins. Co.* v. *Brown*, 57 Miss. 308, 34 Am. Rep. 446.

§ 315. Results of compulsory exhibition of person may be given.—Whether when the defendant is compelled to render evidence of this class against himself the result can be proved on trial, has been much discussed.[1] In New York, in a case where a woman was charged with the murder of her illegitimate child, it was held that the results of a medical examination to which she was compelled when in prison to submit could not be given on trial.[1a]

In North Carolina it has been held that where a defendant was compelled to exhibit himself to a jury so as to see whether he was within the prohibited degree as to color, a new trial should be given.[2]

In Georgia it was held inadmissible for the prosecution to prove that the defendant's feet, when forced against his will into a track, fitted the track.[3] It was held, also, to be error to compel the defendant to exhibit his leg to the jury when the condition of such leg was at issue.[4]

On the other hand, it has been held in North Carolina (in a case subsequent to that giving a new trial after a compulsory exhibition of the person) admissible when the defendant had been compelled before the trial to show the condition of her hand, that being material to the issue, for the parties compelling to testify as to the results of their examination.[5]

[1] As to compelling accused to submit to physical examination, see note in 14 L.R.A. 466.

[1a] *People* v. *McCoy*, 45 How. Pr. 216.

[2] *State* v. *Jacobs*, 50 N. C. (5 Jones, L.) 259; *State* v. *Johnson*, 67 N. C. 59.

[3] *Day* v. *State*, 63 Ga. 667; 11 Cent. L. J. 219.

[4] *Blackwell* v. *State*, 67 Ga. 76, 44 Am. Rep. 717, 4 Am. Crim. Rep. 183. In *Gordon* v. *State*, 68 Ga. 814, however, it was held that where the defendant exhibited a scar as part of his case, he would be required to submit such scar on cross-examination to medical inspection.

In *Stokes* v. *State*, 5 Baxt. 619, 30 Am. Rep. 72, a pan of soft mud was brought into court, and the defendant was asked to put his foot into it, which he declined. It was held error to permit the request to be made in the presence of the jury.

[5] *State* v. *Garrett*, 71 N. C. 85, 17 Am. Rep. 1. "The distinction," said the court, "between that and our

In Louisiana it has been ruled that a defendant on trial can be forced to take his feet from under a chair, so that they could be inspected by a witness, for the purpose of determining whether they were about the same size as footprints on the soil at the place of a guilty deed.[6]

In Nevada a defendant was compelled to exhibit his arm in order to show a tattoo mark.[7]

It is agreed on all sides that, where a defendant voluntarily makes certain footprints, at the request of arresting parties, they can be afterwards described by these parties.[8] Undoubtedly, if torture is applied to compel a party thus to give evidence against himself, the evidence thus produced should be excluded as obtained by a proceeding against the policy of the law. But if the defendant's person is simply uncovered, or his hand or foot moved, without any injury to himself, this must be regarded in the same light as is the disclosure of any material fact by means of a confession induced by force or fraud. The confession itself is inadmissible, but not the fact to which the confession leads; *e.g.*, stolen property, or other marks of guilt discovered. If the admissibility of such facts is not excluded by the constitutional provision that no one shall be compelled to be a witness against himself, it is hard to see why peculiarities in his person which are brought to light by an inadmissible confession should not be admitted

case is that in *Jacobs's Case,* the prisoner himself, on trial, was compelled to exhibit himself to the jury, that they might see that he was within the prohibited degree of color. Thus he was forced to become a witness against himself. This was held to be error. In our case, not the prisoner, but the witnesses, were called to prove what they saw upon inspecting the prisoner's hand, although that inspection was obtained by intimidation." See to same effect *State* v. *Graham,* 74 N. C. 646, 21 Am. Rep. 493, 1 Am. Crim. Rep. 182, cited post, § 661.

[6] *State* v. *Prudhomme,* 25 La. Ann. 523. See, to the same effect, *Blackwell* v. *State,* 67 Ga. 76, 44 Am. Rep. 717, 4 Am. Crim. Rep. 183, and cases post § 796.

[7] *State* v. *Ah Chuey,* 14 Nev. 79, 33 Am. Rep. 530.

[8] *Walker* v. *State,* 7 Tex. App. 245, 32 Am. Rep. 595; post § 796.

in evidence against him. We might go still further, and hold with the Nevada court that an order of a judge sitting as a justice of the peace, to examine the person of an accused party, stands on the same ground and may be justified by the same reasons as a search warrant issued against the same party. But waiving this position, as inconsistent with the rule that the production of criminatory documents will not be compelled,[9] and conceding, at all events, that so far as concerns a compulsory exhibition of the defendant's person to the jury under trial is concerned, he is protected by the constitutional guaranty that self-criminatory evidence is not to be compelled, it does not follow that, when facts material to the issue are thus disclosed, they should be excluded.[10]

[9] See supra, § 213; post, § 560.

[10] That a woman setting up pregnancy will be compelled to exhibit her person, see supra, § 312. In *People* v. *Mead,* 50 Mich. 228, 15 N. W. 95, it was held to be error to compel a prisoner to put his foot in a shoe to see if his foot in such shoe would fit a track. See, to the same general effect, *Day* v. *State,* 63 Ga. 667. See post, § 796. That the refusal of the court to compel a party to submit himself to medical inspection on trial, in order to test the injury for which he brings suit, is not error, see *Parker* v. *Enslow,* 102 Ill. 272, 40 Am. Rep. 588; *Schroeder* v. *Chicago, R. I. & P. R. Co.* 47 Iowa, 375. On this topic may be consulted interesting articles in 22 Alb. L. J. 145, and 15 Cent. L. J. 207.

CHAPTER VIII.

BURDEN OF PROOF.

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§ 319. Burden on the prosecution.—The burden of proof in criminal prosecutions is never on the defendant, in the sense understood in civil cases, for the reasonable doubt and presumption of innocence extends to the entire case.[1] The burden of proof never devolves on defendant when he confines himself to a traverse of the issues tendered in the indictment. The correct principle is that when the defendant in a criminal prosecution relies on no separate, distinct, and independent fact, but confines his defense to the original transaction on which the charge is founded, with its accompanying circumstances, the burden of proof continues throughout on the prosecution.[2] It is only when the defendant sets up independent matters of defense, or matters in avoidance of the allegations of the indictment, that the burden of proof is on defendant.[3]

The same controversy that is agitated in civil issues, in reference to the burden of proof, is agitated in criminal issues; and, in criminal as well as in civil practice, the prevalent opinion, backed by high authorities, is that the question is to be determined by the test of the quality of the proposition to be

[1] *Perry* v. *State,* 44 Tex. 473.

As to power of legislature to enact prima facie rules of evidence in criminal case, see notes in 1 L.R.A.(N.S.) 626, 2 L.R.A.(N.S.) 1007.

[2] *Dubose* v. *State,* 10 Tex. App. 230, 253.

[3] *Kent* v. *People,* 8 Colo. 563, 9 Pac. 852, 5 Am. Crim. Rep. 406; *Schultz* v. *Territory,* 5 Ariz. 239, 52 Pac. 352, 11 Am. Crim. Rep. 44.

established. An affirmative proposition is to be proved by the party advancing it: not so, a negative proposition. Among the most authoritative exponents of this view is Mr. Best in his treatise on Evidence.[4] "The general rule," he declares, "is that the burden of proof lies on the party who asserts the affirmative of the issue or question in dispute according to the maxim, *Ei incumbit probatio, qui dicit, non qui negat,*" and to this effect he cites Mr. Starkie and Mr. Phillips, sustaining his views by a copious exposition. The negative, it is argued, is not susceptible of proof. An affirmative proposition, therefore, is the only kind of a proposition which a party can be called upon to prove.

§ 320. Burden on the side undertaking to prove a point.—But to this it has been well replied [1] that there is no proposition which does not blend negation with affirmation, and in which affirmation on one side does not involve a denial on the other side. An *alibi,* for instance, is at once a negation of the defendant's presence at a particular spot, at a particular time, which is impliedly, at least, averred in any indictment for crime, and an affirmation of his presence at another place at the same time. Or, the defense of in-

[4] Best, Ev. 5th ed. 369; Wharton, Ev. § 353; Greenl. Ev. § 74; Wigmore, Ev. § 2486, title "Burden of Proof and Presumptions," chap. 86, § 2483.

It has been well said that no attempt is more unsatisfactory than one to define and explain the principles of law appertaining to this subject; and with good reason the following remark has been considered, at least as "singular," by Mr. Wigmore in this chapter, note 2, page 3521: "Every student of the law understands the exact import of the phrase, 'burden of proof.'" *State* v. *Thornton,* 10 S. D. 349, 41 L.R.A. 530, 73 N. W. 196.

[1] Heffter, Appendix to Weber, 259.

The Roman law supplies more concise terms for dealing with this subject than the English law. For the phrase, "he who asserts the affirmative," the equivalent is *actor.* He who resists such a claim is *reus.* 5 Am. & Eng. Enc. Law, p. 23; Thayer, Ev. pp. 44 et seq.

sanity is in like manner both an affirmation and a negation,—an affirmation of the existence of disturbing mental conditions, and a negation of sanity. Nor is this all. In many cases each party unites with an affirmation on his part of his own rights, a denial of the rights of his opponent, and the affirmation and denial are so mixed as to be incapable of severance in proof. We may take, as illustrating the position, cases in which the defendant set up as a bar the maxim, *Volenti non fit injuria.* You cannot prosecute me, he says, because you consented to my taking the article, and this assertion involves two incidents: (1) An affirmation of the prosecutor's assent, and (2) a negation of his right to maintain a prosecution. And in like manner the prosecution's case in rape involves an affirmation and negation. The affirmation is "force;" the negation is, "without her consent." These are logically distinguishable elements of the case, but practically the two are so blended that one cannot be put in evidence without the other. If the prosecution in such cases is not to prove a negative, then it is not to prove anything. If the prosecution is bound to prove the affirmative, then it must necessarily prove the negative, which is bound up and embraced, as a matter of fact, in the affirmative.

It is said that the term "burden of proof" has two distinct meanings: One, referring to the duty of establishing the issue by such a quantum of evidence as the law demands in the case, whether civil or criminal, in which the issue arises; and, second, to the duty of producing evidence at the outset or at any subsequent stage of the trial, in order to meet a prima facie case.[2] And in a prosecution for homicide, even where

[2] 5 Am. & Eng. Enc. Law, p. 22. In *Scott* v. *Wood,* 81 Cal. 398, 22 Pac. 871, the court through Hayne, C., says: "The term 'burden of proof' is used in different senses. Sometimes it is used to signify the burden of making or meeting a prima facie case, and sometimes the burden of producing a preponderance of the evidence. These burdens are often on the same party. But this is not necessarily or

the burden is on the defendant to show that he acted in self-defense, he is not required to go further and prove that he

always the case. And it is by no means safe to infer that, because a party has the burden of meeting a prima facie case, therefore he must have a preponderance of evidence. It may be sufficient for him to produce just enough evidence to counterbalance the evidence adduced against him. This is illustrated by a very common case. Suppose that, upon an issue of the performance of a contract sued upon, the plaintiff should testify to facts showing nonperformance. In such case if the defendant produced no evidence the plaintiff must prevail. This is often expressed by saying that the burden has shifted to the defendant. And so it has in one sense. But suppose that the defendant should take the stand and deny the truth of the facts testified to by the plaintiff, oath being opposed against oath. Would it be correct to say that the defendant must have a preponderance of evidence? It most certainly would not. And this, though the "burden of proof" had been transferred to him. Nor would it be correct to say that the burden had shifted back to the plaintiff, if the burden of producing a preponderance of evidence was meant. For that never was on the defendant. The two burdens are distinct things. One may shift back and forth with the ebb and flow of the testimony, the other remains with the party upon whom it is cast by the pleadings, that is to say, with the party who had the affirmative of the issue."

"The burden of proof is on the prosecution throughout, and the jury must be satisfied from all the evidence, beyond any reasonable doubt, of the truth of the affirmative of the issue presented,—that he is guilty, as charged."

"That this is the rule seems now to be settled by the highest authorities, after much conflict of decision and opinion." Abbott, Trial Brief, Crim. p. 632; *Lilienthal* v. *United States,* 97 U. S. 237, 24 L. ed. 901; *State* v. *Jaynes,* 78 N. C. 504; *People* v. *Ribolsi,* 89 Cal. 492, 26 Pac. 1082; *Davis* v. *State,* 54 Neb. 177, 74 N. W. 599; *Johnson* v. *State,* 21 Tex. App. 368, 17 S. W. 252; *People* v. *McWhorter,* 93 Mich. 641, 53 N. W. 780; *State* v. *Josey,* 64 N. C. 56, 53 N. W. 780; *Turner* v. *Com.* 86 Pa. 54, 27 Am. Rep. 683.

Burden of proof never shifts, but rests on the prosecution throughout the case. *Turner* v. *Com.* 86 Pa. 54, 27 Am. Rep. 683; *Watson* v. *Com.* 95 Pa. 418; *State* v. *Taylor,* 118 Mo. 153, 24 S. W. 449, 11 Am. Crim. Rep. 51; *State* v. *Harvey,* 131 Mo. 339, 32 S. W. 1110; *State* v. *Ardoin,* 49 La. Ann. 1145, 62 Am. St. Rep. 678, 22 So. 620; *McLain* v. *State,* 18 Neb. 159, 24 N. W. 720, 6 Am. Crim. Rep. 21; *Walters* v. *State,* 39 Ohio St. 215, 4 Am. Crim. Rep. 33; *State* v. *Chee Gong,* 16 Or. 534, 19 Pac. 607; *State* v. *Thornton,* 41 L.R.A. 530 and case note, 10 S. D. 349, 73 N. W. 196.

was not at fault in bringing on the difficulty; and if this is relied on, to overcome the evidence of acting in self-defense, it must be established by the prosecution, to the satisfaction of the jury and beyond a reasonable doubt.[3]

§ 321. Negatives are susceptible of proof.—It is asserted in defense of the rule here contested, that a negative cannot be proved, and hence, as only an affirmative is provable, on the affirming party alone can rest the burden of proving.[1] To this, aside from the objection already made that all affirmations involve negations of their contradictory opposites,[2] the following answer is to be made: High probability, as has already been seen,[3] is the best we can obtain in any case; high probability may be reached as to the nonexistence of many things which are claimed to exist. It may be difficult for me to prove that a thing does not exist in all space, or that certain occult intents may not lurk in the undisclosed recesses of a particular person's heart. But jurisprudence has to do with no such vague domains. Its territory is limited. It inquires whether, in a particular spot, at a particular time, open to human observation, a particular thing existed; or whether by the small range of witnesses to whom a party at a particular time was visible he gave signs of the suspected intent. It is possible within such limited range, to call all witnesses who were likely to have been at the given spot, or observed the given person, at the particular time, and so to approach a negative by gradually exhausting the affirmative. And in many cases, *e. g.*, when the dis-

[3] McClain, Crim. Law, §§ 316, 321.

[1] As to the relations of negative to affirmative testimony, see post, § 382.

[2] See Whately's Logic, bk. 2, chap. 2, § 3; *State* v. *Wilbourne*, 87 N. C. 529.

[3] Supra, § 7; post, § 809.

As to licenses, see post, § 342.

And see *Goodwin* v. *Smith*, 72 Ind. 113, 37 Am. Rep. 141, in which latter volume is an elaborate note examining the authorities.

appearance of a party is to be proved, or the absence of a particular thing from a particular place, a negative is the highest kind of proof procurable. The same remark applies to what is often called the highest proof of good character,—*i.e.*, that the witness has never heard the character of the person in question discussed.[4]

§ 322. Burden of proof on the prosecution.—In criminal as well as in civil trials, whether the proposition advanced be an affirmative one or a negative one, the party against whom judgment would be given on a particular issue, just as the proof stands at that particular period in the trial, has on him the burden of proof, which he must satisfactorily sustain.[1]

In criminal cases that burden, from the outset, is on the prosecution to establish the defendant's guilt beyond a reasonable doubt. If this is done, then the burden is on the defendant to establish a reasonable doubt as to his guilt, either by contradictory proof or by proof in confession and avoidance.[2] The advantage that the defendant derives from the fact that the burden is on the prosecution to prove his guilt beyond a reasonable doubt ceases when the prosecution has done this to such an effect as to sustain a verdict of guilty. At this point, should the case close and go to the jury, it goes free from the presumptions arising from the imposition of the burden of proof.[3] The rule requiring the *actor* to take on him the burden of proof is a rule of practice, adopted for the proper development of the case, and ceases to operate when the evidence on the part of the prosecution establishes the defendant's guilt beyond a reasonable

[4] Supra, §§ 58, et seq.

[1] Post, § 439; Wharton, Ev. § 357.

[2] Post, § 330.

[3] See *Case* v. *People*, 76 N. Y. 242. See *Nevling* v. *Com.* 98 Pa. 322; *People* v. *Cheong Foon Ark*, 61 Cal. 527; *Jones* v. *State*, 13 Tex. App. 1.

doubt. The burden of proof concerns the order of proof. The rule requiring guilt to be established beyond a reasonable doubt is a fundamental sanction of the law, applicable at all stages of a trial.[4] This rule concerns the weight of the testimony.

But the presumption of innocence[5] never ceases throughout the trial, but goes, with all the evidence, to the jury for consideration.[6]

§ 323. Burden of proof in tort actions; illustrations.— From the rules settled in respect to torts in their civil relations, we may obtain aid in considering the burden of proof in criminal prosecutions.[1] With respect to torts, under the

[4] *State* v. *Wingo,* 66 Mo. 181, 27 Am. Rep. 329; *Jones* v. *State,* 13 Tex. App. 1; *Ball* v. *Com.* 81 Ky. 662; *United States* v. *Babcock,* 3 Dill. 581, Fed. Cas. No. 14,487; *Ogletree* v. *State,* 28 Ala. 693; *Farris* v. *Com.* 14 Bush, 362; *State* v. *Flye,* 26 Me. 312; *Com.* v. *Kimball,* 24 Pick. 366; *Jones* v. *State,* 51 Ohio St. 331, 38 N. E. 79; *Black* v. *State,* 1 Tex. App. 368; *Horn* v. *State,* 30 Tex. App. 541, 17 S. W. 1094; *People* v. *Tracy,* 1 Utah, 343; *People* v. *Millard,* 53 Mich. 63, 18 N. W. 562; *State* v. *Hardelein,* 169 Mo. 579, 70 S. W. 130; *High* v. *State,* 2 Okla. Crim. Rep. 161, 28 L.R.A. (N.S.) 162, 101 Pac. 115; *Com.* v. *Webster,* 5 Cush. 302, 52 Am. Dec. 711; *Com.* v. *Costley,* 118 Mass. 1.

[5] Post, § 330.

[6] *Ogletree* v. *State,* 28 Ala. 693; *Cook* v. *State,* 85 Miss. 738, 38 So. 110; *State* v. *Hardelein,* 169 Mo. 579, 70 S. W. 130.

[1] The illustrations that can be got from tort actions, in their civil relations, as an aid in considering the burden of proof in criminal actions, is apt to be misleading.

Where the action is civil in its nature and the fraud charged does not amount to a criminal offense, then the tort may be established by a preponderance of the evidence. *Coit* v. *Churchill,* 61 Iowa, 296, 16 N. W. 147. But where the tort, amounting to a criminal offense, is directly in issue, it must be established by proof beyond a reasonable doubt. *Strader* v. *Mullane,* 17 Ohio St. 625; *Young* v. *Edwards,* 72 Pa. 257; *White* v. *Comstock,* 6 Vt. 405.

It must be observed that where tort arises in civil issues, the rule is not universal as to proof of the tort beyond a reasonable doubt. In *Pratt* v. *Pratt,* 96 Ill. 184, and *Greenwood* v. *Lowe,* 7 La. Ann. 197, it is left indefinite, by the court saying that something more than a preponderance is required. In *Lanter* v. *M'Ewen,* 8 Blackf. 495, that greater precision is required. In

Roman law, he who charges *dolus* or *culpa* on another must prove such *dolus* or *culpa;* on such case being made, he who sets up *casus,* or the contributory agency of the plaintiff, must prove such *casus,* or contributory agency.[2] In our own law, it is an elementary principle that a party setting up a tort has the burden on him to prove such tort.[3] Thus, when the cause of action is negligence, the plaintiff must prove negligence;[4] when the cause of action is deceit, the plaintiff must prove deceit;[5] but when deceit is set up as a defense, the deceit must be proved by the defendant;[6] if to a tort justification is set up by the defendant, the burden is on him to prove

Polston v. *See,* 54 Mo. 291, that in libel and slander the issues must be determined against the plaintiff, if the defendant, under plea of justification, creates a reasonable doubt of his guilt. See *Kane* v. *Hibernia Ins. Co.* 39 N. J. L. 697, 23 Am. Rep. 239; *Huchberger* v. *Merchants' F. Ins. Co.* 4 Biss. 265, Fed. Cas. No. 6,822.

But in criminal cases there is no qualification to the rule that the prosecution must establish its case beyond a reasonable doubt. *Kent* v. *People,* 8 Colo. 563, 9 Pac. 852, 5 Am. Crim. Rep. 406; *Washington* v. *State,* 58 Ala. 355; *People* v. *Levine,* 85 Cal. 39, 22 Pac. 969, 24 Pac. 631; *Munson* v. *Atwood,* 30 Conn. 102; *State* v. *Fahey,* 3 Penn. (Del.) 594, 54 Atl. 690; *Hopps* v. *People,* 31 Ill. 385, 83 Am. Dec. 231; *Com.* v. *McKie,* 1 Gray, 61, 61 Am. Dec. 410; *United States* v. *Richards,* 149 Fed. 443; *Little* v. *State,* 145 Ala. 662, 39 So. 674; *State* v. *Samuels,* 6 Penn. (Del.) 36, 67 Atl. 164; *Lucas* v. *State,* 75 Neb. 11, 105 N. W. 976; *State* v. *Jones,* 71 N. J. L. 543, 60 Atl. 396; *State* v. *Lax,* 71 N. J. L. 386, 59 Atl. 18; *People* v. *Gluck,* 188 N. Y. 167, 80 N. E. 1022; *State* v. *Pressler,* 16 Wyo. 214, 92 Pac. 806, 15 A. & E. Ann. Cas. 93; *People* v. *Weber,* 149 Cal. 325, 86 Pac. 671; *Nix* v. *State* — Tex. Crim. Rep. —, 74 S. W. 764; *State* v. *Momberg,* 14 N. D. 291, 103 N. W. 566.

In accord with the cases cited are all the cases that have occasion to refer to or pass upon the rule.

[2] Weber, Heffter's ed. 718.

[3] Wharton, Ev. § 357.

[4] Wharton, Ev. § 359.

[5] *Huchberger Home F. Ins. Co.* 5 Biss. 106, Fed. Cas. No. 6,821; *Holbrook* v. *Burt,* 22 Pick. 546; *Strong* v. *Place,* 4 Robt. 385; *Mutual L. Ins. Co.* v. *Wager,* 27 Barb. 354; *Grimmell* v. *Warner,* 21 Iowa, 11; *Oaks* v. *Harrison,* 24 Iowa, 179; *Robinson* v. *Quarles,* 1 La. Ann. 460; Bigelow, Torts, 1–59.

[6] *Trenton Mut. L. & F. Ins. Co.* v. *Johnson,* 24 N. J. L. 576; *New York L. Ins. Co.* v. *Graham,* 2 Duv. 506.

such justification. When a defendant, in answer to an action for trespass, sets up probable cause on his part to believe that the land belonged to him, he must prove such probable cause.[7]

But it must always be borne in mind that where a criminal offense is directly in issue, the burden is on the prosecution to establish it, by evidence, beyond a reasonable doubt.[8]

It is the imperative duty of the court to see that every material element of the crime is established beyond a reasonable doubt and that testimony is offered from which the jury may find the facts,[9] and a reasonable doubt may arise from the absence of testimony.[10]

I. Corpus Delicti.

§ 323a. Corpus delicti; definition.—The *corpus delicti,* in homicide, has two components: (1) Death as the result; (2) the criminal agency of another as the means.[1] To the *corpus delicti,* in this sense, it is requisite: First, that the deceased be shown to have died from the effects of a wound; second, that it should appear that this wound was unlawfully inflicted and that the defendant was implicated in the crime.[2]

[7] Wharton, Ev. § 359.

The general rule is that, with the exception of matters peculiarly within the knowledge of the other side, the party making a point is bound to prove it. *Com.* v. *Whittaker,* 131 Mass. 224, cited post, §§ 329, 343.

[8] Supra, § 322.

[9] *Clyatt* v. *United States,* 197 U S. 207, 49 L. ed. 726, 25 Sup. Ct. Rep. 429.

[10] *Nix* v. *State,* — Tex. Crim. Rep. —, 74 S. W. 764.

[1] *McBride* v. *People,* 5 Colo. App. 91, 37 Pac. 953.

[2] Wharton, Homicide, 5th ed. § 587.

The true meaning of the words is, "body of the crime," and this involves the essential features of the crime as bearing on the issue. Any other meaning of the term would render nugatory the limitations that the burden of the *corpus delicti* is on the prosecution, and that accomplices are to be corroborated as to the *corpus delicti. State* v. *Dickson,* 78 Mo. 439; *Lovelady* v. *State,* 14 Tex. App. 545; *State* v. *Stowell,* 60 Iowa, 535, 15 N. W. 417; *State* v. *Flanagan,* 26 W. Va. 116; *Zoldoske*

§ 323b. Corpus delicti; proof of primary issue.—The *corpus delicti,* or the fact that a crime has been actually committed, is the foundation of,[1] and the primary issue in, every prosecution.[2] It is a fundamental rule in criminal procedure that no person shall be required to answer to, nor be involved in the consequences of, guilt[3] until the proof of the *corpus delicti* is made beyond a reasonable doubt, and until that is done no conviction of any grade of crime can be had.[4]

The *corpus delicti,* or the fact of the commission of the crime, applies alike to all crimes.[5]

§ 324. The corpus delicti must be proved by the prosecution.—In all criminal prosecutions, no matter what may be the kind of evidence on which they rest, the burden is on the prosecution to prove the *corpus delicti.* "I would never," says Lord Hale, "convict any person for stealing the goods

v. *State,* 82 Wis. 580, 52 N. W. 778; *Dreessen* v. *State,* 38 Neb. 375, 56 N. W. 1024; *White* v. *State,* 49 Ala. 344; *People* v. *Jones,* 123 Cal. 65, 55 Pac. 698; *Pitts* v. *State,* 43 Miss. 472, 480; *People* v. *Dick,* 37 Cal. 277; *Gay* v. *State,* 42 Tex. Crim. Rep. 450, 60 S. W. 771; *State* v. *Calder,* 23 Mont. 504, 59 Pac. 903; *Flower* v. *United States,* 53 C. C. A. 271, 116 Fed. 241.

[1] *State* v. *Millmeier,* 102 Iowa, 692, 72 N. W. 275; *Matthews* v. *State,* 55 Ala. 187, 28 Am. Rep. 698.

[2] *Smith* v. *Com.* 21 Gratt. 809; *State* v. *Flanagan,* 26 W. Va. 116; *Tatum* v. *State,* 1 Ga. App. 778, 57 S. E. 956.

[3] *State* v. *Flanagan,* 26 W. Va. 116.

[4] *United States* v. *Searcey,* 26 Fed. 435; *Brown* v. *Com.* 89 Va. 379, 16 S. E. 250; *State* v. *Miller,* 9 Houst. (Del.) 564, 32 Atl. 137; *Morris* v. *Com.* 20 Ky. L. Rep. 402, 46 S. W. 491; *Com.* v. *Webster,* 5 Cush. 295, 52 Am. Dec. 711; *Pitts* v. *State,* 43 Miss. 472; *State* v. *Jones,* 106 Mo. 302, 17 S. W. 366; *Dreessen* v. *State,* 38 Neb. 375, 56 N. W. 1024; *People* v. *Palmer,* 109 N. Y. 110, 4 Am. St. Rep. 423, 16 N. E. 529, 7 Am. Crim. Rep. 399; *Gay* v. *State,* 40 Tex. Crim. Rep. 242, 49 S. W. 612; *State* v. *Keeler,* 28 Iowa, 551; *Scott* v. *State,* 141 Ala. 1, 37 So. 357; *Williams* v. *State,* 125 Ga. 741, 54 S. E. 661; *State* v. *Pienick,* 46 Wash. 523, 11 L.R.A.(N.S.) 987, 90 Pac. 645, 13 A. & E. Ann. Cas. 800; *Territory* v. *Munroe,* 2 Ariz. 1, 6 Pac. 478.

[5] *State* v. *Millmeier,* 102 Iowa, 692, 72 N. W. 275; *Garcia* v. *State,* 12 Tex. App. 335.

of a person unknown, merely because he would not give an account of how he came by them, unless there were due proofs made that a felony had been committed. I would never convict any person of murder or manslaughter, unless the fact were proved to be done, or at least the body found dead." [1] Equally emphatic is the language of another great judge: "To take presumptions, in order to swell an equivocal and ambiguous fact into a criminal fact, would, I take it, be an entire misapplication of the doctrine of presumptions." [2] And the Roman law is the same: *Diligenter cavendum est judici, ne supplicium præcipitet, antequam de crimine constiterit.*[3] *De corpore interfecti necesse est ut constet.*[4] The death in homicide should be distinctly proved, either by inspection of the body,[5] or other evidence strong enough to leave no ground for reasonable doubt.[6] The test is applicable to all crimes.[7] Thus, in a case of horse stealing, a mere declaration in evidence that the horse had been stolen is not sufficient to prove theft. The facts must appear, so that the judge and jury may see whether such facts, in point of law, amounted to a felonious taking and carrying away of the property in question.[8]

[1] 2 Hale, P. C. 290. See also *People* v. *Bennett,* 49 N. Y. 137; *Smith* v. *Com.* 21 Gratt. 809; *State* v. *Keeler,* 28 Iowa, 553; *Brown* v. *State,* 1 Tex. App. 154; *Black* v. *State,* 1 Tex. App. 368; *Tyner* v. *State,* 5 Humph. 383; *Reg.* v. *Burton,* 24 Eng. L. & Eq. Rep. 551, 6 Cox, C. C. 293, Dears. C. C. 282, 23 L. J. Mag. Cas. N. S. 52, 18 Jur. 157, 2 Week. Rep. 230.

To establish the *corpus delicti* in a homicide case, it is necessary to show that the life of a human being has been taken, the identity of the body, and that death was unlawfully caused by the accused and no other person. *State* v. *Barnes,* 47 Or. 592, 7 L.R.A.(N.S.) 181, 85 Pac. 998.

[2] *Evans* v. *Evans,* 1 Hagg. Consist. Rep. 105, by Lord Stowell.

[3] Matth. de crim. in Dig. liber 48, title 16, chap. 1.

[4] Matth. Probat. chap. 1, note 4, p. 9.

[5] 1 Starkie, Ev. 575, 3d ed. chap. 5.

[6] *People* v. *Ruloff,* 3 Park. Crim. Rep. 401.

[7] See *Garcia* v. *State,* 12 Tex. App. 335.

[8] *Tyner* v. *State,* 5 Humph. 383. See *Mitchum* v. *State,* 11 Ga. 615;

In rape, it is essential to prove, as far as this is practicable, that violence was actually committed on the woman;[9] in burglary, that the house was actually entered;[10] in arson,

R. v. *Trainer* (1906), 4 Australian Com. L. R. 126; 2 Hale, P. C. 290.

[9] Wharton, Crim. Law, 10th ed. §§ 551 et seq.

Force, actual or constructive, is the essential element of the crime, and must be proved by the prosecution beyond a reasonable doubt, and on this proposition all the authorities are in accord: *Posey* v. *State,* 143 Ala. 54, 30 So. 1019; *Bradley* v. *State,* 32 Ark. 704; *People* v. *Royal,* 53 Cal. 62; *State* v. *Smith,* 9 Houst. (Del.) 588, 33 Atl. 441; *Cato* v. *State,* 9 Fla. 163, 185; *Vanderford* v. *State,* 126 Ga. 753, 55 S. E. 1025; *Mills* v. *State,* 52 Ind. 187; *Rucker* v. *People,* 224 Ill. 131, 79 N. E. 606; *Payne* v. *Com.* 33 Ky. L. Rep. 229, 110 S. W. 311; *People* v. *Murphy,* 145 Mich. 524, 108 N. W. 1009; *State* v. *Zempel,* 103 Minn. 428, 115 N. W. 275; *State* v. *Cowing,* 99 Minn. 123, 108 N. W. 851, 9 A. & E. Ann. Cas. 566; *State* v. *Williams,* 32 La. Ann. 335, 36 Am. Rep. 272; *State* v. *Blake,* 39 Me. 322; *State* v. *Cunningham,* 100 Mo. 382, 394, 12 S. W. 376, 8 Am. Crim. Rep. 669; *Martin* v. *State,* 13 Ohio C. C. 604, 7 Ohio C. D. 564; *Harmon* v. *Territory,* 15 Okla. 147, 79 Pac. 765; *Wyatt* v. *State,* 2 Swan, 394; *Elliott* v. *State,* 49 Tex. Crim. Rep. 435, 93 S. W. 742; *McAdoo* v. *State,* 35 Tex. Crim. Rep. 603, 60 Am. St. Rep. 61, 34 S. W. 955; *State* v. *McCune,* 16 Utah, 170, 51 Pac. 818; *Brown* v. *State,* 127 Wis. 193, 106 N. W. 536, 7 A. & E. Ann. Cas. 258.

[10] Wharton, Crim. Law, 10th ed. §§ 759 et seq.

In burglary.—The gist of this offense is breaking and entering, and this must be established by the prosecution beyond a reasonable doubt: *People* v. *Evans,* 150 Mich. 443, 114 N. W. 223; *Lester* v. *State,* 106 Ga. 371, 32 S. E. 335; *Washington* v. *State,* 21 Fla. 328; *State* v. *Warford,* 106 Mo. 55, 27 Am. St. Rep. 322, 16 S. W. 886; *McGrath* v. *State,* 25 Neb. 780, 41 N. W. 780; *State* v. *Cowell,* 12 Nev. 337. See *State* v. *Simas,* 25 Nev. 432, 62 Pac. 242; *May* v. *State,* 40 Fla. 426, 24 So. 498; *Sims* v. *State,* 136 Ind. 358, 36 N. E. 278; *State* v. *Reid,* 20 Iowa, 413; *State* v. *Herbert,* 63 Kan. 516, 66 Pac. 235.

Where force is charged it must be proved. *Jones* v. *State,* 25 Tex. App. 226, 7 S. W. 669. But see *State* v. *Huntley,* 25 Or. 349, 35 Pac. 1065.

Entering an open door, not sufficient to show entry by fraud. *Hamilton* v. *State,* 11 Tex. App. 116.

Raising window is not a breaking. *People* v. *Dupree,* 98 Mich. 26, 56 N. W. 1046. Entering by one way and breaking fastening to window in escaping not sufficient to show breaking. *Walker* v. *State,* 52 Ala. 376, 1 Am. Crim. Rep. 362 and *Brown* v. *State,* 55 Ala. 123, 28 Am. Rep. 693; *State* v. *Maxwell,* 42 Iowa, 208; *Sullivan* v. *People,* 27 Hun, 35.

that burning to some appreciable extent, actually took place;[11] in riot, that there was an actual disturbance of the public peace;[12] in concealed weapons, that the defendant carried the weapon concealed on his person;[13] in contempt, the facts necessary to support the charge;[14] in false pretenses, that

For constructive breaking, see *State* v. *Crawford,* 8 N. D. 539, 46 L.R.A. 312, 73 Am. St. Rep. 772, 80 N. W. 193; also *State* v. *Staehlin,* 16 Mo. App. 559. In the absence of a statute, the breaking must be shown to have been done in the nighttime, beyond a reasonable doubt. *Adams* v. *State,* 31 Ohio St. 462; *Waters* v. *State,* 53 Ga. 567, 1 Am. Crim. Rep. 367; *People* v. *Flynn,* 73 Cal. 511, 15 Pac. 102, 7 Am. Crim. Rep. 126; *People* v. *Bielfus,* 59 Mich. 576, 26 N. W. 771; *Ashford* v. *State,* 36 Neb. 38, 53 N. W. 1036; *Keeler* v. *State,* 73 Neb. 441, 103 N. W. 64; *State* v. *Thompson,* 24 Utah, 314, 67 Pac. 789; Russell, Crimes, 7th Eng. ed. pp. 1065–1096.

[11] *In arson.*—The *corpus delicti* is an actual burning. Wharton, Crim. Law, 10th ed. § 826; *Reg.* v. *Russell,* Car. & M. 541; *Com.* v. *Tucker,* 110 Mass. 403; *State* v. *Sandy,* 25 N. C. (3 Ired. L.) 570; *State* v. *Mitchell,* 27 N. C. (5 Ired. L.) 350; Russell, Crimes, 7th Eng. ed. pp. 1789–1791; 3 Coke Inst. 66; Dalton's Country Justice, 506; 1 Hale, P. C. 568, 569; 1 Hawk. P. C. chap. 39, §§ 16, 17; 2 East, P. C. chap. 21 § 4; *Com.* v. *Van Schaack,* 16 Mass. 105; *State* v. *Dennin,* 32 Vt. 158.

[12] Wharton, Crim. Law, 10th ed. §§ 1539 et seq.

In riot.—The *corpus delicti* in riot is the assembling of three or more persons, with some circumstance of actual force or violence or threatening speeches, turbulent gestures, and threatening conduct. *Rex* v. *Hughes,* 4 Car. & P. 373; 1 Hawk. P. C. chap. 65, § 5; 2 Russell, Crimes, 7th Eng. ed. p. 430; *Com.* v. *Gibney,* 2 Allen, 150; *Coney* v. *State,* 113 Ga. 1060, 39 S. E. 425, 12 Am. Crim. Rep. 537; *Turner* v. *State,* 120 Ga. 850, 48 S. E. 312; *Blackwell* v. *State,* 30 Tex. App. 672, 18 S. W. 676, 9 Am. Crim. Rep. 582; *Reg.* v. *Soley,* 2 Salk. 594; *United States* v. *Fenwick,* 4 Cranch, C. C. 675, Fed. Cas. No. 15,086; *State* v. *Boies,* 34 Me. 235.

Proof of concert to do an unlawful act, followed by the act in such manner as to terrify third parties, will sustain the charge. *State* v. *Brazil,* Rice, L. 257; *Pennsylvania* v. *Cribs,* Addison (Pa.) 277; *Douglass* v. *State,* 6 Yerg. 525; *Stafford* v. *State,* 93 Ga. 207, 19 S. E. 50.

A charivari has been held a riot, *Bankus* v. *State,* 4 Ind. 114. So a combination to enter a theatre and drown the voices of the performers. *State* v. *Brazil,* Rice, L. 257. Likewise a disturbance in a ballroom, in which violence is threatened and provoked. *Trittipo* v. *State,* 13 Ind. 360.

[13] *Concealed weapons.*—*State* v. *Hale,* 70 Mo. App. 143.

[14] *Contempt.*—*Dines* v. *People,* 39

they were false in fact;[15] in larceny, where the accused has reasonably accounted for his possession of the alleged stolen property, the burden is on the prosecution to prove the explanation false;[16] and it is essential in all criminal prosecu-

Ill. App. 565; *Call* v. *Pike,* 68 Me. 217.

In constructive contempts, only such evidence should be received as would be admissible on the trial of an indictment for the same grade of offense. *Bates's Case,* 55 N. H. 325; *Welch* v. *Barber,* 52 Conn. 147, 52 Am. Rep. 567. As to rule in civil and criminal contempts, see *People ex rel. Kelly* v. *Aitken,* 19 Hun, 327; *Re Buckley,* 69 Cal. 1, 10 Pac. 69; *Harwell* v. *State,* 10 Lea, 544; *State* v. *Cunningham,* 33 W. Va. 607, 11 S. E. 76; *United States* v. *Jose,* 63 Fed. 951; *Accumulator Co.* v. *Consolidated Electric Storage Co.* 53 Fed. 796; *Sabin* v. *Fogarty,* 70 Fed. 482; *United States* v. *Carroll,* 147 Fed. 947.

[15] *False pretenses.*—The intent to defraud is the *corpus delicti,* and the prosecution must establish it beyond a reasonable doubt. Underhill, Crim. Ev. 439; *Morris* v. *People,* 4 Colo. App. 136, 35 Pac. 188; *Babcock* v. *People,* 15 Hun, 347; *State* v. *Hurley,* 58 Kan. 668, 50 Pac. 887; *Brown* v. *State,* 29 Tex. 503; *State* v. *Wilbourne,* 87 N. C. 529; *Bowler* v. *State,* 41 Miss. 576; *People* v. *Getchell,* 6 Mich. 496; *People* v. *Martin,* 102 Cal. 558, 36 Pac. 952; *Edwards* v. *State,* 45 Fla. 22, 33 So. 853; *State* v. *Metsch,* 37 Kan. 222, 15 Pac. 251; *State* v. *Myers,* 82 Mo. 558, 52 Am. Rep. 389; *People* v. *Shulman,* 80 N. Y. 375, note; *Dorsey* v. *State,* 111 Ala. 40, 20 So. 629; *State* v. *Briscoe,* 6 Penn. (Del.) 401, 67 Atl. 154; *Goddard* v. *State,* 2 Ga. App. 154, 58 S. E. 304; *State* v. *Dines,* 206 Mo. 649, 105 S. W. 722.

Proof of any false representation averred in the indictment will sustain a conviction. *State* v. *Keyes,* 196 Mo. 136, 6 L.R.A.(N.S.) 369, 93 S. W. 801, 7 A. & E. Ann. Cas. 23. For representation of ownership that amounts to false pretense, see *Martins* v. *State,* 17 Wyo. 319, 22 L.R.A.(N.S.) 645, 98 Pac. 709.

[16] *In larceny.*—Burden on prosecution to prove reasonable explanation of alleged stolen goods is false. *Powell* v. *State,* 11 Tex. App. 401; *Jones* v. *State,* 30 Miss. 653, 64 Am. Dec. 175.

The *corpus delicti,* that is, the actual crime, must be established beyond a reasonable doubt. *Bolling* v. *State,* 98 Ala. 80, 12 So. 782; *People* v. *Williams,* 57 Cal. 108; *Blandford* v. *State,* 115 Ga. 824, 43 S. E. 207; *Franklin* v. *State,* 3 Ga. App. 342, 59 S. E. 835; *State* v. *Stewart,* 6 Penn. (Del.) 435, 67 Atl. 786; *Whitsel* v. *State,* 49 Tex. Crim. Rep. 42, 90 S. W. 505; *State* v. *Blay,* 77 Vt. 56, 58 Atl. 794; *Topolewski* v. *State,* 130 Wis. 244, 7 L.R.A.(N.S.) 756, 118 Am. St. Rep. 1019, 109 N. W. 1037, 10 A. & E. Ann. Cas. 627; *May* v. *People,* 92 Ill. 343; *People* v. *Gordon,* 40 Mich. 716; *State* v. *McGowan,* 1 S. C. 14; Russell, Crimes, 7th Eng. ed. pp. 1307, et seq.

tions to prove the element that constitutes the crime, and this burden is on the prosecution as a primary requisite.[17]

§ 325. Corpus delicti; essential elements.—The finding of a dead body establishes only the *corpus*.[1] The finding of such body under circumstances that indicate a crime would indicate the *delicti* or felonious killing.[2]

When these facts concur, the first element of the *corpus delicti,* the criminal act, is made to appear. Hence, it is not necessary to the establishment of a complete *corpus delicti* that identity should be shown,[3] because the dead body and the crime against it complete all that is indicated by the *corpus delicti.*[4]

The second element is the agency in the crime.[5]

In the trial of the charge, however, the *corpus delicti* and the criminal agency of the accused are so involved that testimony on both issues is admitted at the same time.[6]

[17] *Matthews* v. *State,* 55 Ala. 187, 28 Am. Rep. 698; *Smith* v. *Com.* 21 Gratt. 809; *Tatum* v. *State,* 1 Ga. App. 778, 57 N. E. 956.

[1] *People* v. *Simonsen,* 107 Cal. 345, 40 Pac. 440.

[2] *State* v. *Potter,* 52 Vt. 33, 38.

[3] *State* v. *Calder,* 23 Mont. 504, 53 Pac. 903, 906; *People* v. *Palmer,* 109 N. Y. 110, 4 Am. St. Rep. 423, 16 N. E. 529, 7 Am. Crim. Rep. 399; *State* v. *Wehr,* 6 Ohio N. P. 345, 9 Ohio S. & C. P. Dec. 478; Contra, *Edmonds* v. *State,* 34 Ark. 720.

[4] The idea conveyed by the phrase, *corpus delicti,* is not obscure. While it is generally defined as the body of the crime, it is more clearly expressed by calling it the body or thing which is the victim of a wrong. The body of a man produced under circumstances that show a felony is *corpus delicti* in homicide, but the expression is equally correct applied to all crimes. The bodies of sheep or other domestic animals, with indications of poison feloniously administered, is *corpus delicti* in malicious mischief. A house partly burned, with evidences of incendiary firing, is *corpus delicti* in arson. The primary fact is the *corpus delicti.* When that appears in any crime, then follows the investigation which has for its object the detection and punishment of the criminal agency.

[5] *State* v. *Dickson,* 78 Mo. 438.

[6] *Lovelady* v. *State,* 14 Tex. App. 545, 560; *Gay* v. *State,* 42 Tex. Crim. Rep. 450, 60 S. W. 771.

Logically, after proof that a crime has been committed,[7] follows testimony as to the guilty agent. In other words, the facts which are the basis of a *corpus delicti* form a distinct ingredient in the case of the prosecution, and must be first established beyond a reasonable doubt. When this is done, to sustain a conviction, there must be proof of the accused's guilty agency in the production of the act charged.[8]

In homicide, for instance, the fact of the death should be shown, either by witnesses who were present when the murderous act was done, or by proof of the body having been seen dead;[9] or, at all events, that fragments of it, if in a state of decomposition or disintegration, should be identified.[10] Lord Coke illustrates the policy of this rule by citing a trial where an uncle, being unable to account for the disappearance of a niece who was in his custody and care, was executed for her murder, though it afterwards appeared that she fled from home, to which, in fact, after a lapse of some

[7] *Flower* v. *United States,* 53 C. C. A. 271, 116 Fed. 241.

[8] *Rex* v. *Burdett,* 4 Barn. & Ald. 95, 22 Revised Rep. 539; *United States* v. *McGlue,* 1 Curt. C. C. 1, Fed. Cas. No. 15,679; *Com.* v. *McKie,* 1 Gray, 61, 61 Am. Dec. 410; *People* v. *Kennedy,* 32 N. Y. 141; *People* v. *Bennett,* 49 N. Y. 147; *Maher* v. *People,* 10 Mich. 212, 81 Am. Dec. 781; *Johnson* v. *Com.* 29 Gratt. 811.

See *Pitts* v. *State,* 43 Miss. 472; post, §§ 329, 633, 810.

While criminal agency is often lost sight of, it is as essential as the fact of the crime itself. Acts are essential to the *corpus delicti* to establish the guilt of the accused. A may have designed the death of the deceased, but no matter how guilty he may be morally, if he did nothing nor advised anything in respect to the death, he is not amenable to the law. Gellius VII. 3.

[9] See *Ruloff* v. *People,* 18 N. Y. 179; *State* v. *Williams,* 52 N. C. (7 Jones, L.) 446, 78 Am. Dec. 248; Wharton & S. Med. Jur. 4th ed. §§ 776 et seq.

[10] *Com.* v. *Webster,* 5 Cush. 295, 319, 52 Am. Dec. 711; *Rex* v. *Clewes,* 4 Car. & P. 221; Wharton & S. Med. Jur. 4th ed. § 783; *Adderzook* v. *Com.* 76 Pa. 340, 1 Am. Crim. Rep. 311; *McCulloch* v. *State,* 48 Ind. 109, 1 Am. Crim. Rep. 318; supra, § 20; post, § 806.

Compare *Com.* v. *Costley,* 118 Mass. 1; *Wilson* v. *State,* 43 Tex. 472.

years, she returned; and Doctor Hitzig gives several illustrations to the same effect.[11] Lord Hale tells us that in his own time, after the party charged was convicted and executed, the "deceased" returned from sea, where he had been sent against his will by the accused, who, though innocent of the murder, was not entirely blameless.[12] In our own country the alleged victim in a conspicuous case made his appearance just in time to save a person who had been indicted for murdering him, and who actually had made a confession of guilt, from being hung.[13]

[11] Der neue Pitoval, etc.

[12] 2 Hale, P. C. 230. See also Best's Theory, App. Cas. 5.

[13] *Boorn's Case* cited in 1 Greenl. Ev. § 214, post, §§ 634, 804; Wharton & S. Med. Jur. 4th ed. §§ 776, et seq. 783.

See N. Y. Sun March 23, 1884, showing facts in a disappearance case that led to the indictment of an innocent man and return in apt time of the deceased, condensed as follows:

Early in 1826, Doesey Viers, of Northfield township, Ohio, received in his cabin an Englishman named Rupert Charlesworth. "He was a jolly good fellow with plenty of money, and he became very popular in the neighborhood. Suddenly he dropped out of sight. He was known to have gone to Viers' cabin on the night of July 23d, but the constable who went there early next morning to arrest him for passing counterfeit money could not find him. One day a good while after, a hunter found a skelton under a log in the woods near Viers' farm. The discovery helped to jog the memory of a man who had heard a rifle report at Viers' cabin on the night of Charlesworth's disappearance. Another suddenly remembered that he had seen blood on the bars in Viers' lane, near the woods. Viers was questioned. At one time he said the Englishman had jumped from a window and ran away; at another, that he knew nothing about the man's departure, as he was asleep at the time. The constable, who had gone early in the morning to Viers' cabin to arrest Charlesworth, remembered that at that unusual hour Mrs. Viers was mopping the floor. For five years the gossips talked, but nothing was done." Finally on January 8th, 1831, Viers was arrested on charge of murdering Rupert Charlesworth. The proof was strong: "A hired girl who was working at Viers' cabin when Charlesworth disappeared said that a bed blanket used by the Englishman was missing on the morning he left, and that it was afterwards found concealed under a haystack, with large spots on it resembling clotted blood. A dozen neighbors testified to Charlesworth's reputed wealth, and others told of the sudden evidence of prosperity that had been seen about Viers' premises, in

§ 325a. **Proof of the corpus delicti.**—In every criminal case, the *corpus delicti* must be proved as an essential condition of conviction.[1] In larceny, it must be shown that the property was lost by the owner, and lost by a felonious taking.[2] In arson, not only the burning, but the wilful burning

the shape of a new house and in the purchase of some blooded stock. Viers and his pioneer wife grew sick at the prospect. But an unexpected deliverance came in the last two days. Two men from Northwest Ohio took the stand and gave positive evidence that they had seen Charlesworth subsequent to his disappearance from Northfield. This turned the scale in Viers' favor, and he was discharged. As there was still a strong popular feeling against Viers, however, he began a search for Charlesworth, which led to his discovery in Detroit. Even then, however, the identity of the person so discovered with Charlesworth was disputed. To settle the question Charlesworth agreed to come back to Ohio, and Viers put up handbills in Northfield Boston, and adjoining townships, saying that on a certain day Rupert Charlesworth would exhibit himself at one of the churches, and all persons who had known him were invited to be present. The meeting attracted a great crowd. Charlesworth took the platform, from which through the day he responded to interrogatories. The examination was conducted chiefly by one of the shrewdest attorneys at the bar of Akron. Not only did Charlesworth readily recognize and name persons he had not seen for sixteen years, but he related incidents known only to individual questioners and himself. He refreshed the memory of an old farmer with regard to a spree in which they had been partners, recalling the curious circumstance of their having boiled their whisky. Late in the afternoon a vote was taken as to whether the man before them was Rupert Charlesworth. The audience affirmed with one voice that the man stood before them."

[1] *Bines* v. *State,* 68 L.R.A. 33, and note, 118 Ga. 320, 45 S. E. 376, 12 Am. Crim. Rep. 205; *Lovelady* v. *State,* 14 Tex. App. 545; *McBride* v. *People,* 5 Colo. App. 91, 37 Pac. 953; *State* v. *Nesenhener,* 164 Mo. 461, 65 S. W. 230; *Dreessen* v. *State,* 38 Neb. 375, 56 N. W. 1025; *Zoldoske* v. *State,* 82 Wis. 581, 52 N. W. 778; *State* v. *Flanagan,* 26 W. Va. 116; *People* v. *Palmer,* 109 N. Y. 113, 4 Am. St. Rep. 423, 16 N. E. 529, 7 Am. Crim. Rep. 399; *Johnson* v. *Com.* 29 Gratt. 796.

See also extensive note in 68 L.R.A. 33.

[2] *Dalzell* v. *State,* 7 Wyo. 450, 53 Pac. 297.

But finding and conversion, without knowledge of the loser, is not larceny. *State* v. *Taylor,* 25 Iowa, 273. See also *Jorasco* v. *State,* 8 Tex. App. 540 and *Hill* v. *State,* 11 Tex. App. 132; *Graves* v. *State,* 25

by a person responsible criminally for his acts,[3] must be proved. In burglary, there must be proof of the breaking and entering of a house, at common law, in the nighttime.[4] In bigamy, the fact of the first marriage must be proved.[5] In adultery the *corpus delicti* consists of the alleged intercourse between the man and the woman.[6]

In homicide, the *corpus delicti* is death as the result and the criminal agency as the cause.[7]

Tex. App. 333, 8 S. W. 471; *State* v. *McGowan,* 1 S. C. 14; *Tyner* v. *State,* 5 Humph. 383; *Younkins* v. *State,* 2 Coldw. 219; *People* v. *Caniff,* 2 Park. Crim. Rep. 586; *State* v. *Hogard,* 12 Minn. 293, Gil. 191; *Stringer* v. *State,* 135 Ala. 60, 33 So. 685, 14 Am. Crim. Rep. 462; *Roberts* v. *State,* 61 Ala. 401; *Fuller* v. *State,* 48 Ala. 273; *Bailey* v. *State,* 52 Ind. 462, 21 Am. Rep. 182.

In larceny the *corpus delicti* cannot be established by confessions alone. *Williams* v. *People,* 101 Ill. 382. See also *Stringfellow* v. *State,* 26 Miss. 157, 59 Am. Dec. 247; *Brown* v. *State,* 32 Miss. 433; *Smith* v. *State,* 17 Neb. 358, 22 N. W. 780, 5 Am. Crim. Rep. 363; *State* v. *Long,* 2 N. C. (1 Hayw.) 455.

[3] *State* v. *Jones,* 106 Mo. 302, 17 S. W. 366; *Phillips* v. *State,* 29 Ga. 105.

Uncorroborated confession will not support a conviction for arson. *Murray* v. *State,* 43 Ga. 256 (under statute); *State* v. *Carroll,* 85 Iowa, 1, 51 N. W. 1159; *State* v. *Millmeier,* 102 Iowa, 692, 72 N. W. 275.

[4] *White* v. *State,* 49 Ala. 344; *State* v. *Moore,* 117 Mo. 395, 22 S. W. 1086 (what constitutes a sufficient breaking.)

[5] *People* v. *Lambert,* 5 Mich. 349, 72 Am. Dec. 49; *People* v. *Humphrey,* 7 Johns. 314; *Gahagan* v. *People,* 1 Park. Crim. Rep. 378; *Arnold* v. *State,* 53 Ga. 574; *Squire* v. *State,* 46 Ind. 459; *Parker* v. *State,* 77 Ala. 47, 54 Am. Rep. 43; *State* v. *Allen,* 113 La. 705, 37 So. 614; *People* v. *Goodrode,* 132 Mich. 542, 94 N. W. 14; *State* v. *St. John,* 94 Mo. App. 229, 68 S. W. 374; *State* v. *Goulden,* 134 N. C. 743, 47 S. E. 450; *Com.* v. *Bernard,* 27 Pa. Co. Ct. 12; *Hearne* v. *State,* 50 Tex. Crim. Rep. 431, 97 S. W. 1050 (proof must be beyond a reasonable doubt); *Goad* v. *State,* 51 Tex. Crim. Rep. 393, 102 S. W. 121.

(See *State* v. *Sharkey,* 73 N. J. L. 491, 63 Atl. 866, where it is held that evidence of divorce is inadmissible, on the perfectly tenable ground that in a civil suit a mere preponderance of evidence is enough, but will not satisfy in a criminal prosecution.)

[6] *State* v. *Potter,* 52 Vt. 33. See *State* v. *Hodgskins,* 19 Me. 155, 36 Am. Dec. 742.

[7] *State* v. *Flanagan,* 26 W. Va. 116; *People* v. *Bennett,* 49 N. Y. 137; *People* v. *Place,* 157 N. Y. 584, 52 N. E. 576; *People* v. *Benham,*

And all the elements of the *corpus delicti* may be proved by presumptive or circumstantial evidence, when direct evidence is not available.[8]

160 N. Y. 402, 55 N. E. 11; *People* v. *Palmer,* 109 N. Y. 110, 4 Am. St. Rep. 423, 16 N. E. 529, 7 Am. Crim. Rep. 399; *Ruloff* v. *People,* 18 N. Y. 179; *Cavaness* v. *State,* 43 Ark. 331; *McBride* v. *People,* 5 Colo. App. 91, 37 Pac. 953; *State* v. *Miller,* 9 Houst. (Del.) 564, 32 Atl. 137; *Holsenbake* v. *State,* 45 Ga. 43; *Campbell* v. *People,* 159 Ill. 9, 50 Am. St. Rep. 134, 42 N. E. 123; *Pitts* v. *State,* 43 Miss. 472; *State* v. *Dickson,* 78 Mo. 438; *State* v. *Shackelford,* 148 Mo. 493, 50 S. W. 105; *State* v. *Henderson,* 186 Mo. 473, 85 S. W. 576; *State* v. *Pepo,* 23 Mont. 473, 59 Pac. 721; *Sullivan* v. *State,* 58 Neb. 796, 79 N. W. 721; *State* v. *Leuth,* 5 Ohio C. C. 94, 3 Ohio C. D. 48; *Com.* v. *Cutaiar,* 5 Pa. Dist. R. 403; *Harris* v. *State,* 28 Tex. App. 308, 19 Am. St. Rep. 837, 12 S. W. 1102; *Lovelady* v. *State,* 14 Tex. App. 545, 17 Tex. App. 287; *Shulze* v. *State,* 28 Tex. App. 316, 12 S. W. 1084; *Josef* v. *State,* 34 Tex. Crim. Rep. 446, 30 S. W. 1067; *Gay* v. *State,* 40 Tex. Crim. Rep. 242, 49 S. W. 612, 42 Tex. Crim. Rep. 450, 60 S. W. 771; *Smith* v. *Com.* 21 Gratt. 809; *Williams* v. *State,* 61 Wis. 281, 21 N. W. 56.

[8] *St. Clair* v. *United States,* 154 U. S. 135, 38 L. ed. 936, 14 Sup. Ct. Rep. 1002; *Isaacs* v. *United States,* 159 U. S. 487, 40 L. ed. 229, 16 Sup. Ct. Rep. 51; *United States* v. *Gibert,* 2 Sumn. 19, Fed. Cas. No. 15,204; *Edmonds* v. *State,* 34 Ark. 720; *Anderson* v. *State,* 24 Fla. 139, 3 So. 884; *Holland* v. *State,* 39 Fla. 178, 22 So. 298; *Mitchum* v. *State,* 11 Ga. 615; *State* v. *Alcorn,* 7 Idaho, 599, 97 Am. St. Rep. 252, 64 Pac. 1014; *Campbell* v. *People,* 159 Ill. 9, 50 Am. St. Rep. 134, 42 N. E. 123; *Stocking* v. *State,* 7 Ind. 326; *McCulloch* v. *State,* 48 Ind. 109, 1 Am. Crim. Rep. 318; *State* v. *Keeler,* 28 Iowa, 551; *State* v. *Novak,* 109 Iowa, 717, 79 N. W. 465; *State* v. *Westcott,* 130 Iowa, 1, 104 N. W. 341; *State* v. *Winner,* 17 Kan. 298; *Johnson* v. *Com.* 81 Ky. 325, 4 Am. Crim. Rep. 140; *Com.* v. *Webster,* 5 Cush. 295, 52 Am. Dec. 711; *Com.* v. *Williams,* 171 Mass. 461, 50 N. E. 1035; *Pitts* v. *State,* 43 Miss. 472; *State* v. *Henderson,* 186 Mo. 473, 85 S. W. 576; *State* v. *Dickson,* 78 Mo. 438; *State* v. *Ah Chuey,* 14 Nev. 79, 33 Am. Rep. 530; *State* v. *Williams,* 52 N. C. (7 Jones, L.) 446, 78 Am. Dec. 248; *Zell* v. *Com.* 94 Pa. 258; *Gray* v. *Com.* 101 Pa. 381, 47 Am. Rep. 733; *Com.* v. *Johnson,* 162 Pa. 63, 29 Atl. 280; *State* v. *Motley,* 7 Rich. L. 327; *Lancaster* v. *State,* 91 Tenn. 267, 18 S. W. 777; *Timmerman* v. *Territory,* 3 Wash. Terr. 445, 17 Pac. 624; *State* v. *Gates,* 28 Wash. 689, 59 Pac. 385; *Zoldoske* v. *State,* 82 Wis. 580, 52 N. W. 778; *Buel* v. *State,* 104 Wis. 132, 80 N. W. 78, 15 Am. Crim. Rep. 175.

See *State* v. *Heusack,* 189 Mo. 295, 88 S. W. 21; *State* v. *White,* 189 Mo. 339, 87 S. W. 1188;

§ 325b. Proof establishing the corpus delicti in various crimes.—The *corpus delicti,* the body of the crime; or that a body or thing has suffered a wrong, which fact is being investigated before the proper legal tribunal,—must be established beyond a reasonable doubt as to the existence of that fact.[1]

The character of the evidence to prove the *corpus delicti,* and its sufficiency for that purpose, depend largely upon the circumstances of each case. No universal rule can be laid down, except the general principle that it must be proved by the best evidence that can be adduced, but such evidence, whether direct or circumstantial, must establish the fact, in each case, beyond a reasonable doubt.[2]

Thus on a charge of concealing the birth of a child and the secret disposition of its dead body, there must be proof of the birth and also the death.[3]

In criminal libel, the *corpus delicti* is the malicious publication, and does not lie in the authorship of the article nor ownership of the publication.[4]

Schwantes v. *State,* 127 Wis. 160, 106 N. W. 237; *Dimmick* v. *United States,* 135 Fed. 257; *People* v. *Vanderpool,* 1 Mich. N. P. 264; *Perovich* v. *United States,* 205 U. S. 86, 51 L. ed. 722, 27 Sup. Ct. Rep. 456.

[a] For *corpus delicti* in homicide, see post, §§ 325c. 325d.

[1] *Lambright* v. *State,* 34 Fla. 564, 16 So. 582, 9 Am. Crim. Rep. 383; *State* v. *Williams,* 46 Or. 287, 80 Pac. 655; *United States* v. *Searcey,* 26 Fed. 435; *People* v. *Schryver* 42 N. Y. 6, 1 Am. Rep. 480; *People* v. *Plath,* 100 N. Y. 590, 53 Am. Rep. 236, 3 N. E. 790, 6 Am. Crim. Rep. 1; *Goldman* v. *Com.* 100 Va. 865, 42 S. E. 923; *State* v. *Parsons,* 39 W. Va. 464, 19 S. E. 876; *Johnson* v. *Com.* 29 Gratt. 796; *State* v. *Millmeier,* 102 Iowa, 692, 72 N. W. 275; *People* v. *Palmer,* 109 N. Y. 113, 4 Am. St. Rep. 423, 16 N. E. 529, 7 Am. Crim. Rep. 399.

[2] *State* v. *Potter,* 52 Vt. 33.

[3] *Reg.* v. *Bell,* Ir. Rep. 8 C. L. 542; *Reg.* v. *Cook,* 11 Cox, C. C. 542, 21 L. T. N. S. 216; *Reg.* v. *Williams,* 11 Cox, C. C. 684; *Com.* v. *McKee,* Addison (Pa.) 1.

[4] *People* v. *Miller,* 122 Cal. 84, 54 Pac. 523; *Rex* v. *Burdett,* 4 Barn. & Ald. 95, 22 Revised Rep. 539.

In abortion, the *corpus delicti* consists in unlawfully procuring the miscarriage of the woman.[5]

In false pretenses, to establish the *corpus delicti,* it is necessary to show the falsity of the representations by which the money was procured.[6]

In assault, the evidence must show that the injury was the result of design, because if it is left doubtful whether it was design or accident, it renders the criminal act doubtful, and the defendant has a right to an acquittal.[7]

In malicious mischief, the *corpus delicti* is to prove the destruction of the property or serious injury to it.[8]

In robbery, the *corpus delicti* is to show that the personal property of the victim was taken from him, with felonious intent, against his will, through force or violence or by putting him in fear.[9]

[5] *Taylor* v. *State,* 101 Ind. 65.

See *Seifert* v. *State,* 160 Ind. 464, 98 Am. St. Rep. 340, 67 N. E. 100; also *State* v. *Howard,* 32 Vt. 380.

[6] *People* v. *Ward,* 145 Cal. 736, 79 Pac. 448; *Johnson* v. *State,* 142 Ala. 1, 37 So. 937; *People* v. *Simonsen,* 107 Cal. 345, 40 Pac. 440; *People* v. *Hong Quin Moon,* 92 Cal. 41, 27 Pac. 1096; *State* v. *Wilbourne,* 87 N. C. 529; *State* v. *Penny,* 70 Iowa, 190, 30 N. W. 561; *Babcock* v. *People,* 15 Hun, 347; *Swift* v. *State,* 126 Ga. 590, 55 S. E. 478; *Fairy* v. *State,* 50 Tex. Crim. Rep. 396, 97 S. W. 700.

[7] *Com.* v. *McKie,* 1 Gray, 61, 61 Am. Dec. 410.

[8] *Pollet* v. *State,* 115 Ga. 234, 41 S. E. 606; *State* v. *McBeth,* 49 Kan. 584, 31 Pac. 145; *Com.* v. *Sullivan,* 107 Mass. 218; *United States* v. *Gideon,* 1 Minn. 292, Gil. 226; *Patterson* v. *State,* 41 Tex. Crim. Rep. 412, 55 S. W. 338; *Davis* v. *Chesapeake & O. R. Co.* 61 W. Va. 246, 9 L.R.A. (N.S.) 993, 56 S. E. 400; *State* v. *Martin,* 141 N. C. 832, 53 S. E. 874; *State* v. *Keller,* 8 Idaho, 699, 70 Pac. 1051; *Johnson* v. *State,* — Tex. Crim. Rep. —, 70 S. W. 83.

But see *State* v. *Green,* 106 La. 440, 30 So. 898, and *Moody* v. *State,* 127 Ga. 821, 56 S. E. 993.

[9] *Bloomer* v. *People,* 1 Abb. App. Dec. 146; *State* v. *Scott,* 39 Mo. 424, but compare *State* v. *Lamb,* 28 Mo. 218; *People* v. *Jones,* 31 Cal. 565.

See *Rex* v. *Falkner,* Russ. & R. C. C. 481; *Hall* v. *People,* 171 Ill. 540, 49 N. E. 495; *Reg.* v. *Edwards,* 1 Cox, C. C. 32; *Rex* v. *Gnosil,* 1 Car. & P. 304; *Steward's Case,* 2 East, P. C. 702; *Horner's Case,* 2 East, P. C. 703; *Lapier's Case,* 2 East, P. C. 708; *State* v. *Graves,* 185 Mo. 713, 84 S. W. 904; *State* v. *Adair,* 160 Mo. 391, 61 S. W. 187,

In receiving stolen goods, the *corpus delicti* must show: (a) The stealing of the goods by some other than the accused; (b) that the accused, knowing them to be stolen, received or aided in concealing the goods, and (c) continued such possession or concealment with a dishonest purpose.[10]

14 Am. Crim. Rep. 597; *Rex* v. *Fallows,* 5 Car. & P. 508; *Trimble* v. *State,* 61 Neb. 604, 85 N. W. 844; *Thomas* v. *State,* 91 Ala. 34, 9 So. 81; *Young* v. *State,* 50 Ark. 501, 8 S. W. 828; *Crawford* v. *State,* 90 Ga. 701, 35 Am. St. Rep. 242, 17 S. E. 628, 9 Am. Crim. Rep. 587; *O'Donnell* v. *People,* 224 Ill. 218, 79 N. E. 639, 8 A. & E. Ann. Cas. 123; *Glass* v. *Com.* 6 Bush, 436; *State* v. *Lawler,* 130 Mo. 366, 51 Am. St. Rep. 575, 32 S. W. 979; *Hill* v. *State,* 42 Neb. 503, 60 N. W. 916; *Brooks* v. *People,* 49 N. Y. 436, 10 Am. Rep. 398; *Crews* v. *State,* 3 Coldw. 350; *Clemens* v. *State,* 84 Ga. 660, 20 Am. St. Rep. 385, 11 S. E. 505, 8 Am. Crim. Rep. 692; *State* v. *Lamb,* 141 Mo. 298, 42 S. W. 827; *Turner* v. *State,* 1 Ohio St. 422; *Com.* v. *Clifford,* 8 Cush. 215; *State* v. *Graves,* 185 Mo. 713, 84 S. W. 904; *State* v. *Adair,* 160 Mo. 391, 61 S. W. 187, 14 Am. Crim. Rep. 597; *Hope* v. *People,* 83 N. Y. 418, 38 Am. Rep. 460; *Williams* v. *State,* 37 Tex. Crim. Rep. 147, 38 S. W. 999; *Tones* v. *State,* 48 Tex. Crim. Rep. 363, 1 L.R.A.(N.S.) 1024, 122 Am. St. Rep. 759, 88 S. W. 217, 13 A. & E. Ann. Cas. 455.

See *Re Lewis,* 83 Fed. 159.

The felonious intent may be presumed from the violent taking from the victim (*Howard* v. *People,* 193 Ill. 615, 61 N. E. 1016); and fear may be presumed where the evidence shows reasonable cause for it (*Long* v. *State,* 12 Ga. 293).

[10] *Hester* v. *State,* 103 Ala. 83, 15 So. 857; *Boyd* v. *State,* 150 Ala. 101, 43 So. 204; *Baker* v. *State,* 58 Ark. 513, 25 S. W. 603, 9 Am. Crim. Rep. 455; *People* v. *Tilley,* 135 Cal. 61, 67 Pac. 42; *Stripland* v. *State,* 114 Ga. 843, 40 S. E. 993; *Aldrich* v. *People,* 101 Ill. 16, 14 Am. Crim. Rep. 534; *Semon* v. *State,* 158 Ind. 55, 62 N. E. 625; *Sanderson* v. *Com.* 11 Ky. L. Rep. 341, 12 S. W. 136, 8 Am. Crim. Rep. 687; *State* v. *Burdon,* 38 La. Ann. 357; *Com.* v. *Mason,* 105 Mass. 163, 7 Am. Rep. 507; *State* v. *Fink,* 186 Mo. 50, 84 S. W. 921; (collecting authorities) *George* v. *State,* 57 Neb. 656, 78 N. W. 259; *People* v. *McClure,* 148 N. Y. 95, 42 N. E. 523; *People* v. *Jaffe,* 185 N. Y. 497, 9 L.R.A. (N.S.) 263, 78 N. E. 169, 7 A. & E. Ann. Cas. 348; *Smith* v. *State,* 59 Ohio St. 350, 52 N. E. 826; *State* v. *Pray,* 30 Nev. 206, 94 Pac. 218; *State* v. *Crawford,* 39 S. C. 343, 17 S. E. 799; *Rice* v. *State,* 3 Heisk. 215; *Arcia* v. *State,* 26 Tex. App. 193, 9 S. W. 685; *Hey* v. *Com.* 32 Gratt. 946, 34 Am. Rep. 799.

Where the accused is charged as an accessory to larceny, it must be shown that he got the goods from the thief. *Foster* v. *State,* 106 Ind. 272, 6 N. E. 641; *State* v. *Ives,*

In intoxicating liquors, on prosecution for illegal selling, the *corpus delicti* of the illegal sales must show payment or agreement to pay and any other element necessary to the proof of a contract of sale, to sustain a conviction.[11]

In forgery, to prove the *corpus delicti,* it must appear that the instrument purported to be the writing of another so simulated as effectually to deceive, and that it was done fraudulently and against the consent of another.[12]

35 N. C. (13 Ired. L.) 338; *People* v. *Johnson,* 1 Park. Crim. Rep. 564; *Rice* v. *State,* 3 Heisk. 215; *State* v. *Hodges,* 55 Md. 127, 2 Mor. Min. Rep. 448; Hochheimer, Crim. Law, p. 462; 2 Russell, Crimes, 7th Eng. ed. p. 1483; *State* v. *Caveness,* 78 N. C. 484; *Com.* v. *Leonard,* 140 Mass. 473, 54 Am. Rep. 485, 4 N. E. 96, 7 Am. Crim. Rep. 593; *Murio* v. *State,* 31 Tex. App. 210, 20 S. W. 356.

[11] *Birr* v. *People,* 113 Ill. 645; *Bottoms* v. *State,* — Tex. Crim. Rep. —, 73 S. W. 16; *Massey* v. *State,* 74 Ind. 368.

Proof of exchange will not suffice. *Gillan* v. *State,* 47 Ark. 555, 2 S. W. 185. But see *Barnes* v. *State,* — Tex. Crim. Rep. —, 88 S. W. 804; *Com.* v. *Worcester,* 126 Mass. 256; *State* v. *Shields,* 110 La. 547, 34 So. 673; *Fleming* v. *State,* 106 Ga. 359, 32 S. E. 338; *Fitze* v. *State,* — Tex. Crim. Rep. —, 85 S. W. 1156; *State* v. *Stephens,* 70 Mo. App. 554; *Com.* v. *Hurst,* 23 Ky. L. Rep. 365, 62 S. W. 1024; *Ledbetter* v. *State,* 143 Ala. 52, 38 So. 856; *Reynolds* v. *State,* 52 Fla. 409, 42 So. 373; *Graves* v. *State,* 127 Ga. 46, 56 S. E. 72; *Southern Exp. Co.* v. *State,* 1 Ga. App. 700, 58 S. E. 67; *Dowdy* v. *Com.* 31 Ky. L. Rep. 33, 101 S. W. 338; *Adams Exp. Co.* v. *Com.* 124 Ky. 160, 5 L.R.A. (N.S.) 630, 92 S. W. 932; *Cable* v. *State,* — Miss. —, 38 So. 98; *Price* v. *State,* — Miss. —, 38 So. 41; *Harper* v. *State,* 85 Miss. 338, 37 So. 956; *Morton* v. *State,* — Tex. Crim. Rep. —, 107 S. W. 549.

Evidence held sufficient to show sale. *Fisher* v. *State,* 55 Fla. 17, 46 So. 422; *Gibbs* v. *United States,* 7 Ind. Terr. 182, 104 S. W. 583, *Day* v. *Com.* 29 Ky. L. Rep. 807, 814, 816, 96 S. W. 508, 510; *State* v. *Budworth,* 104 Minn. 257, 116 N. W. 486; *State* v. *Brown,* 130 Mo. App. 214, 109 S. W. 99; *State* v. *Herring,* 145 N. C. 418, 122 Am. St. Rep. 461, 58 S. E. 1007; *Oldham* v. *State,* 52 Tex. Crim. Rep. 516, 108 S. W. 667.

Circumstantial evidence is admissible to show a sale. *Johnson* v. *State,* 52 Tex. Crim. Rep. 554, 107 S. W. 816.

See *State* v. *O'Malley,* 132 Iowa, 696, 109 N. W. 491.

[12] *Frazier* v. *State,* — Tex. Crim. Rep. —, 64 S. W. 934; *Leslie* v. *State,* 10 Wyo. 10, 65 Pac. 849, 69 Pac. 2; *People* v. *Peacock,* 6 Cow. 72; *Edwards* v. *State,* 53 Tex. Crim. Rep. 50, 126 Am. St. Rep. 767, 108

§ 325c. Corpus delicti in homicide; proof of death.[a]— The general rule, following the common-law rule, is, in homicide, that the proof of death, the first element of the *corpus delicti,* must be established by direct evidence.[1] This requirement is fully satisfied when the death is shown by witnesses who were present when the murderous act was done, or by production of the dead body.[2]

S. W. 673; *Glenn* v. *State,* 116 Ala. 483, 23 So. 1; *Goodman* v. *People,* 228 Ill. 154, 81 N. E. 830; *People* v. *Turner,* 113 Cal. 278, 45 Pac. 331; *Garmire* v. *State,* 104 Ind. 444, 4 N. E. 54, 5 Am. Crim. Rep. 238; *State* v. *Ferguson,* 35 La. Ann. 1042; *Arnold* v. *Cost,* 3 Gill & J. 219, 22 Am. Dec. 302; *Com.* v. *Hinds,* 101 Mass. 209; *State* v. *Evans,* 15 Mont. 539, 28 L.R.A. 127, 48 Am. St. Rep. 701, 39 Pac. 850; *Roode* v. *State,* 5 Neb. 174, 25 Am. Rep. 475; *Rohr* v. *State,* 60 N. J. L. 576, 38 Atl. 673; *Hess* v. *State,* 5 Ohio, 5, 22 Am. Dec. 767; *Hendricks* v. *State,* 26 Tex. App. 176, 8 Am. St. Rep. 463, 9 S. W. 555, 557, 8 Am. Crim. Rep. 279; *Santolini* v. *State,* 6 Wyo. 110, 71 Am. St. Rep. 906, 42 Pac. 746; *Crossland* v. *State,* 77 Ark. 537, 544, 92 S. W. 776; *State* v. *Pine,* 56 W. Va. 1, 48 S. E. 206; *People* v. *Lundin,* 117 Cal. 124, 48 Pac. 1024; *State* v. *White,* 98 Iowa, 346, 67 N. W. 267; *Com.* v. *Bowman,* 96 Ky. 40, 27 S. W. 816; *Knowles* v. *State,* — Tex. Crim. Rep. —, 74 S. W. 767; *Romans* v. *State,* 51 Ohio St. 528, 37 N. E. 1040; *State* v. *Swan,* 60 Kan. 461, 56 Pac. 750.

[a] As to proof in connection with confessions of the accused, see post, chap. XIV.

[1] *People* v. *Benham,* 160 N. Y. 402, 55 N. E. 11; *Ruloff* v. *People,* 18 N. Y. 179; *People* v. *Bennett,* 49 N. Y. 137; *Edmonds* v. *State,* 34 Ark. 720; *People* v. *Place,* 157 N. Y. 584, 52 N. E. 576; *People* v. *Beckwith,* 108 N. Y. 67, 15 N. E. 53; *State* v. *Henderson,* 186 Mo. 473, 85 S. W. 576; *State* v. *Williams,* 52 N. C. (7 Jones, L.) 446, 78 Am. Dec. 248; *Rex* v. *Hindmarsh,* 2 Leach, C. L. 569; *Reg.* v. *Hopkins,* 8 Car. & P. 591.

See also note in 68 L.R.A. 35, as to proof of *corpus delicti* in homicide cases.

[2] *Ruloff* v. *People,* 53 N. Y. 179; *State* v. *Williams,* 52 N. C. (7 Jones, L.) 446, 78 Am. Dec. 248; Wharton & S. Med. Jur. 4th ed. § 776 et seq. § 786; *Smith* v. *Com.* 21 Gratt. 809.

See *High* v. *State,* 26 Tex. App. 545, 8 Am. St. Rep. 488, 10 S. W. 238.

As to evidence of physician, see *Com.* v. *Danz,* 211 Pa. 507, 60 Atl. 1070; *People* v. *O'Connell,* 78 Hun, 323, 29 N. Y. Supp. 195; *Edmonds* v. *State,* 34 Ark. 720; *People* v. *Alviso,* 55 Cal. 230; *McCulloch* v. *State,* 48 Ind. 109, 1 Am. Crim. Rep. 318; *Com.* v. *Williams,* 171 Mass. 461, 50 N. E. 1035.

As declaratory of this rule, several of the states have passed statutes providing that no person can be convicted of any grade of homicide unless the death of the person alleged to have been killed is established as an independent fact by direct proof, and the criminal agency of the accused is established as an independent fact beyond a reasonable doubt;[3] and in Texas it is indispensable to conviction that the dead body, or portions of it, should be found and clearly proved to be that of the person alleged to have been killed.[4] Should the death be proved by eyewitnesses, of course inspection of the body can be dispensed with,[5] and where the body is found and identified, death is conclusively established,[6] and where it is assumed at the trial, by both parties, that the person alleged to have been killed is dead, direct proof is not necessary.[7]

But the desire to conceal the crime often leads to the disposition of the dead body, and hence the rule must be satisfied where portions of the body have been found and clearly identified as that of the deceased. In many instances the identification is as completely established as though the body had been produced.

[3] *People* v. *Benham*, 160 N. Y. 402, 55 N. E. 11; *State* v. *Pepo*, 23 Mont. 473, 59 Pac. 721.

[4] *Walker* v. *State*, 14 Tex. App. 609; *Puryear* v. *State*, 28 Tex. App. 73, 11 S. W. 929; *Gay* v. *State*, 42 Tex. Crim. Rep. 450, 60 S. W. 771.

[5] *Rex* v. *Hindmarsh*, 2 Leach, C. L. 569; *Anderson* v. *State*, 24 Fla. 139, 3 So. 884; *United States* v. *Williams*, 1 Cliff. 5, Fed. Cas. No. 16,707.

[6] *Com.* v. *Webster*, 5 Cush. 295, 52 Am. Dec. 711; *Thomas* v. *Com.* 14 Ky. L. Rep. 288, 20 S. W. 226.

See *Hayes* v. *State*, 112 Wis. 304, 87 N. W. 1076; *State* v. *Calder*, 23 Mont. 504, 59 Pac. 903; *State* v. *Pepo*, 23 Mont. 473, 59 Pac. 721; *People* v. *Wise*, 163 N. Y. 440, 57 N. E. 740; *State* v. *Downing*, 24 Wash. 340, 64 Pac. 550; *Paulson* v. *State*, 118 Wis. 89, 94 N. W. 771, 15 Am. Crim. Rep. 497.

[7] *Cavaness* v. *State*, 43 Ark. 331; *People* v. *Lagroppo*, 90 App. Div. 219, 86 N. Y. Supp. 116.

Nor is proof necessary where the accused admits the killing and says that he will show self-defense. *State* v. *White*, 189 Mo. 339, 87 S. W. 1188. See also *Davis* v. *People*, 114 Ill. 86, 29 N. E. 192, where the killing was not a disputed fact in the case.

But in such case, the identification of the remains must be positive, for such identification is a necessary part of the *corpus delicti.*[8]

But the rule that the element of the death in the *corpus delicti* must be shown by production of the body would operate to shield an accused who was able to completely dispose of the body, and the rule now established by the weight of authority is that the element of death in the *corpus delicti* can be established by circumstantial evidence,[9] so that in case of

[8] *State* v. *Flanagan,* 26 W. Va. 116; *Wilson* v. *State,* 41 Tex. 320; *McCulloch* v. *State,* 48 Ind. 109, 1 Am. Crim. Rep. 318; *State* v. *Henderson,* 186 Mo. 473, 85 S. W. 576.

See note 7, supra; *State* v. *Ah Chuey,* 14 Nev. 79, 33 Am. Rep. 530; *State* v. *Williams,* 46 Or. 287, 80 Pac. 655; *State* v. *Barnes,* 7 L.R.A.(N.S.) 181, and note, 47 Or. 592, 85 Pac. 998; *People* v. *Beckwith,* 108 N. Y. 67, 15 N. E. 53, 7 N. Y. Crim. Rep. 146; *Taylor* v. *State,* 35 Tex. 97; *Wilson* v. *State,* 43 Tex. 472; *Smith* v. *Com.* 21 Gratt. 809.

Showing identity by name. *Shepherd* v. *People,* 72 Ill. 480; *State* v. *Kilgore,* 70 Mo. 546.

See also *State* v. *Downing,* 24 Wash. 340, 64 Pac. 550; *Paulson* v. *State,* 118 Wis. 89, 94 N. W. 771, 15 Am. Crim. Rep. 497.

[9] Supra, note 8, § 325b; *Campbell* v. *People,* 159 Ill. 9, 50 Am. St. Rep. 134, 42 N. E. 123; *Carroll* v. *People,* 136 Ill. 463, 27 N. E. 18; *Dimmick* v. *United States,* 54 C. C. A. 329, 116 Fed. 825, 135 Fed. 257, 189 U. S. 509, 47 L. ed. 923, 23 Sup. Ct. Rep. 850, 57 C. C. A. 664, 121 Fed. 638, 191 U. S. 574, 48 L. ed. 308, 24 Sup. Ct. Rep. 846; *Winslow* v. *State,* 76 Ala. 42, 5 Am. Crim. Rep. 43; *Bradford* v. *State,* 104 Ala. 68, 53 Am. St. Rep. 24, 16 So. 107; *Roberts* v. *People,* 11 Colo. 213, 17 Pac. 637; *Stocking* v. *State,* 7 Ind. 326; *State* v. *Keeler,* 28 Iowa, 551; *Johnson* v. *Com.* 81 Ky. 325, 4 Am. Crim. Rep. 140; *State* v. *Minor,* 106 Iowa, 642, 77 N. W. 330; *State* v. *Winner,* 17 Kan. 298; *State* v. *Dickson,* 78 Mo. 438; *State* v. *Loveless,* 17 Nev. 424, 30 Pac. 1080; *State* v. *Cardelli,* 19 Nev. 319, 10 Pac. 433; *State* v. *Williams,* 52 N. C. (7 Jones, L.) 446, 78 Am. Dec. 248; *Zell* v. *Com.* 94 Pa. 258; *Willard* v. *State,* 27 Tex. App. 386, 11 Am. St. Rep. 197, 11 S. W. 453; *State* v. *Davidson,* 30 Vt. 377, 73 Am. Dec. 312; *Timmerman* v. *Territory,* 3 Wash. Terr. 445, 17 Pac. 624; *Zoldoske* v. *State,* 82 Wis. 580, 52 N. W. 778; *Williams* v. *State,* 46 Or. 287, 80 Pac. 655; 10 Cent. L. J. p. 165, citing *Reg.* v. *Murphy,* 4 W. W. & B. 95; *Cowper's Trial,* 13 How. St. Tr. 1105; *Reg.* v. *Woodgate,* 2 New Zealand Jur. N. S. 5, cited in 10 Cent. L. J. p. 165; *State* v. *Laliyer,* 4 Minn. 368, Gil.

the destruction of the body, or in case of its disappearance, as in murder upon the high seas, where the body is rarely, if ever found, death may be proved circumstantially.[10] And to establish the *corpus delicti* by circumstantial evidence, facts are admissible showing the impossibility or improbability of rescue, as at sea;[11] existence and extent of wounds;[12] and deceased's condition of health;[13] that the wound was sufficient to cause death and the party was reported dead;[14] and

277; *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; *Laughlin* v. *Com.* 18 Ky. L. Rep. 640, 37 S. W. 590; *State* v. *Pepo,* 23 Mont. 473, 59 Pac. 721.

[10] *St. Clair* v. *United States,* 154 U. S. 134, 38 L. ed. 936, 14 Sup. Ct. Rep. 1002; *Edmonds* v. *State,* 34 Ark. 720; *People* v. *Alviso,* 55 Cal. 231; *State* v. *Winner,* 17 Kan. 298; *People* v. *Wilson,* 3 Park. Crim. Rep. 199; *State* v. *Williams,* 52 N. C. (7 Jones, L.) 446, 78 Am. Dec. 248; *United States* v. *Brown,* Fed. Cas. No. 14,656a; *United States* v. *Williams,* 1 Cliff. 5, Fed. Cas. No. 16,707; *United States* v. *Matthews,* Fed. Cas. No. 15,741a; *Rex* v. *Hindmarsh,* 2 Leach, C. L. 569; *United States* v. *Hewson,* Brunner Col. Cas. 532, Fed. Cas. No. 15,360.

[11] *St. Clair* v. *United States,* 154 U. S. 134, 38 L. ed. 936, 14 Sup. Ct. Rep. 1002.

[12] *Wilson* v. *State,* — Tex. Crim. Rep. —, 24 S. W. 409; *Fuller* v. *State,* 117 Ala. 36, 23 So. 688; *Basye* v. *State,* 45 Neb. 261, 63 N. W 811; *Cavaness* v. *State,* 43 Ark. 331; *Wilson* v. *State,* 140 Ala. 43, 37 So. 93; *Casteel* v. *State,* — Ark. —, 88 S. W. 1004; *Lemons* v. *State,* 97 Tenn. 560, 37 S. W. 552; *Mayfield* v. *State,* 101 Tenn. 673, 49 S. W. 742; *Scott* v. *State,* 40 Tex. Crim. Rep. 105, 47 S. W. 523.

[13] *Reg* v. *Johnson,* 2 Car. & K. 354; *Williams* v. *State,* 64 Md. 384, 1 Atl. 887, 5 Am. Crim. Rep. 512; *Phillips* v. *State,* 68 Ala. 469; *Davidson* v. *State,* 135 Ind. 254, 34 N. E. 972; *Mayfield* v. *State,* 101 Tenn. 673, 49 S. W. 742; *State* v. *Phillips,* — Iowa, —, 89 N. W. 1092 (thin skull); *Winter* v. *State,* 123 Ala. 1, 26 So. 949 (age).

See also *People* v. *Aikin,* 66 Mich. 460, 11 Am. St. Rep. 512, 33 N. W. 821, 7 Am. Crim. Rep. 345; *Morrison* v. *State,* 40 Tex. Crim. Rep. 473, 51 S. W. 358; *Keaton* v. *State,* 41 Tex. Crim. Rep. 621, 57 S. W. 1125; *State* v. *David,* 131 Mo. 380, 33 S. W. 28.

[14] *Cavaness* v. *State,* 43 Ark. 331; *Wilson* v. *State,* 140 Ala. 43, 37 So. 93; *People* v. *Wood,* 145 Cal. 659, 79 Pac. 367; *Thompson* v. *State,* 38 Tex. Crim. Rep. 335, 42 S. W. 974; *Scott* v. *State,* — Tex. Crim. Rep. —, 47 S. W. 531; *Patton* v. *State,* — Tex. Crim. Rep. —, 80 S. W. 86.

death is sufficiently shown by the testimony of a witness that he saw the flash, heard the report, that deceased fell to the ground, declaring he was shot, and accused did the shooting.[15]

But to establish the element of death in the *corpus delicti,* the circumstantial evidence must be strong and cogent.[16]

And it is not sufficiently established by a mere showing of absence,[17] nor by ill usage and injuries inflicted on the party alleged to be killed,[18] nor by unaccountable disappearance,[19] and this also applies to the case of a child last seen in charge of its mother.[20]

And in infanticide where the requirement is that to establish the *corpus delicti,* it must be shown beyond a reasonable doubt that the child was born alive and death due to the criminal act of the accused,[21] yet both facts may be established by circumstantial evidence.[22]

§ 325d. Corpus delicti in homicide; proof of criminal agency.—The general rule in homicide is that the criminal

[15] *Casteel* v. *State,* — Ark. —, 88 S. W. 1004.

[16] *State* v. *Williams,* 52 N. C. (7 Jones, L.) 446, 78 Am. Dec. 248.

[17] *Haynes* v. *State,* — Miss. —, 27 So. 601.

[18] *People* v. *Ah Fung,* 16 Cal. 137; *People* v. *Callego,* 133 Cal. 295, 65 Pac. 572; *Puryear* v. *State,* 28 Tex. App. 73, 11 S. W. 929.

[19] *State* v. *Miller,* 9 Houst. (Del.) 564, 32 Atl. 137; *Puryear* v. *State,* 28 Tex. App. 73, 11 S. W. 929; *Com.* v. *Webster,* 5 Cush. 295, 52 Am. Dec. 711; *Haynes* v. *State,* — Miss. —, 27 So. 601.

[20] *Reg.* v. *Hopkins,* 8 Car. & P. 591.

[21] *Josef* v. *State,* 34 Tex. Crim. Rep. 446, 30 S. W. 1067; *Sheppard* v. *State,* 17 Tex. App. 74; *Com.* v. *O'Donohue,* 8 Phila. 623; *Rex* v. *Poulton,* 5 Car. & P. 349; *Rex* v. *Crutchley,* 7 Car. & P. 814; *Rex* v. *Sellis,* 7 Car. & P. 850; (Sellis) *Reg.* v. *Wright,* 9 Car. & P. 754; *Reg.* v. *Reeves,* 9 Car. & P. 25; *People* v. *Callego,* 133 Cal. 295, 65 Pac. 572; *Warren* v. *State,* 30 Tex. App. 57, 16 S. W. 747; *Lee* v. *State,* 76 Ga. 498; *Harris* v. *State,* 28 Tex. App. 308, 19 Am. St. Rep. 837; 12 S. W. 1102; *State* v. *O'Neall,* 79 S. C. 571, 60 S. E. 1121.

[22] *Echols* v. *State,* 81 Ga. 696, 8 S. E. 443; *Heubner* v. *State,* 131 Wis. 162, 111 N. W. 63; *Hardin* v. *State,* 52 Tex. Crim. Rep. 238, 106 S. W. 352; *Peters* v. *State,* 67 Ga. 29.

agency—the cause of the death, the second element of the *corpus delicti*—may always be shown by circumstantial evidence.[1] To sustain a conviction, proof of the criminal agency is as indispensable as the proof of death.[2] The fact of death is not sufficient; it must affirmatively appear that the death was not accidental, that it was not due to natural causes, and that it was not due to the act of the deceased.[3] Where it is shown by the evidence, on one side, that death may have been accidental, or it may have been the result of natural causes or due to suicide, and on the other side that it was through criminal agency, a conviction cannot be sustained. Proof of death cannot rest in the disjunctive. It must affirmatively appear that death resulted from criminal agency.[4]

[1] Supra, § 325c, note 1; *People* v. *Harris,* 136 N. Y. 423, 33 N. E. 65; *People* v. *Place,* 157 N. Y. 584, 52 N. E. 576; *People* v. *Benham,* 160 N. Y. 402, 55 N. E. 11; *People* v. *Patrick,* 182 N. Y. 131, 74 N. E. 843; *People* v. *Holmes,* 118 Cal. 444, 50 Pac. 675; *Baker* v. *State,* 30 Fla. 41, 11 So. 492; *Flinchem* v. *Com.* 28 Ky. L. Rep. 653, 89 S. W. 1129; *State* v. *Shackelford,* 148 Mo. 493, 50 S. W. 105; *People* v. *Parmelee,* 112 Mich. 291, 70 N. W. 577; *Sullivan* v. *State,* 58 Neb. 796, 79 N. W. 721; *Smith* v. *Com.* 21 Gratt. 809; *People* v. *Palmer,* 109 N. Y. 110, 4 Am. St. Rep. 423, 16 N. E. 529, 7 Am. Crim. Rep. 399; *State* v. *Pepo,* 23 Mont. 473, 59 Pac. 721; *State* v. *Calder,* 23 Mont. 504, 59 Pac. 903; *People* v. *Beckwith,* 108 N. Y. 67, 15 N. E. 53; *Clark* v. *State,* 29 Tex. App. 357, 16 S. W. 187; *Kugadt* v. *State,* 38 Tex. Crim. Rep. 681, 44 S. W. 989; *Gay* v. *State,* 40 Tex. Crim. Rep. 242, 49 S. W. 612; *Shulze* v. *State,* 28 Tex. App. 316, 12 S. W. 1084; *Darlington* v. *State,* 40 Tex. Crim. Rep. 333, 50 S. W. 375.

[2] *Cole* v. *State,* 59 Ark. 50, 26 S. W. 377; *Pitts* v. *State,* 43 Miss. 472; *State* v. *Nesenhener,* 164 Mo. 461, 65 S. W. 230; *Lovelady* v. *State,* 14 Tex. App. 545; *Holsenbake* v. *State,* 45 Ga. 43; *State* v. *German,* 54 Mo. 526, 14 Am. Rep. 481; *Conde* v. *State,* 35 Tex. Crim. Rep. 98, 60 Am. St. Rep. 22, 34 S. W. 286; *Harris* v. *State,* 28 Tex. App. 308, 19 Am. St. Rep. 837, 12 S. W. 1102.

[3] *Wrigley's Case,* 1 Lewin, C. C. 171; *Cole* v. *State,* 59 Ark. 50, 26 S. W. 377; *Herren* v. *People,* 28 Colo. 23, 62 Pac. 833; *McBride* v. *People,* 5 Colo. App. 91, 37 Pac. 953; *State* v. *Billings,* 81 Iowa, 99, 46 N. W. 862; *Bourn* v. *State* — Miss. —, 5 So. 626; *Lee* v. *State,* 76 Ga. 498; *Dreessen* v. *State,* 38 Neb. 375, 56 N. W. 1024; *Lucas* v. *State,* 19 Tex. App. 79; *State* v. *Flanagan,* 26 W. Va. 116.

[4] Supra, note 3; *State* v. *Moxley,* 102 Mo. 374, 14 S. W. 969, 15 S. W.

But the criminal agency is sufficiently shown where a dead body is found with injuries apparently sufficient to cause death, under circumstances which exclude inference of accident or suicide;[5] or in such a place as it could not probably get without human agency;[6] or with evidences of an effort to destroy the body or its identity;[7] or by proof of wounds which shortly afterwards were followed by death;[8] or, in case of a woman, evidences of strangulation, particularly after violation of her person;[9] or the infliction of a mortal wound which was followed by death;[10] or that a person in

556; *People* v. *Kerrigan,* 9 N. Y. Crim. Rep. 469; *Harris* v. *State,* 30 Tex. App. 549, 17 S. W. 1110.

[5] *People* v. *Palmer,* 109 N. Y. 113, 4 Am. St. Rep. 423, 16 N. E. 529, 7 Am. Crim. Rep. 399; *People* v. *Lagroppo,* 90 App. Div. 219, 86 N. Y. Supp. 116; *Hunt* v. *State,* 135 Ala. 1, 33 So. 329; *People* v. *Wood,* 145 Cal. 659, 79 Pac. 367; *Malcek* v. *State,* 33 Tex. Crim. Rep. 14, 24 S. W. 417; *Buel* v. *State,* 104 Wis. 132, 80 N. W. 78, 15 Am. Crim. Rep. 175.

[6] *Com.* v. *Costley,* 118 Mass. 1; *Com.* v. *Cutaiar,* 5 Pa. Dist. R. 403.

[7] *State* v. *Smith,* 9 Wash. 341, 37 Pac. 491; *Wilson* v. *State,* 43 Tex. 472; *State* v. *Tettaton,* 159 Mo. 354, 60 S. W. 743; *Udderzook* v. *Com.* 76 Pa. 340, 1 Am. Crim. Rep. 311.

[8] *State* v. *Lucy,* 41 Minn. 60, 42 N. W. 697; *People* v. *O'Connell,* 78 Hun, 323, 29 N. Y. Supp. 195; *Baker* v. *State,* 30 Fla. 41, 11 So. 492 (blow of the fist); *State* v. *Crabtree,* 170 Mo. 642, 71 S. W. 127 (blow, rather than drowning, but criminal agency not sufficiently shown); *People* v. *Kerrigan,* 84 Hun, 609, 32 N. Y. Supp. 367 (blow or alcoholism as cause of death); *State* v. *O'Brien,* 81 Iowa, 88, 46 N. W. 752; *Patton* v. *State,* — Tex. Crim. Rep. —, 80 S. W. 86; *State* v. *Murphy,* 9 Nev. 394; *Thompson* v. *State,* 38 Tex. Crim. Rep. 335, 42 S. W. 974; *Edwards* v. *State,* 39 Fla. 753, 23 So. 537; *Smith* v. *State,* 50 Ark. 545, 8 S. W. 941; *United States* v. *Wiltberger,* 3 Wash. C. C. 515, Fed. Cas. No. 16,738; *Scott* v. *State,* 40 Tex. Crim. Rep. 105, 47 S. W. 523; *State* v. *Moody,* 7 Wash. 395, 35 Pac. 132; *Gibson* v. *Territory,* 8 Ariz. 42, 68 Pac. 540.

[9] *Morgan* v. *State,* 51 Neb. 672, 71 N. W. 788; *Dunn* v. *State,* — Ind. —, 67 N. E. 940. See *State* v. *Crabtree,* 170 Mo. 642, 71 S. W. 127.

[10] *Thompson* v. *State,* 38 Tex. Crim. Rep. 335, 42 S. W. 974; *United States* v. *Wiltberger,* 3 Wash. C. C. 515, Fed. Cas. No. 16,738; *Scott* v. *State,* 40 Tex. Crim. Rep. 105, 47 S. W. 523; *Lemons* v. *State,* 97 Tenn. 560, 37 S. W. 552

previous good health was so seriously wounded that death shortly followed.[11]

Where the proof showed two wounds, either of them mortal, it was sufficient to sustain an indictment for murder averred by shooting in the head.[12]

Where there is evidence of the robbery of deceased and of his death, resulting from injuries which might have been accidental or the result of a criminal assault, it is sufficient to go to the jury upon the question of fact.[13] Death is sufficiently shown by the opinion of medical experts, where they testify that it was from strangulation, caused by an outward force, leaving physical evidences of the fact,[14] or that a wound and disease produced the death, where the disease was the result of the wound.[15]

It is necessary to produce medical testimony as to the extent and character of the wounds that caused the death, where there were physicians in attendance and their testimony is available,[16] but where the character of the wound is such that it is obvious to any intelligent person that the wound is mortal, medical testimony is not necessary.[17]

In prosecution for manslaughter, by procuring an abortion, the *corpus delicti* is to be established not only by the autopsy, but also proving the pregnancy of the deceased, and for this

[11] *Scott* v. *State,* 40 Tex. Crim. Rep. 105, 47 S. W. 523; *State* v. *Murphy,* 9 Nev. 394; *Mayfield* v. *State,* 101 Tenn. 673, 49 S. W. 742.

[12] See *State* v. *Dunn,* 179 Mo. 95, 77 S. W. 848; *Real* v. *People,* 42 N. Y. 270. See *Wilson* v. *State,* 140 Ala. 43, 37 So. 93.

[13] *Williams* v. *State,* 61 Wis. 281, 21 N. W. 56.

[14] *Com.* v. *Bell,* 164 Pa. 517, 30 Atl. 511. See *Pitts* v. *State,* 43 Miss. 472.

[15] *Powell* v. *State,* 13 Tex. App. 244. See *People* v. *Thiede,* 11 Utah, 241, 39 Pac. 837, 159 U. S. 510, 40 L. ed. 237, 16 Sup. Ct. Rep. 62.

[16] *High* v. *State,* 26 Tex. App. 545, 8 Am. St. Rep. 488, 10 S. W. 238. See *Edwards* v. *State,* 39 Fla. 753, 23 So. 537.

[17] *Waller* v. *People,* 209 Ill. 284, 70 N. E. 681; *State* v. *Murphy,* 9 Nev. 394; *Lemons* v. *State,* 97 Tenn. 560, 37 S. W. 552.

[18] *People* v. *Aikin,* 66 Mich. 460, 11 Am. St. Rep. 512, 33 N. W. 821, 7 Am. Crim. Rep. 345.

purpose the facts of her illness, and what accused said and did in connection with it while he attended her, are admissible.[18]

In poisoning, the presence in the body of poison in sufficient quantities to cause death is sufficient;[19] it is not necessary to show the kind nor the amount of poison,[20] nor is the detection of the poison by chemical analysis essential, but death from poisoning may be established by symptoms of disease, marks on the body, and other inferential testimony,[21] but in such cases the circumstantial evidence must be overwhelming.[22]

§ 325e. Corpus delicti in homicide; identity.—While identity is not, technically speaking, a part of the *corpus delicti*,[1] yet the identity of the person killed (which is a question for the jury,[2] and not for expert opinion) [3] must always

[19] *Shows* v. *State*, — Miss. —, 23 So. 1021. See *State* v. *Shackelford*, 148 Mo. 493, 50 S. W. 105; *State* v. *Baldwin*, 36 Kan. 1, 12 Pac. 318, 7 Am. Crim. Rep. 377.

[20] Wills, Circumstantial Ev. 180. See post, § 328.

[21] Taylor, Med. Jur. 159; Stewart, Legal Medicine § 170; *Johnson* v. *State*, 29 Tex. App. 150, 15 S. W. 647; *Brown* v. *State*, 88 Ga. 257, 14 S. E. 578; *Nordgren* v. *People*, 211 Ill. 425, 71 N. E. 1042.

[22] *State* v. *Blydenburg*, 135 Iowa, 264, 112 N. W. 634, 14 A. & E. Ann. Cas. 443; *People* v. *Patrick*, 182 N. Y. 131, 74 N. E. 843; *People* v. *Staples*, 149 Cal. 405, 86 Pac. 886; *Hatchett* v. *Com.* 76 Va. 1026; *Joe* v. *State*, 6 Fla. 591, 65 Am. Dec. 579.

See *State* v. *Nesenhener*, 164 Mo. 461, 65 S. W. 230; *Osborne* v. *State*, 64 Miss. 318, 1 So. 349.

[1] *People* v. *Palmer*, 109 N. Y. 110, 4 Am. St. Rep. 423, 7 Am. Crim. Rep. 399, 16 N. E. 529; *Campbell* v. *People*, 159 Ill. 9, 50 Am. St. Rep. 134, 42 N. E. 123; *State* v. *Calder*, 23 Mont. 504, 59 Pac. 903; *State* v. *Wehr*, 6 Ohio N. P. 345, 9 Ohio S. & C. P. Dec. 478.

But see *Wall* v. *State*, 5 Ga. App. 305, 63 S. E. 27; *Edmonds* v. *State*, 34 Ark. 720.

[2] *State* v. *Vincent*, 24 Iowa, 570, 95 Am. Dec. 753; *Holland* v. *Com.* 26 Ky. L. Rep. 789, 82 S. W. 598; *Rye* v. *State*, 8 Tex. App. 163; *State* v. *Williams*, 36 Wash. 143, 78 Pac. 780; *Vaughn* v. *State*, 130 Ala. 18, 30 So. 669 (identity of articles found with body question for jury).

[3] *People* v. *Wilson*, 3 Park. Crim. Rep. 199; *State* v. *Vincent*, 24 Iowa, 570, 95 Am. Dec. 753.

be established beyond a reasonable doubt.[4] Identification may be made by any means that will satisfy the jury beyond a reasonable doubt.[5]

§ 325f. Corpus delicti; order of proof.—As the burden of proof of the *corpus delicti* is always on the prosecution,[1] the prosecution should not be allowed to proceed further, until the proof of death and its character is established, as far as the evidence can be separately given. There is no reason for offering testimony in reference to the commission of the crime by the accused, until there has been proof of the *corpus*

[4] *Taylor* v. *State,* 35 Tex. 97; *State* v. *Miller,* 9 Houst. (Del.) 564, 32 Atl. 137; *People* v. *Wilson,* 3 Park. Crim. Rep. 199; *Puryear* v. *State,* 28 Tex. App. 73, 11 S. W. 929; *Gay* v. *State,* 42 Tex. Crim. Rep. 450, 60 S. W. 771; *Walker* v. *State,* 14 Tex. App. 609.

[5] Supra, note 4; *State* v. *Heusack,* 189 Mo. 295, 88 S. W. 21; *State* v. *Dicksan,* 78 Mo. 438; *State* v. *Knolle,* 90 Mo. App. 238; *State* v. *German,* 54 Mo. 530, 14 Am. Rep. 481; *People* v. *Beckwith,* 45 Hun, 422; *State* v. *Martin,* 47 S. C. 67, 25 S. E 113; *Wilsan* v. *State,* 43 Tex. 472; *Hamby* v. *State,* 36 Tex. 523; *Harris* v. *Com.* 25 Ky. L. Rep. 297, 74 S. W. 1044; *People* v. *Wise,* 163 N. Y. 440, 57 N. E. 740; *Ausmus* v. *People,* 47 Colo. 167, 107 Pac. 204, 19 A. & E. Ann. Cas. 491; *Keith* v. *State,* 157 Ind. 376, 61 N. E. 716; *People* v. *Beckwith,* 108 N. Y. 67, 15 N. E. 53; *Carter* v. *State,* 40 Tex. Crim. Rep. 225, 47 S. W. 979, 49 S. W. 74, 619; *State* v. *Downing,* 24 Wash. 340, 64 Pac. 550; *Com.* v. *Cutaiar,* 5 Pa. Dist. R. 403; *Com.* v. *Williams,* 171 Mass. 461, 50 N. E. 1035; *State* v. *Henderson,* 186 Mo. 473, 85 S. W. 576; *State* v. *Cadatte,* 17 Mont. 315, 42 Pac. 857; *State* v. *Porter,* 32 Or. 135, 49 Pac. 964; *State* v. *Navak,* 109 Iowa, 717, 79 N. W. 465; *State* v. *Kilgore,* 70 Mo. 546; *Rye* v. *State,* 8 Tex. App. 163; *Marion* v. *State,* 20 Neb. 233, 57 Am. Rep. 825, 29 N. W. 911.

See *Carter* v. *State,* 39 Tex. Crim. Rep. 345, 46 S. W. 236, 48 S. W. 508, 177 U. S. 442, 44 L. ed. 839, 20 Sup. Ct. Rep. 687; *State* v. *Tettaton,* 159 Mo. 354, 60 S. W. 743; *State* v. *Lucey,* 24 Mont. 295, 61 Pac. 994.

[1] *United States* v. *Searcey,* 26 Fed. 435; *People* v. *Whiteman,* 114 Cal. 338, 46 Pac. 99; *State* v. *Taylor,* Houst. Crim. Rep. (Del.) 436; *State* v. *Miller,* 9 Houst. (Del.) 564, 32 Atl. 137; *Haynes* v. *State,* — Miss. —, 27 So. 601; *People* v. *Schryver,* 42 N. Y. 1, 1 Am. Rep. 480; *Ettinger* v. *Com.* 98 Pa. 338; *Lovelady* v. *State,* 14 Tex. App. 546, 560. See *United States* v. *Hewson,* Brunner Col. Cas. 532, Fed. Cas. No. 15,360.

delicti.[2] This is the general rule,[3] and even confessions are not admissible until after proof of the *corpus delicti.*[4] This order of proof ought always to prevail where the question of the *corpus delicti* is clearly separate and distinct from the question of the guilt of the party charged.

But in many cases the two matters are so intimately connected that the proof of the *corpus delicti* and the guilty agency is shown at the same time;[5] hence the order of proof in a criminal case is generally within the discretion of the trial court,[6] and this prevails so generally that error committed in admitting testimony as to the guilt, before the proof of the *corpus delicti,* is cured, where the subsequent testimony sufficiently establishes the *corpus delicti.*[7]

§ 326. Identification of body after death not always essential.—Should the death be satisfactorily proved, identi-

[2] *People* v. *Hall,* 48 Mich. 482, 42 Am. Rep. 477, 12 N. W. 665, 4 Am. Crim. Rep. 357; *People* v. *Aikin,* 66 Mich. 460, 11 Am. St. Rep. 512, 33 N. W. 821, 7 Am. Crim. Rep. 345; *People* v. *Swetland,* 77 Mich. 53, 43 N. W. 779, 8 Am. Crim. Rep. 283.

[3] *People* v. *Ward,* 134 Cal. 301, 66 Pac. 372; *Traylor* v. *State,* 101 Ind. 65; *People* v. *Millard,* 53 Mich. 63, 18 N. W. 562.

[4] *People* v. *Simonsen,* 107 Cal. 345, 40 Pac. 440; *Winslow* v. *State,* 76 Ala. 42, 5 Am. Crim. Rep. 43; *Pitts* v. *State,* 43 Miss. 472; *Smith* v. *State,* 133 Ala. 145, 91 Am. St. Rep. 21, 31 So. 806; *Gantling* v. *State,* 41 Fla. 587, 26 So. 737.

[5] *State* v. *Davis,* 48 Kan. 1, 28 Pac. 1092; *People* v. *Swetland,* 77 Mich. 53, 43 N. W. 779, 8 Am. Crim. Rep. 283; *State* v. *Kesner,* 72 Kan. 87, 82 Pac. 720; *Lovelady* v. *State,* 14 Tex. App. 546, 560.

[6] *Holland* v. *State,* 39 Fla. 178, 22 So. 298; *Whitney* v. *State,* 53 Neb. 287, 73 N. W. 696; *State* v. *Grear,* 29 Minn. 221, 13 N. W. 140; *State* v. *Potter,* 52 Vt. 33; *Carl* v. *State,* 125 Ala. 89, 28 So. 505; *Anthony* v. *State,* 44 Fla. 1, 32 So. 818; *People* v. *Benham,* 160 N. Y. 402, 55 N. E. 11; *Reg.* v. *Howell,* 3 State Tr. N. S. 1087, 1104; *People* v. *Shainwold,* 51 Cal. 468; *People* v. *Jones,* 123 Cal. 65, 55 Pac. 698; *State* v. *Laliyer,* 4 Minn. 368, Gil. 277; *Scott* v. *State,* 141 Ala. 1, 37 So. 357; *Williams* v. *State,* 123 Ga. 138, 51 S. E. 322; *State* v. *Alcorn,* 7 Idaho, 599, 97 Am. St. Rep. 252, 64 Pac. 1014.

[7] *Carl* v. *State,* 125 Ala. 89, 28 So. 505; *Holland* v. *State,* 39 Fla. 178, 22 So. 298.

fication of the body after death may be dispensed with.[1] Thus in a case in England the accused, a sailor on board the ship Eolus, was charged with murdering the captain; the first count of the indictment averred murder by a blow from a piece of wood; the second, by throwing deceased into the sea. The evidence showed that while the ship was lying off the coast of Africa, with several other vessels near, accused was seen to take the captain up in his arms and throw him into the sea, after which he was never seen or heard of; near the place on the deck where this occurred was found a piece of wood, and the deck and the accused's clothes were stained with blood. It was objected that the *corpus delicti* was not sufficiently proved, as the captain might have been rescued by a neighboring vessel; and while the court admitted the general rule, he left it to the jury to say, upon all the evidence, whether or not the deceased was killed before the body was cast into the sea, and, the jury finding that he was, the accused was convicted and executed.[2]

Something more than mere disappearance must be shown. In England a woman was tried for the murder of her chilld aged about sixteen days, the evidence showing that she was going from Bristol to Llandogo, and was seen near Tintern, with the child in her arms, about 6 P. M.; that she arrived at Llandogo between 8 and 9 o'clock without the child, which was not afterwards heard of. The court directed an acquittal, as she could not be compelled to account for the child or to say where it was, as there must be evidence to show that the child was actually dead.[3]

[1] *Reg.* v. *Burton,* Dears, C. C. 284, 23 L. J. Mag. Cas. N. S. 52, 18 Jur. 157, 2 Week. Rep. 230, 6 Cox, C. C. 293; *Rex* v. *Douglas,* 1 Moody, C. C. 480; *State* v. *Patterson,* 73 Mo. 695; post, § 804. See 10 Cent. L. J. 164; see note supra § 325d; *Rex* v. *Hindmarsh,* 2 Leach, C. L. 569.

[2] *United States* v. *Williams,* 1 Cliff. 5, Fed. Cas. No. 16,707; *Stocking* v. *State,* 7 Ind. 326.

[3] *Reg.* v. *Hopkins,* 8 Car. & P. 591; Wharton & S. Med. Jur. 4th ed. §§ 776 et seq. § 783.

On the other hand, in a case in Missouri tried in 1859, the prisoner's confession that he drowned his wife was held sufficient proof of her death, without any evidence that the body was seen after death, though in this case there were other facts from which a killing could be inferred.[4]

§ 327. Corpus delicti; infanticide.—In infanticide,[1] it must be shown that the child had acquired an independent circulation and existence,[2] and the fact of the child having breathed is not conclusive proof that it was born alive.[3] Such independent circulation and existence may be present, even though it is still attached to its mother by the umbilical cord,[4] if its independent circulation and existence is not wholly dependent on the connection still existing with the mother.[5] In one case proof of life was required in a child some months old, where during an attack of puerperal fever the mother threw it from the window of a steamboat.[6] If, however, the child is completely born and is alive, it is not essential that it should have breathed at the time it was killed, as many children are born alive and yet do not breathe for sometime after birth.[7]

Whether the child was born alive is a question of fact to be determined from all the circumstances. Where the evidence showed that the child was dropped while the mother

[4] *State* v. *Lamb*, 28 Mo. 218.

[1] Supra, § 325 c, note 21.

[2] *Wallace* v. *State*, 7 Tex. App. 570, s. c. 10 Tex. App. 255.

[3] Wills, Circumstantial Ev. p. 205; *Rex* v. *Poulton*, 5 Car. & P. 329; Wharton & S. Med. Jur. 4th ed. §§ 776, et seq. 783; Wharton Crim. Law, 10th ed. § 445; *Rex* v. *Sellis*, 7 Car. & P. 850; *Com.* v. *O'Donohue*, 8 Phila. 623.

[4] *Reg.* v. *Trilloe*, Car. & M. 650, 2 Moody, C. C. 260; *Evans* v. *People*, 49 N. Y. 86.

[5] *Reg.* v. *Handley*, 13 Cox, C. C. 79.

[6] *United States* v. *Hewson*, Brunner, Col. Cas. 532, 7 Law Rep. 361, Fed. Cas. No. 15,360. See *Com.* v. *Harman*, 4 Pa. 269.

[7] *Rex* v. *Brain*, 6 Car. & P. 350. See also *Reg.* v. *West*, 2 Car. & K. 784, 2 Cox, C. C. 500; *Rex* v. *Crutchley*, 7 Car. & P. 814; *Reg.* v. *Reeves*, 9 Car. & P. 25; *Rex* v. *Enoch*, 5 Car. & P. 539; *Reg.* v. *Wright*, 9 Car. & P. 754.

was at a privy, and was smothered in the soil,[8] or was killed by falling through the toilet,[9] the question to be determined by the jury was whether or not it was alive at birth. Likewise, the question of death is to be determined from all the facts.[10]

§ 328. Corpus delicti; proof must show that death resulted from the injury.—Because a person is wounded and dies, it is not conclusive that death resulted from the wound; and the burden is on the prosecution to show beyond a reasonable doubt that such wound caused the death.[1] Where poison has been administered, death may result from natural causes, and the burden is on the prosecution to show beyond a reasonable doubt that the poison thus received into the system was the cause of death.[2]

In aid of determination of the presence of poison, we may look to the symptoms during life, to the post-mortem appearance, to the moral circumstances; and the existence of poison in the body may be shown by matter ejected from the body, or that it was contained in the food and drink of which the sufferer has partaken.[3]

II. Reasonable Doubt.

§ 328a. Reasonable doubt.—Reasonable doubt is the phrase used by all courts to indicate the degree of proof necessary to sustain a conviction of the charge assigned in a criminal case.

[8] *Reg.* v. *Middleship,* 5 Cox, C. C. 275; *State* v. *Winthrop,* 43 Iowa, 519, 22 Am. Rep. 257, 2 Am. Crim. Rep. 274.

[9] *Brown* v. *State,* 95 Miss. 670, 49 So. 146.

[10] *Peters* v. *State,* 67 Ga. 29; supra, § 325c, note 22.

[1] Wharton Crim. Law, 10th ed. §§ 152, et seq.

[2] Wills, Circumstantial Ev. 209; post, §§ 787–792.

[3] Wharton & S. Med. Jur. 4th ed. §§ 321, 1022.

Hence, the jury is always instructed, in a criminal case, that the guilt of the accused must be proved beyond a reasonable doubt;[1] that this degree of proof is necessary in both misdemeanors and felonies[2] and in all degrees of the same;[3] the jury is instructed to acquit of any grade of which it may have a reasonable doubt, and to convict of any grade of which

[1] The courts in all jurisdictions are in accord on this.

United States v. *Brown,* 4 McLean, 142, Fed. Cas. No. 14,667; *Lang* v. *State,* 84 Ala. 1, 5 Am. St. Rep. 324, 4 So. 193; *Brown* v. *State,* 148 Ala. 657, 43 So. 101; *Byrd* v. *State,* 69 Ark. 537, 64 S. W. 270; *Larimore* v. *State,* 84 Ark. 606, 107 S. W. 165; *People* v. *Wynn,* 133 Cal. 72, 65 Pac. 126; *Kent* v. *People,* 8 Colo. 563, 9 Pac. 852, 5 Am. Crim. Rep. 406; *Boykin* v. *People,* 22 Colo. 496, 45 Pac. 419; *State* v. *Johns,* 6 Penn. (Del.) 174, 65 Atl. 763; *State* v. *Reidell,* 9 Houst. (Del.) 470, 14 Atl. 550; *Wallace* v. *State,* 41 Fla. 547, 26 So. 713; *McBeth* v. *State,* 122 Ga. 737, 50 S. E. 931; *Spies* v. *People,* 122 Ill. 1, 3 Am. St. Rep. 320, 12 N. E. 865, 17 N. E. 898, 6 Am. Crim. Rep. 570; *Polk* v. *State,* 19 Ind. 170, 81 Am. Dec. 382; *Best* v. *State,* 155 Ind. 46, 57 N. E. 534; *State* v. *Snyder,* 137 Iowa, 600, 115 N. W. 225; *Horne* v. *State,* 1 Kan. 47, 81 Am. Dec. 499; *State* v. *Tulip,* 9 Kan. App. 454, 60 Pac. 659; *Watkins* v. *Com.* 123 Ky. 817, 97 S. W. 740; *Mann* v. *Com.* 33 Ky. L. Rep. 269, 110 S. W. 243; *People* v. *Niles,* 44 Mich. 606, 7 N. W. 192; *Blalock* v. *State,* — Miss. —, 27 So. 642; *State* v. *Tettaton,* 159 Mo. 354, 60 S. W. 743; *Territory* v. *Clayton,* 8 Mont. 1, 19 Pac. 293; *Keeler* v. *State,* 73 Neb. 441, 103 N. W. 64; *Morrison* v. *State,* 13 Neb. 527, 14 N. W. 475; *People* v. *O'Bryan,* 1 Wheeler, Crim. Cas. 21; *People* v. *Willson,* 109 N. Y. 345, 16 N. E. 540; *State* v. *Byrd,* 121 N. C. 684, 28 S. E. 353; *State* v. *Gardiner,* Wright (Ohio) 392; *State* v. *Ah Lee,* 7 Or. 237; *Ortwein* v. *Com.* 76 Pa. 414, 18 Am. Rep. 420, 1 Am. Crim. Rep. 297; *State* v. *Taylor,* 57 S. C. 483, 76 Am. St. Rep. 575, 35 S. E. 729; *Persons* v. *State,* 90 Tenn. 291, 16 S. W. 726; *Brown* v. *State,* 23 Tex. App. 214, 4 S. W. 588; *State* v. *Meyer,* 58 Vt. 457, 3 Atl. 195, 7 Am. Crim. Rep. 428; *Tilley* v. *Com.* 90 Va. 99, 17 S. E. 895; *Miller* v. *Territory,* 3 Wash. Terr. 554, 19 Pac. 50; *State* v. *Strauder,* 11 W. Va. 745, 27 Am. Rep. 606; *Cornish* v. *Territory,* 3 Wyo. 95, 3 Pac. 793.

[2] *State* v. *Murphy,* 6 Ala. 845; *State* v. *King,* 20 Ark. 166; *State* v. *Dill,* 9 Houst. (Del.) 495, 18 Atl. 763; *Sowder* v. *Com.* 78 Bush. 432; *Stewart* v. *State,* 44 Ind. 237; *Vandeventer* v. *State,* 38 Neb. 592, 57 N. W. 397; *State* v. *Hicks,* 125 N. C. 636, 34 S. E. 247; *Fuller* v. *State,* 12 Ohio St. 433.

[3] *State* v. *Mills,* 6 Penn. (Del.) 497, 69 Atl. 841; *People* v. *Chun Heong,* 86 Cal. 329, 24 Pac. 1021; *Hayes* v. *People,* 146 Ill. App. 596;

it has no reasonable doubt;[4] that each juror must be satisfied beyond a reasonable doubt before he can convict,[5] but that defendant cannot be acquitted unless every one of the jurors entertains a reasonable doubt of the defendant's guilt;[6] that a reasonable doubt as to any essential element of the crime, or of the proof of any essential fact, must always be resolved in favor of the defendant.[7]

[4] *Newport* v. *State,* 140 Ind. 299, 39 N. E. 926; *Ramsey* v. *State,* 92 Ga. 53, 17 S. E. 613; post, § 721 and authorities.

[5] *United States* v. *Schneider,* 21 D. C. 381; *People* v. *Dole,* 122 Cal. 486, 68 Am. St. Rep. 50, 55 Pac. 581; *Carter* v. *State,* 103 Ala. 93, 15 So. 893; *Brown* v. *State,* 23 Tex. App. 214, 4 S. W. 588; *Fassinow* v. *State,* 89 Ind. 235; *Boyd* v. *State,* 150 Ala. 101, 43 So. 204; *State* v. *Sloan,* 55 Iowa, 220, 7 N. W. 516; *State* v. *Stewart,* 52 Iowa, 284, 3 N. W. 99, 2 Am. Crim. Rep. 603; *State* v. *Nicholson,* 124 N. C. 820, 32 S. E. 813; *Bradley* v. *State,* 31 Ind. 492; *People* v. *Lee,* 237 Ill. 272, 86 N. E. 573; *Phillips* v. *State,* 162 Ala. 53, 50 So. 326.

It is not necessary, it seems, from the authorities, that if one or more jurors, less than the whole number, or number necessary to convict, entertains a reasonable doubt, that the defendant be acquitted, because the doubt of one juror is not binding on the others, and, while the result might be a disagreement, an acquittal could not be demanded. See *Boyd* v. *State,* 33 Fla. 316, 14 So. 836.

[6] *State* v. *Rorabacher,* 19 Iowa, 154; *Leonard* v. *State,* 150 Ala. 89, 43 So. 214; *Territory* v. *Livingston,* 13 N. M. 318, 84 Pac. 1021; *Frazier* v. *State,* 117 Tenn. 430, 100 S. W. 94; *Lucas* v. *State,* 75 Neb. 11, 105 N. W. 976; *State* v. *Fleetwood,* 6 Penn. (Del.) 153, 65 Atl. 772; *State* v. *Cephus,* 6 Penn. (Del.) 160, 67 Atl. 150; *Steinkuhler* v. *State,* 77 Neb. 332, 109 N. W. 395.

See *People* v. *Hare,* 57 Mich. 505, 24 N. W. 843 (directing acquittal); *Jimmerson* v. *State,* 133 Ala. 18, 32 So. 141 (in accord all Alabama cases); *Price* v. *State,* 114 Ga. 855, 40 S. E. 1015, 12 Am. Crim. Rep. 203; *Hodge* v. *Territory,* 12 Okla. 108, 69 Pac. 1077; *Littleton* v. *State,* 128 Ala. 31, 29 So. 390; *Turner* v. *State,* 160 Ala. 40, 49 So. 828.

[7] *Henson* v. *State,* 112 Ala. 41, 21 So. 79; *Lawless* v. *State,* 4 Lea, 173; *State* v. *Hamilton,* 13 Nev. 386; *State* v. *Meyer,* 58 Vt. 457, 3 Atl. 195, 7 Am. Crim. Rep. 428; *United States* v. *Wright,* 16 Fed. 112; *Lucas* v. *State,* 75 Neb. 11, 105 N. W. 976; *State* v. *Fleetwood,* 6 Penn. (Del.) 153, 65 Atl. 772; *State* v. *Cephus,* 6 Penn. (Del.) 160, 67 Atl. 150; *Steinkuhler* v. *State,* 77 Neb. 332, 109 N. W. 395; *Brown* v. *State,* 62 N. J. L. 666, 42 Atl. 811; *People* v. *Quakenboss,* 1 Wheeler, Crim. Cas. 91; *Com.* v. *Rider,* 29 Pa. Super. Ct. 621 (jury must acquit on a reasonable doubt, and has

It is difficult to define the phrase "reasonable doubt," because it is difficult to make clearer, by definition,[8] that which is self-evident and clearly comprehended by the intelligent mind by the use of the words themselves.

But in all criminal cases a careful explanation of the term ought to be given, as "without it, justice is liable, at times, through ignorance, to be defeated, and the efficacy of the law to protect society, and its administration by the courts, discredited." [9]

A reasonable doubt "is the doubt which makes you hesitate as to the correctness of the conclusion which you reach. If, under your oaths and upon your consciences, after you have fully investigated the evidence and compared it in all its parts, you say to yourselves, 'I doubt if he is guilty,' then it is a reasonable doubt. It is a doubt which settles in your judgment, and finds a resting place there." [10]

It must be a doubt arising from the evidence, or from want

no discretion about it); *State* v. *Strother,* 84 S. C. 503, 66 S. E. 877; *State* v. *Pepe,* —Del.—, 76 Atl. 367; *State* v. *Dinneen,* — Del. — 76 Atl. 623;

[8] *Knights of Pythias* v. *Steele,* 108 Tenn. 624, 69 S. W. 336; *State* v. *Wilcox,* 132 N. C. 1120, 44 S. E. 625; *People* v. *Cox,* 70 Mich. 247, 38 N. W. 235; *State* v. *Morrison,* 67 Kan. 144, 72 Pac. 554; *State* v. *Davis,* 48 Kan. 1, 28 Pac. 1092; *State* v. *Reed,* 62 Me. 129, 143; *Mickey* v. *Com.* 9 Bush, 593; *Lipscomb* v. *State,* 75 Miss. 559, 23 So. 210, 230; *Barney* v. *State,* 49 Neb. 515, 68 N. W. 636; *State* v. *Aughtry,* 49 S. C. 285, 26 S. E. 619, 27 S. E. 199; *Battle* v. *State,* 103 Ga. 53, 29 S. E. 491; *Chavez* v. *Territory,* 6 N. M. 455, 30 Pac. 903; *State* v. *Smith,* 65 Conn. 283, 31 Atl. 206; *Lenert* v. *State,* — Tex. Crim. Rep. —, 63 S. W. 563; *Miles* v. *United States,* 103 U. S. 304, 26 L. ed. 481; *Costley* v. *Com.* 118 Mass. 1.

[9] *Emery* v. *State,* 101 Wis. 627, 78 N. W. 145; *Buel* v. *State,* 104 Wis. 132, 80 N. W. 78, 15 Am. Crim. Rep. 175.

[10] *Brown* v. *State,* 62 N. J. L. 666, 42 Atl. 811, 828; *State* v. *Bridges,* 29 Kan. 138; *Müller* v. *State,* 139 Wis. 57, 119 N. W. 850; *Simmons* v. *State,* 158 Ala. 8, 48 So. 606; *United States* v. *Guthrie,* 171 Fed. 528; *Vance* v. *Territory,* — Okla. Crim. Rep. —, 105 Pac. 307; *State* v. *Short,* — Del. —, 75 Atl. 787; *State* v. *Curdy,* — Del. —, 75 Atl. 868; *State* v. *McCallister,* — Del. —, 76 Atl. 226.

of evidence;[11] it must exclude every reasonable hypothesis but guilt,[12] and must be such a doubt as, in the graver transactions of life, would cause a reasonable man to hesitate and pause,[13] in passing a final judgment on the question before him.

[11] *State* v. *Nicholson,* 124 N. C. 820, 32 S. E. 813; *United States* v. *Politzer,* 59 Fed. 273, 279; *State* v. *Sumner,* 55 S. C. 32, 74 Am. St. Rep. 707, 32 S. E. 771; *People* v. *Barberi,* 47 N. Y. Supp. 168; *Lewis* v. *State,* 90 Ga. 95, 15 S. E. 697; *Harris* v. *State,* 155 Ind. 265, 58 N. E. 75; *Knight* v. *State,* 74 Miss. 140, 20 So. 860; *People* v. *Rich,* 133 Mich. 14, 94 N. W. 375; *Massey* v. *State,* 1 Tex. App. 563; *United States* v. *Johnson,* Fed. Cas. No. 15,483; *United States* v. *Gleason,* Woolw. 128, Fed. Cas. No. 15,216. See *People* v. *Del Cerro,* 9 Cal. App. 764, 100 Pac. 887; *Van Wyk* v. *People,* 45 Colo. 1, 99 Pac. 1009; *State* v. *Kruger,* 7 Idaho, 178, 61 Pac. 463; *Batten* v. *State,* 80 Ind. 394; *Nix* v. *State,* — Tex. Crim. Rep. —, 74 S. W. 764; *Emery* v. *State,* 101 Wis. 627, 78 N. W. 145; *Owens* v. *State,* 64 C. C. A. 525, 130 Fed. 279; *Carwile* v. *State,* 148 Ala. 576, 39 So. 220 (absence of evidence); *State* v. *Blue,* 136 Mo. 41, 37 S. W. 796 (instruction held erroneous in charging that a reasonable doubt was "a substantial doubt growing out of and consistent with the evidence," because it deprived the accused of the benefit which might arise from a reasonable doubt that might arise from the want of evidence against him.)

But see *Tomlinson* v. *State,* — Tex. Crim. Rep. —, 43 S. W. 332; *Whitesides* v. *State,* 42 Tex. Crim. Rep. 151, 58 S. W. 1016; *Mikel* v. *State,* 43 Tex. Crim. Rep. 615, 68 S. W. 512; *Piano* v. *State,* 161 Ala. 88, 49 So. 803.

[12] *Com.* v. *Costley,* 118 Mass. 1, 23; *Carlton* v. *People,* 150 Ill. 181, 41 Am. St. 346, 37 N. E. 244, 9 Am. Crim. Rep. 62; *Crumpton* v. *State,* 167 Ala. 4, 52 So. 605.

[13] *May* v. *People,* 60 Ill. 119; *Dunn* v. *People* 109 Ill. 635, 645, 4 Am. Crim. Rep. 52; *Stout* v. *State,* 90 Ind. 1, 12; *Miles* v. *United States,* 103 U. S. 304, 26 L. ed. 481; *Minich* v. *People,* 8 Colo. 440, 9 Pac. 4, 5 Am. Crim. Rep. 20; *United States* v. *Allis,* 73 Fed. 165.

Some states, in endeavoring to define the self-evident, make a virtual play upon words, and say that "a reasonable doubt is a doubt for which a reason can be given," and the following cases hold that such is a correct definition, or, if added in as a part of the definition, does not render an instruction erroneous: *Walker* v. *State,* 117 Ala. 42, 23 So. 149; *Jones* v. *State,* 120 Ala. 303, 25 So. 204. But see *Roberts* v. *State,* 122 Ala. 47, 25 So. 238; *Smith* v. *State,* 142 Ala. 14, 39 So. 329; *Powell* v. *State,* 95 Ga. 502, 20 S. E. 483; *United States* v. *Johnson,* 26 Fed. 682; *United States* v. *Butler,* 1 Hughes, 457, Fed. Cas. No.

§ 329. Burden of proof on the prosecution in various crimes.—Where the defense is the traverse of some essential fact to be established on the trial of the charge, the bur-

14,700; *State* v. *Jefferson,* 43 La. Ann. 995, 10 So. 199; *People* v. *Stubenvoll,* 62 Mich. 329, 28 N. W. 883; *Wallace* v. *State,* 41 Fla. 547, 26 So. 713; *People* v. *Guidici,* 100 N. Y. 503, 3 N. E. 493, 5 Am. Crim. Rep. 455; *State* v. *Morey,* 25 Or. 241, 35 Pac. 655, 36 Pac. 573; *People* v. *Lagroppo,* 179 N. Y. 126, 71 N. E. 737; *State* v. *Newman,* 93 Minn. 393, 101 N. W. 499; *State* v. *Grant,* 20 S. D. 164, 105 N. W. 97, 11 A. & E. Ann. Cas. 1017; *Butler* v. *State,* 102 Wis. 364, 78 N. W. 590; *State* v. *Raice,* 24 S. D. 111, 123 N. W. 708.

The following cases hold that it is erroneous to instruct that a reasonable doubt is such a doubt as the jury are able to give a reason for:

All later Alabama cases: *Siberry* v. *State,* 133 Ind. 677, 33 N. E. 681; *Cowan* v. *State,* 22 Neb. 519, 35 N. W. 405; *Carr* v. *State,* 23 Neb. 749, 37 N. W. 630; *Morgan* v. *State,* 48 Ohio St. 371, 27 N. E. 710; *Price* v. *State,* 1 Okla. Crim. Rep. 358, 98 Pac. 447; *Reeves* v. *Territory,* 2 Okla. Crim. Rep. 82, 99 Pac. 1021; *Gragg* v. *State,* 3 Okla. Crim. Rep. 409, 106 Pac. 350; *Blue* v. *State,* 86 Neb. 189, 125 N. W. 136.

In Arkansas this definition is held erroneous in that it puts on the accused "the burden of furnishing to every juror a reason why he is satisfied of his guilt before there can be an acquittal." *Bennett* v. *State,* 95 Ark. 100, 128 S. W. 851.

In Alabama it is held that the probability of innocence is the equivalent of reasonable doubt, and requires the acquittal of a defendant. *Gainey* v. *State,* 141 Ala. 72, 37 So. 355. Also that a reasonable doubt may exist although there may not be a probability of innocence. *Nordan* v. *State,* 143 Ala. 13, 39 So. 406.

Good character as creating a reasonable doubt.—Evidence of good character may create a presumption in the minds of the jury that the party would not likely have committed the act imputed to him, and it is immaterial whether the doubt arises from want of testimony, or on the testimony, or upon evidence of good character. *People* v. *Vanderpool,* 1 Mich. N. P. 264; *Sweet* v. *State,* 75 Nev. 263, 106 N. W. 31; *Redd* v. *State,* 99 Ga. 210, 25 S. E. 268; *Teague* v. *State,* 144 Ala. 42, 40 So. 312.

But good character, disassociated from the other evidence, is not of itself sufficient to create a reasonable doubt. *Crawford* v. *State,* 112 Ala. 1, 21 So. 214; *Carwile* v. *State,* 148 Ala. 576, 39 So. 220; *Browne* v. *United States,* 76 C. C. A. 31, 145 Fed. 1; *Hammond* v. *State,* 74 Miss. 214, 21 So. 149; *State* v. *Cushing,* 17 Wash. 544, 50 Pac. 512.

But it is always proper to charge that good character in connection with all the other evidence may be considered, and when so considered it raises a reasonable doubt that the jury ought to acquit. *Olds* v.

State, 44 Fla. 452, 33 So. 296; *Howell* v. *State,* 124 Ga. 698, 52 S. E. 649; *Fordham* v. *State,* 125 Ga. 791, 54 S. E. 694. But see *People* v. *Elliott,* 163 N. Y. 11, 57 N. E. 103, 15 Am. Crim. Rep. 41.

It is erroneous to confine the effect of good character to what are termed doubtful cases. Evidence of good character is to be considered by the jury in all cases in connection with all the other evidence. *Rowe* v. *United States,* 38 C. C. A. 496, 97 Fed. 779; *Edgington* v. *United States,* 164 U. S. 361, 41 L. ed. 467, 17 Sup. Ct. Rep. 72; *Com.* v. *Leonard,* 140 Mass. 473, 54 Am. Rep. 485, 4 N. E. 96, 7 Am. Crim. Rep. 593. See *State* v. *Porter,* 32 Or. 135, 49 Pac. 964.

But it is held "that good character may in itself create a reasonable doubt, which may be acted upon." *Lewis* v. *State,* 93 Miss. 697, 47 So. 467; *Webb* v. *State,* 6 Ga. App. 353, 64 S. E. 1001.

Contra, *Simmons* v. *State,* 158 Ala. 8, 48 So. 606; *Phillips* v. *State,* 161 Ala. 60, 49 So. 794. See *People* v. *Fisher,* 136 App. Div. 57, 120 N. Y. Supp. 659; *People* v. *Blatt,* 136 App. Div. 717, 121 N. Y. Supp. 507; *United States* v. *Wilson,* 176 Fed. 806.

On the question of reasonable doubt it is not erroneous to explain in the instruction that "you are not at liberty to disbelieve as jurors, if from the evidence you believe as men." *Spies* v. *People,* 122 Ill. 1, 3 Am. St. Rep. 320, 12 N. E. 865, 17 N. E. 898, 6 Am. Crim. Rep. 570; *Fife* v. *Com.* 29 Pa. 429; *McMeen* v. *Com.* 114 Pa. 300, 9 Atl. 878; *Clark* v. *Com.* 123 Pa. 555, 16 Atl. 795; *People* v. *Worden,* 113 Cal. 569, 45 Pac. 844; *Bothwell* v. *State,* 71 Neb. 747, 99 N. W. 669; *Holmes* v. *State,* 82 Neb. 406, 118 N. W. 99; *State* v. *Kellison,* 56 W. Va. 690, 47 S. E. 166.

But where an instruction states: "You are not at liberty to disbelieve as jurors if you believe as men; your oath imposes on you no obligation to doubt where no doubt would exist if no oath had been administered,"—it is held to be erroneous, on the ground that it tends to relieve the jury from the obligations of their oaths, in the following cases: *Siberry* v. *State,* 133 Ind. 677, 33 N. E. 681; *State* v. *Ruby,* 61 Iowa, 86, 15 N. W. 848; *People* v. *Johnson,* 140 N. Y. 350, 35 N. E. 604, 9 Am. Crim. Rep. 377; *State* v. *Taylor,* 57 W. Va. 228, 50 S. E. 247; *Robinson* v. *State,* — Wyo. —, 106 Pac. 24.

That the latter cases state the safe rule is clear. In endeavoring to explain that which is so clear that explanation only clouds it, the words above quoted go too far. There could be no objection to the use of the words, "you are not at liberty to disbelieve as jurors if you believe as men." To go farther, and add that "your oath imposes on you no obligation to doubt where no doubt would exist if no oath had been administered" is a practical nullification of the safeguards of an oath, impartiality, and absence of prejudice required of jurors, and is submitting, at the last end of the trial, the suggestion that there is with them, as jurors, no greater obligation nor restraint than there

den of proof is always on the prosecution to establish such essential fact beyond a reasonable doubt.[1]

On indictment for assault and battery, the burden is always on the prosecution to show that it was not justified.[2] In aid of this, however, the prosecution may show acts,[3] statements,[4] appearance, and condition of parties,[5] that accomplices were

would be in the chance meeting and decision upon the street corner of a dozen men, upon some question that might arise, where they would not disbelieve as men.

[1] Starkie, Ev. 436; *Rex* v. *Burdett,* 4 Barn. & Ald. 95, 22 Revised Rep. 539; *Case* v. *People,* 76 N. Y. 242; *Turner* v. *Com.* 86 Pa. 54, 27 Am. Rep. 683; *Nevling* v. *Com.* 98 Pa. 322; *Pauli* v. *Com.* 89 Pa. 432; *Johnson* v. *Com.* 29 Gratt. 817; *Farris* v. *Com.* 14 Bush, 362; *Algheri* v. *State,* 25 Miss. 584; *Bowler* v. *State,* 41 Miss. 570.

See *State* v. *Vincent,* 24 Iowa, 570, 95 Am. Dec. 753.

[2] Supra, § 325; *Com.* v. *McKie,* 1 Gray, 61, 61 Am. Dec. 410; *Rex* v. *Allen,* 1 Moody, C. C. 154; *Com.* v. *Kimball,* 24 Pick. 366; *Com.* v. *Dana,* 2 Met. 340; *People* v. *Kennedy,* 32 N. Y. 141; *People* v. *Bennett,* 49 N. Y. 137; *State* v. *Fowler,* 52 Iowa, 103, 2 N. W. 983; Bennett & H. Lead. Crim. Cas. 356; *State* v. *Shea,* 104 Iowa, 724, 74 N. W. 687; *People* v. *Shanley,* 30 Misc. 290, 62 N. Y. Supp. 389; *State* v. *Morphy,* 33 Iowa, 270, 11 Am. Dec. 122; *United States* v. *Lunt,* 1 Sprague, 311, Fed. Cas. No. 15,643; *People* v. *Rodrigo,* 69 Cal. 601, 11 Pac. 481, 8 Am. Crim. Rep. 53; *State* v. *Hickam,* 95 Mo. 323, 6 Am. St. Rep. 54, 8 S. W. 252; *Moody* v. *State,* 52 Tex. Crim. Rep. 232, 105 S. W. 1127; *Greer* v. *State,* — Tex. Crim. Rep. —, 106 S. W. 359; *State* v. *Thornton,* 136 N. C. 610, 48 S. E. 602; *State* v. *Schmidt,* 19 S. D. 585, 104 N. W. 259.

[3] *Com.* v. *Crowley,* 167 Mass. 434, 45 N. E. 766; *State* v. *Swails,* 8 Ind. 524, 65 Am. Dec. 772; *Richards* v. *State,* 3 Tex. App. 423; *Blount* v. *State,* 49 Ala. 381; *Gill* v. *State,* 48 Tex. Crim. Rep. 39, 85 S. W. 1062; *Davis* v. *State,* — Tex. Crim. Rep. —, 90 S. W. 646; *State* v. *Thornhill,* 177 Mo. 691, 76 S. W. 948.

[4] *Fields* v. *State,* 46 Fla. 84, 94, 35 So. 185; *State* v. *Leuhrsman,* 123 Iowa, 476, 99 N. W. 140; *State* v. *Wiggins,* 152 Mo. 170, 53 S. W. 421; *Monday* v. *State,* 32 Ga. 672, 79 Am. Dec. 314; *Crow* v. *State,* 41 Tex. 468.

[5] *Com.* v. *Malone,* 114 Mass. 295; *Harris* v. *State,* 123 Ala. 69, 26 So. 515; *Hodges* v. *State,* 15 Ga. 117; *Blount* v. *State,* 49 Ala. 381; *Tompkins* v. *State,* 17 Ga. 356.

present,[6] all being *res gestæ* of the assault.[7] It may also show the character of the injuries,[8] and show the same to the jury.[9] It may also show intent or malice [10] and former difficulties.[11]

[6] *Tompkins* v. *State,* 17 Ga. 356; *Yeary* v. *State,* — Tex. Crim. Rep. —, 66 S. W. 1106; *Jackson* v. *United States,* 42 C. C. A. 452, 102 Fed. 473; *Elmore* v. *State,* 110 Ala. 63, 20 So. 323; *Blount* v. *State,* 49 Ala. 381.

[7] *State* v. *Newland,* 27 Kan. 764; *Harris* v. *State,* 123 Ala. 69, 26 So. 515; *People* v. *Pearl,* 76 Mich. 207, 4 L.R.A. 709, 15 Am. St. Rep. 304, 42 N. W. 1109; *Lambert* v. *State,* 80 Neb. 562, 114 N. W. 775; *Lockland* v. *State,* 45 Tex. Crim. Rep. 87, 73 S. W. 1054.

See *Tubbs* v. *State,* 50 Tex. Crim. Rep. 143, 95 S. W. 112; *Tuberville* v. *State,* — Miss. —, 38 So. 333; *Gray* v. *State,* — Tex. Crim. Rep. —, 86 S. W. 764; *Starr* v. *State,* 160 Ind. 661, 67 N. E. 527; *Scott* v. *State,* 46 Tex. Crim. Rep. 305, 81 S. W. 950; *Tompkins* v. *State,* 17 Ga. 356; *State* v. *Goering,* 106 Iowa, 636, 77 N. W. 327, 11 Am. Crim. Rep. 140; *Smith* v. *State,* 123 Ala. 64, 26 So. 641; *Hoffman* v. *State,* 65 Wis. 46, 26 N. W. 110; *Horn* v. *State,* 102 Ala. 144, 15 So. 278; *People* v. *Demasters,* 109 Cal. 607, 42 Pac. 236; *Nelson* v. *State,* — Tex. Crim. Rep. —, 20 S. W. 766; *Com.* v. *Malone,* 114 Mass. 295; *People* v. *Teixeira,* 123 Cal. 297, 55 Pac. 988; *Hodges* v. *State,* 15 Ga. 117; *Monday* v. *State,* 32 Ga. 672, 79 Am. Dec. 314; *Richards* v. *State,* 3 Tex. App. 423; *Pool* v. *State,* — Tex. Crim. Rep. —, 23 S. W. 891; *State* v. *Tucker,* 75 Conn. 201, 52 Atl. 741; *Starr* v. *State,* 160 Ind. 661, 67 N. E. 527; *Cole* v. *State,* 2 Ga. App. 734, 59 S. E. 24; *Chambless* v. *State,* 49 Tex. Crim. Rep. 354, 94 S. W. 220; *State* v. *Koonse,* 123 Mo. App. 655, 101 S. W. 139; *State* v. *McFadden,* 42 Wash. 1, 84 Pac. 401.

See *State* v. *McCann,* 43 Or. 155, 72 Pac. 137.

[8] *People* v. *Sutherland,* 104 Mich. 468, 62 N. W. 566; *People* v. *Zounek,* 66 Hun, 626, 49 N. Y. S. R. 642, 20 N. Y. Supp. 755; *Kinnard* v. *State,* 35 Tex. Crim. Rep. 276, 60 Am. St. Rep. 47, 33 S. W. 234; *State* v. *Haynie,* 118 N. C. 1265, 24 S. E. 536; *Beavers* v. *State,* 151 Ala. 5, 44 So. 401; *State* v. *Quong,* 8 Idaho, 191, 67 Pac. 491.

[9] *King* v. *State,* 100 Ala. 85, 14 So. 878; *People* v. *Sutherland,* 104 Mich. 468, 62 N. W. 566; *Parrish* v. *State,* 32 Tex. Crim. Rep. 583, 25 S. W. 420; *Mayes* v. *State,* — Tex. Crim. Rep. —, 100 S. W. 386.

[10] *Walker* v. *State,* 85 Ala. 7, 7 Am. St. Rep. 17, 4 So. 686; *Bolton* v. *State,* — Tex. Crim. Rep. —, 39 S. W. 672; *State* v. *Henn,* 39 Minn. 476, 40 N. W. 572; *Read* v. *State,* 2 Ind. 438; *Yeary* v. *State,* — Tex. Crim. Rep. —, 66 S. W. 1106; *Doolittle* v. *State,* 93 Ind. 272; *Cogswell* v. *Com.* 17 Ky. L. Rep. 822, 32 S. W. 935; *Allen* v. *State,* 74 Ind. 216; *State* v. *Davidson,* 44 Mo. App. 513; *Garner* v. *State,* 28

It is also aided by the presumption of law that the defendant intended the necessary consequences of his act.[12] In case of assault with a gun, the burden is on the defendant to show that it was not loaded.[13] But there is no presumption that any instrument is a deadly weapon, and the burden is on the

Fla. 113, 29 Am. St. Rep. 232, 9 So. 835; *Fields* v. *State,* 46 Fla. 84, 35 So. 185; *Newport* v. *State,* 140 Ind. 299, 39 N. E. 926; *Starr* v. *State,* 160 Ind. 661, 67 N. E. 527; *Larkin* v. *State,* 163 Ind. 375, 71 N. E. 959; *State* v. *Surry,* 23 Wash. 655, 63 Pac. 557; *State* v. *Thornton,* 136 N. C. 610, 48 S. E. 602; *State* v. *Koonse,* 123 Mo. App. 655, 101 S. W. 139.

See *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. *Wells,* 145 Cal. 138, 78 Pac. 470; *People* v. *Suesser,* 142 Cal. 354, 75 Pac. 1093; *State* v. *Carmon,* 145 N. C. 481, 59 S. E. 657.

[11] *State* v. *Raymo,* 76 Vt. 430, 57 Atl. 993; *Coleman* v. *State,* 45 Tex. Crim. Rep. 120, 74 S. W. 24; *State* v. *Forsythe,* 89 Mo. 667, 1 S. W. 834; *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; *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. *Daily,* 143 N. Y. 638, 37 N. E. 823; *State* v. *Griffis,* 25 N. C. (3 Ired. L.) 504.

Contra to this, see *Latham* v. *State,* 39 Tex. Crim. Rep. 472, 46 S. W. 638; *Simpson* v. *State,* 47 Tex. Crim. Rep. 578, 85 S. W. 16; *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.

[12] *State* v. *Merchant,* — N. H. —, 18 Atl. 654; *State* v. *Gillett,* 56 Iowa, 459, 9 N. W. 362; *People* v. *Wright,* 93 Cal. 564, 29 Pac. 240; *Lambert* v. *State,* 80 Neb. 562, 114 N. W. 775.

[13] *State* v. *Herron,* 12 Mont. 230, 33 Am. St. Rep. 576, 29 Pac. 819; *State* v. *Cherry,* 33 N. C. (11 Ired. L.) 475; *Burton* v. *State,* 3 Tex. App. 408, 30 Am. Rep. 146; *Lipscomb* v. *State,* 130 Wis. 238, 109 N. W. 986; *Beach* v. *Hancock,* 27 N. H. 223, 59 Am. Dec. 373; *Lockland* v. *State,* 45 Tex. Crim. Rep. 87, 73 S. W. 1054; *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; *People* v. *Wells,* 145 Cal. 138, 78 Pac. 470.

But see *State* v. *Napper,* 6 Nev. 113.

prosecution to show that character and its use,[14] but it has been held that the burden is on the accused, to justify the use of such a weapon.[15]

On an indictment for seduction, the burden is always on the prosecution to establish the essential elements of the crime beyond a reasonable doubt,[16] including the illicit intercourse.[17] While the chastity of the prosecutrix is in issue, and must be proved as an essential element,[18] it need not always be proved in the first instance,[19] as it is presumed; and in such cases if the accused relies on the fact of unchastity the burden is on

[14] *Ballard* v. *State*, — Tex. Crim. Rep. —, 13 S. W. 674; *Melton* v. *State*, 30 Tex. App. 273, 17 S. W. 257; *Gladney* v. *State*, — Tex. Crim. Rep. —, 12 S. W. 868; *Hilliard* v. *State*, 17 Tex. App. 210; *Parks* v. *State*, — Tex. Crim. Rep. —, 15 S. W. 174; *Hunt* v. *State*, 6 Tex. App. 663; *Branch* v. *State*, 35 Tex. App. 304, 33 S. W. 356.

See *Norwood* v. *State*, 3 Ga. App. 325, 59 S. E. 828; *Mazzotte* v. *Territory*, 8 Ariz. 270, 71 Pac. 911, 13 Am. Crim. Rep. 182.

[15] *Sawyer* v. *People*, 91 N. Y. 667.

[16] *Suther* v. *State*, 118 Ala. 88, 24 So. 43; *People* v. *Krusick*, 93 Cal. 74, 28 Pac. 794; *State* v. *Fisher*, 162 Mo. 169, 62 S. W. 690; *People* v. *Eckert*, 2 N. Y. Crim. Rep. 470; *Snodgrass* v. *State*, — Tex. Crim. Rep. —, 31 S. W. 366; *State* v. *Brown*, 65 N. J. L. 687, 51 Atl. 1109 (under statute requiring that pregnancy must result before action can be brought); *Smith* v. *State*, 118 Ala. 117, 24 So. 55; *Caldwell* v. *State*, 69 Ark. 322, 63 S. W. 59; *State* v. *Haven*, 43 Iowa, 181, 2 Am. Crim. Rep. 594; *People* v. *DeFore*, 64 Mich. 693, 8 Am. St. Rep. 863, 31 N. W. 585; *People* v. *Hubbard*, 92 Mich. 322, 52 N. W. 729; *State* v. *Horton*, 100 N. C. 443, 6 Am. St. Rep. 613, 6 S. E. 238.

[17] *Cunningham* v. *State*, 73 Ala. 51; *Cheaney* v. *State*, 36 Ark. 74, 4 Am. Crim. Rep. 264; *State* v. *Reeves*, 97 Mo. 668, 10 Am. St. Rep. 349, 10 S. W. 841, 8 Am. Crim. Rep. 698; *Safford* v. *People*, 1 Park. Crim. Rep. 474; *State* v. *King*, 9 S. D. 628, 70 N. W. 1046; *Gorzell* v. *State*, 43 Tex. Crim. Rep. 82, 63 S. W. 126.

[18] *West* v. *State*, 1 Wis. 209, but see *Crilley* v. *State*, 20 Wis. 232.

See *Slocum* v. *People*, 90 Ill. 274; *Com.* v. *Whittaker*, 131 Mass. 224; post, §§ 341, 343.

[19] *McTyier* v. *State*, 91 Ga. 254, 18 S. E. 140; *Andre* v. *State*, 5 Iowa, 389, 68 Am. Dec. 708; *State* v. *McClintic*, 73 Iowa, 663, 35 N. W. 696; *People* v. *Squires*, 49 Mich. 487, 13 N. W. 828; *Ferguson* v. *State*, 71 Miss. 805, 42 Am. St. Rep. 492, 15 So. 66; *Mills* v. *Com.* 93 Va. 815, 22 S. E. 863.

him to establish it.[20] Other courts offset presumption of chastity with presumption of innocence on part of the accused, and require proof of chastity as one of the essential elements of the charge.[21] The criminal intent of the accused must be established by the prosecution.[22] Any relevant evidence may be adduced in proof of all the essential elements of the crime.[23]

When identity,[24] intent,[25] malice,[26] or time,[27] is in issue and essential, the burden of establishing these is always on the prosecution.

It has been held that it is error to refuse an instruction charging the jury that the burden of proof to establish the essential elements of the crime is always on the prosecution,[28] or, on the other hand, to give an instruction calculated to impress the minds of the jury with the fact that the prosecution has established its case, and that, unless the evidence on the

[20] *State* v. *Brown,* 86 Iowa, 121, 53 N. W. 92; *State* v. *Hemm,* 82 Iowa, 609, 48 N. W. 971; *Smith* v. *State,* 118 Ala. 117, 24 So. 55; *Polk* v. *State,* 40 Ark. 482, 48 Am. Rep. 17; *Wilhite* v. *State,* 84 Ark. 67, 104 S. W. 531; *State* v. *Higdon,* 32 Iowa, 262; *Kerr* v. *United States,* 7 Ind. Terr. 486, 104 S. W. 809; *State* v. *Drake,* 128 Iowa, 539, 105 N. W. 54.

[21] *State* v. *Lockerby,* 50 Minn. 363, 36 Am. St. Rep. 656, 52 N. W. 958, 9 Am. Crim. Rep. 617; *State* v. *Horton,* 100 N. C. 443, 6 Am. St. Rep. 613, 6 S. E. 238; *Harvey* v. *Territory,* 11 Okla. 156, 65 Pac. 837; *West* v. *State,* 1 Wis. 209; *State* v. *Hill,* 91 Mo. 423, 4 S. W. 121.

[22] *Bailey* v. *State,* — Tex. Crim. Rep. —, 30 S. W. 669.

[23] *Whatley* v. *State,* 144 Ala. 68, 39 So. 1014; *Anderson* v. *State,* 104 Ala. 83, 16 So. 108; *Wood* v. *State,* 48 Ga. 192, 15 Am. Rep. 664; *State* v. *Whalen,* 98 Iowa, 662, 68 N. W. 554; *State* v. *Bennett,* 137 Iowa, 427, 110 N. W. 150; *People* v. *Hubbard,* 92 Mich. 322, 52 N. W. 729; *State* v. *Eckler,* 106 Mo. 585, 27 Am. St. Rep. 372, 17 S. W. 814; *Armstrong* v. *People,* 70 N. Y. 38.

[24] *State* v. *Morris,* 47 Conn. 179.

[25] *United States* v. *McGlue,* 1 Curt. C. C. 1, Fed. Cas. No. 15,679; post, § 734.

[26] *Farris* v. *Com.* 14 Bush, 362.

[27] *Gore* v. *State,* 58 Ala. 391; *Com.* v. *Boston & L. R. Corp.* 126 Mass. 66.

[28] *Black* v. *State,* 1 Tex. App. 369; *Phillips* v. *State,* 26 Tex. App. 228, 8 Am. St. Rep. 471, 9 S. W. 557; Blashfield, Instructions to Juries, § 346.

part of the accused raises in their minds a reasonable doubt, they should convict,[29] but where the court has correctly charged upon the question of reasonable doubt it is not error to refuse specific instructions as to the burden of proof.[30]

The rule is that the burden is on the party to prove all matters which have such a relation to his case that, if he should omit to prove them, the verdict, if the trial stopped at that particular point, would go against him.[31]

§ 330. Burden of proof and presumption of innocence.— When the prosecution has made a prima facie case, to say that the burden of proof shifts to the defense involves two errors: (1) The defense is not required to take up any burden until the prosecution has established every essential element of the crime charged, beyond a reasonable doubt. When the prosecution is through with its case, defendant is entitled to an acquittal if the case of the prosecution is not made out beyond a reasonable doubt. When this is done, then, but not before, can the defendant be called upon for his defense. (2) The burden of proof must never be confounded with the presumption of innocence. The burden of proof is a formal rule determining the order in which the proofs are adduced on the trial, which rule ceases to apply when, in a criminal case, sufficient proof has been adduced to sustain a verdict. The presumption of innocence is a rule of substance, operating during the whole trial, and continuing to operate until overcome by proof of the guilt of the accused beyond a reasonable doubt.[1]

[29] *Snyder* v. *State,* 59 Ind. 105.

[30] *Huggins* v. *State,* 42 Tex. Crim. Rep. 364, 60 S. W. 52; *Day* v. *State,* 21 Tex. App. 213, 17 S. W. 262.

[31] *State* v. *Flye,* 26 Me. 316; *Stokes* v. *People,* 53 N. Y. 164, 13 Am. Rep. 492; *Turner* v. *Com.* 86 Pa. 54. 27 Am. Rep. 683; *State* v. *Wingo,* 66 Mo. 181, 27 Am. Rep. 329; *Henderson* v. *State,* 14 Tex. 503; *State* v. *McCluer,* 5 Nev. 132; post, § 721; supra, notes above.

[1] *Rex* v. *Allen,* 1 Moody, C. C. 154; *Com.* v. *Kimball,* 24 Pick. 366; *Com.* v. *Clark,* 2 Met. 24. See Bennett & H. Lead. Crim. Cas. 356; *Densmore* v. *State,* 67 Ind. 306, 33

§ 331. Degree of proof required of the defendant.— Under the rule of the burden of proof, the prosecution is compelled to establish every essential element of the crime charged beyond a reasonable doubt, in the first instance. When this is done, two courses are opened to the accused: (1) He may offer no evidence, and the case made by the prosecution must go to the jury, but only in connection with the presumption of innocence, to which the accused is entitled to the end of the trial.[1] The court has no power to direct a verdict of guilty, but the case must be submitted to the jury, which, considering the presumption of innocence, should not convict unless the state has established every essential element of the crime charged beyond a reasonable doubt.

(2) Or he may become the *actor,* and then the duty is on him to make good the defense he asserts by proof. Where his defense is exclusively one of admission and avoidance, then he must establish such defense by a preponderance of proof,[2] and when he pleads any substantive or independent

Am. Rep. 96; *People* v. *Niles,* 44 Mich. 606, 7 N. W. 192; *West* v. *State,* 1 Wis. 209; *Crilley* v. *State,* 20 Wis. 232; *Henderson* v. *State,* 14 Tex. 503; *Fury* v. *State,* 8 Tex. App. 471; *State* v. *McCluer,* 5 Nev. 132; supra, § 322; *Com.* v. *Knapp,* 10 Pick. 477, 20 Am. Dec. 534; *Com.* v. *Stow,* 1 Mass. 54. See *State* v. *Holme,* 54 Mo. 153; *Kingen* v. *State,* 45 Ind. 518; supra, § 1, on reasonable doubt; *Com.* v. *McKie,* 1 Gray, 61, 61 Am. Dec. 410; *Com.* v. *Sturtivant,* 117 Mass. 122, 19 Am. Rep. 401.

On a trial in homicide, an instruction stating that the presumption of innocence is overthrown by proof of the *corpus delicti,* the venue, and the killing of deceased by the accused, is misleading. *Bryant* v. *State,* 7 Baxt. 67.

[1] *United States* v. *Babcock,* 3 Dill. 581, Fed. Cas. No. 14,487; *United States* v. *Wright,* 16 Fed. 112; *Ogletree* v. *State,* 28 Ala. 693; *Guffee* v. *State,* 8 Tex. App. 187; *Cook* v. *State,* 85 Miss. 738, 38 So. 110; *State* v. *Hardelein,* 169 Mo. 579, 70 S. W. 130; *Tucker* v. *Com.* 88 Va. 20, 13 S. E. 298.

[2] *Rex* v. *Turner,* 5 Maule & S. 206; *Rex* v. *Burdett,* 4 Barn. & Ald. 95, 22 Revised Rep. 539; *Blatch* v. *Archer,* Cowp. 66; *Rex* v. *Brannan,* 6 Car. & P. 326; *Smith* v. *Jefferies,* 9 Price, 257; *United States* v. *Hayward,* 2 Gall, 485, Fed. Cas. No. 15,336; *State* v. *Crowell,* 25 Me. 171; *Sheldon* v. *Clark,* 1 Johns. 513;

matter as a defense, which does not constitute an essential element of the crime charged, then the burden of proof, with reference to such defense, devolves on him.[3]

332. Defenses requiring a preponderance of proof.—What defenses are so extrinsic as to require a preponderance of proof to support them, as distinguished from those which are sufficient for an acquittal by casting a reasonable doubt upon the case of the prosecution? Illustrations of defenses which defendant must establish by a preponderance of proof are: Licenses or authorizations from the state to carry on a forbidden business,[1] pleas of *autrefois acquit*,[2] and of facts

Sawyer v. *People*, 1 N. Y. Crim. Rep. 249; *State* v. *Morrison*, 14 N. C. (3 Dev. L.) 299; *Geuing* v. *State*, 1 M'Cord, L. 573; *State* v. *Paulk*, 18 S. C. 514; *Farrell* v. *State*, 32 Ala. 557; *Wheat* v. *State*, 6 Mo. 455; *State* v. *Lipscomb*, 52 Mo. 32; *Black* v. *State*, 1 Tex. App. 368; *Jones* v. *State*, 13 Tex. App. 1; *Hopper* v. *State*, 19 Ark. 143.

Contra:

Mehan v. *State*, 7 Wis. 670; *Com.* v. *Thurlow*, 24 Pick. 374, qualified in *Com.* v. *Boyer*, 7 Allen, 306; *People* v. *Bodine*, 1 Edm. Sel. Cas. 36. Compare *Re Barrett*, 28 U. C. Q. B. 561.

[3] *United States* v. *Holmes*, 1 Cliff. 98, Fed. Cas. No. 15,382; *Stitt* v. *State*, 91 Ala. 10, 24 Am. St. Rep. 853, 8 So. 669; *Day* v. *State*, 21 Tex. App. 213, 17 S. W. 262; *Stokes* v. *People*, 53 N. Y. 164, 13 Am. Rep. 492; *State* v. *Wingo*, 66 Mo. 181, 186, 27 Am. Rep. 329; *State* v. *Johnson*, 91 Mo. 439, 3 S. W. 868; *Weaver* v. *State*, 24 Ohio St. 584; *People* v. *Rodrigo*, 69 Cal. 601, 11 Pac. 481, 8 Am. Crim. Rep. 53; *People* v. *Tarm Poi*, 86 Cal. 225, 24 Pac. 998; *Kriel* v. *Com.* 5 Bush, 362; *Bergin* v. *State*, 31 Ohio St. 111; *State* v. *Rollins*, 113 N. C. 722, 18 S. E. 394; *State* v. *Welsh*, 29 S. C. 4, 6 S. E. 894; *Robertson* v. *Com.* 2 Va. Dec. 142, 22 S. E. 359; *Myers* v. *Com.* 90 Va. 705, 19 S. E. 881; *Cleveland* v. *State*, 86 Ala. 1, 5 So. 426; *Com.* v. *Eddy*, 7 Gray, 583.

[1] Supra, § 331; post, § 342; *Farrall* v. *State*, 32 Ala. 557; *State* v. *Wilson*, 39 Mo. App. 114; *People* v. *Nyce*, 34 Hun, 298; *People* v. *Maxwell*, 83 Hun, 157, 31 N. Y. Supp. 564; *People* v. *Townsey*, 5 Denio, 70; *People* v. *Safford*, 5 Denio, 112; *State* v. *McGlynn*, 34 N. H. 422; *State* v. *Simons*, 17 N. H. 83; *State* v. *Foster*, 23 N. H. 348, 55 Am. Dec. 191; *Wheat* v. *State*, 6 Mo. 455; *State* v. *Crow*, 53 Kan. 662, 37 Pac. 170; *State, Jackson, Prosecutor*, v. *Camden*, 48 N. J. L. 89, 2 Atl. 668; *Hines* v. *State*, 93 Ga. 187, 18 S. E. 558; *Sharp* v. *State*, 17 Ga.

peculiarly within the defendant's knowledge, as where he relies upon nonage as a defense.[3]

§ 333. Alibi; burden of proof; when unavailing; character of defense.—The defense of an *alibi* not only goes to the essence of guilt, but it traverses one of the material averments of the indictment, namely, that the defendant did then and there the particular act charged.[1] It is not an affirma-

290; *Geuing* v. *State,* 1 M'Cord, L. 573; *State* v. *Kriechbaum,* 81 Iowa, 633, 47 N. W. 872. See under statute, *Com.* v. *Thurlow,* 24 Pick. 374; *Com.* v. *Locke,* 114 Mass. 288; *Mehan* v. *State,* 7 Wis. 670; *State* v. *Hill,* 46 La. Ann. 27, 49 Am. St. Rep. 316, 14 So. 294; *State* v. *McCaffrey,* 69 Vt. 85, 37 Atl. 234.

[2] Post, §§ 570–593.

To sustain this plea, there must be proof of final judgment. *State* v. *Sherburne,* 58 N. H. 535.

[3] *Ellis* v. *State,* 30 Tex. App. 601, 18 S. W. 139; *State* v. *Arnold,* 35 N. C. (13 Ired. L.) 184; supra, note 1.

[1] *Turner* v. *Com.* 86 Pa. 54, 27 Am. Rep. 683; *Watson* v. *Com.* 95 Pa. 418; *Toler* v. *State,* 16 Ohio St. 583; *Binns* v. *State,* 46 Ind. 311; *Howard* v. *State,* 50 Ind. 190; *Stuart* v. *People,* 42 Mich. 255, 3 N. W. 863; *People* v. *Pearsall,* 50 Mich. 233, 15 N. W. 98; *Wade* v. *State,* 65 Ga. 756; *State* v. *Hardin,* 46 Iowa, 623, 26 Am. Rep. 174; *State* v. *Henry,* 48 Iowa, 403; *State* v. *Lewis,* 69 Mo. 92; *Pollard* v. *State,* 53 Miss. 410, 24 Am. Rep. 703; *Thompson* v. *State,* 5 Humph. 138; *State* v. *Waterman,* 1 Nev. 543; *Rex* v. *Hilditch,* 5 Car. & P. 299; *Rex* v. *Findon,* 6 Car. & P. 132; *Com.* v. *Webster,* 5 Cush. 295, 52 Am. Dec. 711. See Ram, Facts, 3d Am. ed. Int; Burrill, Circumstantial Ev. pp. 517 et seq; *Com.* v. *Costley,* 118 Mass. 1; *Walker* v. *State,* 37 Tex. 366; *People* v. *Larned,* 7 N. Y. 448 (for instruction criticizing the defense of *alibi*).

See also *Albin* v. *State,* 63 Ind. 598, 3 Am. Crim. Rep. 295; *Sullivan* v. *People,* 31 Mich. 1, 1 Am. Crim. Rep. 359; *Spencer* v. *State,* 50 Ala. 124; *State* v. *Jaynes,* 78 N. C. 504; *State* v. *Byers,* 80 N. C. 426; *State* v. *Watson,* 7 S. C. 63; *Porter* v. *State,* 55 Ala. 95 (reaction of fraudulent *alibi*); post, § 742; *Briceland* v. *Com.* 74 Pa. 463 (time covered, but see farther, post, note 9 this section); *Donnelly* v. *Com.* 6 W. N. C. 104; *Johnson* v. *State,* 14 Ga. 57; *Turner* v. *Com.* 86 Pa. 54, 27 Am. Rep. 683 (error to charge that failure to establish raises presumption against accused.)

See *State* v. *Williams,* 27 Vt. 724; *State* v. *Ardoin,* 49 La. Ann. 1145, 62 Am. St. Rep. 678, 22 So. 620; *People* v. *Fong Ah Sing,* 64 Cal. 253, 28 Pac. 233, 11 Am. Crim. Rep. 331; *McNamara* v. *People,* 24 Colo.

tive,[2] nor an extrinsic defense.[3] The presence of the accused at the time and place must be shown as essential to the commission of the crime.[4]

To hold that where the accused, by his evidence of an *alibi,* has cast a reasonable doubt on the averment of his presence and participation, he must be convicted unless he establishes his nonco-operation by a preponderance of proof, is to confound burden of proof with the presumption of innocence. When his proof is in, the final question remains, Are the essential averments of the indictment proved beyond a reasonable doubt? If this question cannot be answered affirmatively, the accused is entitled to an acquittal, without regard to the manner in which such doubt was raised, whether by evidence or lack of evidence or any other factor in the case.

The rule that the burden of proof never shifts, in criminal cases, applies to the defense of an alibi,[5] which need only be

61, 48 Pac. 541; *Albritton* v. *State,* 94 Ala. 76, 10 So. 426.

[2] *McNamara* v. *People,* 24 Colo. 61, 48 Pac. 541; *Zipperian* v. *People,* 33 Colo. 141, 79 Pac. 1018; *People* v. *Winters,* 125 Cal. 325, 57 Pac. 1067; *State* v. *McClellan,* 23 Mont. 532, 75 Am. St. Rep. 558, 59 Pac. 924, 12 Am. Crim. Rep. 13; *Sherlock* v. *State,* 60 N. J. L. 31, 37 Atl. 435; *State* v. *Chee Gong,* 16 Or. 534, 19 Pac. 607; *Ayres* v. *State,* 21 Tex. App. 399, 17 S. W. 253; *Schultz* v. *Territory,* 5 Ariz. 239, 52 Pac. 352, 11 Am. Crim. Rep. 44; *State* v. *Freeman,* 100 N. C. 429, 5 S. E. 921; *State* v. *Taylor,* 118 Mo. 153, 24 S. W. 449, 11 Am. Crim. Rep. 51; *Ratliff* v. *State,* 122 Ala. 104, 26 So. 123; *State* v. *Reed,* 62 Iowa, 40, 17 N. W. 150; *Johnson* v. *State,* 21 Tex. App. 368, 17 S. W. 252; *State* v. *Lowry,* 42 W. Va. 205, 24 S. E. 561; *Smith* v. *State,* — Tex. Crim. Rep. —, 49 S. W. 583; *Padron* v. *State,* 41 Tex. Crim. Rep. 548, 55 S. W. 827. But see *Com.* v. *Gutshall,* 22 Pa Super. Ct. 269; *State* v. *Hier,* 78 Vt. 488, 63 Atl. 877.

[3] *State* v. *Taylor,* 118 Mo. 153, 24 S. W. 449, 11 Am. Crim. Rep. 51.

[4] *State* v. *Woolard,* 111 Mo. 248, 20 S. W. 27.

[5] See authorities, note 2, supra; *State* v. *Webb,* 6 Idaho, 428, 55 Pac. 892; *Hopps* v. *People,* 31 Ill. 385, 83 Am. Dec. 231; *Parker* v. *State,* 136 Ind. 284, 35 N. E. 1105; *State* v. *Conway,* 56 Kan. 682, 44 Pac. 627; *Gravely* v. *State,* 38 Neb. 871, 57 N. W. 751; *Rudy* v. *Com.* 128 Pa. 500, 18 Atl. 344; *Glover* v. *United States,* 77 C. C. A. 450, 147 Fed. 426, 8 A. & E. Ann. Cas. 1184; *Cas-*

proven so as to raise a reasonable doubt as to whether or not the accused was present when the crime was committed.[6] It is error to charge the jury that the *alibi* must be established by a preponderance of proof,[7] because the evidence offered as to the *alibi* is to be considered only in connection with all the other evidence adduced, to determine whether, on the whole case, the guilt of the defendant has been established beyond a reasonable doubt.[8]

ey v. *State,* 49 Neb. 403, 68 N. W. 643.

[6] *People* v. *Roberts,* 122 Cal. 377, 55 Pac. 137, 11 Am. Crim. Rep. 31; *Flanagan* v. *People,* 214 Ill. 170, 73 N. E. 347; *Com.* v. *Choate,* 105 Mass. 451; *Miles* v. *State,* 93 Ga. 117, 44 Am. St. Rep. 140, 19 S. E. 805; *State* v. *Jaynes,* 78 N. C. 504; *State* v. *Watson,* 7 S. C. 63; *French* v. *State,* 12 Ind. 670, 74 Am. Dec. 229; *State* v. *Howell,* 100 Mo. 628, 14 S. W. 4; *Walters* v. *State,* 39 Ohio St. 215, 4 Am. Crim. Rep. 33.

[7] *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; *Casey* v. *State,* 49 Neb. 403, 68 N. W. 643; *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.

While all authorities are in general accord that to instruct the jury that the *alibi* "must be established to the satisfaction of the jury," or that it must "be proven beyond a reasonable doubt," is error, yet nevertheless, if the words are qualified by stating the degree of proof necessary, such as "raises a reasonable doubt," thus limiting the proof necessary by the accepted standard of reasonable doubt, it seems that the error is cured. See *Boston* v. *State,* 94 Ga. 590, 20 S. E. 98, 21 S. E. 603; *State* v. *Woolard,* 111 Mo. 248, 20 S. W. 27; *State* v. *Watson,* 7 S. C. 63.

[8] *Pate* v. *State,* 94 Ala. 14, 10 So. 665; *Blankenship* v. *State,* 55 Ark. 244, 18 S. W. 54; *Harrison* v. *State,* 83 Ga. 129, 9 S. E. 542; *Sheehan* v. *People,* 131 Ill. 22, 22 N. E. 818; *State* v. *Jaynes,* 78 N. C. 504; *Cochran* v. *State,* 113 Ga. 726, 39 S. E. 332; *Prince* v. *State,* 100 Ala. 144, 46 Am. St. Rep. 28, 14 So. 409; *Ackerson* v. *People,* 124 Ill. 563, 16 N. E. 847; *Fleming* v. *State,* 136 Ind. 149, 36 N. E. 154; *French* v. *State,* 12 Ind. 670, 74 Am. Dec. 229; *State* v. *Maher,* 74 Iowa, 77, 37 N. W. 2; *People* v. *Garbutt,* 17 Mich. 9, 97 Am. Dec. 162; *Nightingale* v. *State,* 62 Neb. 371, 87 N. W. 158; *Henry* v. *State,* 51 Neb 149, 66 Am. St. Rep. 450, 70 N. W. 924; *Wilburn* v. *Territory,* 10 N. M. 402, 62 Pac 968, 14 Am. Crim. Rep. 500; *People* v. *Stone,* 117 N. Y. 480, 23 N. E. 13; *State* v. *Jackson,* 36 S. C. 487, 31 Am. St. Rep. 890, 15 S. E. 559; *State* v. *Thornton,* 10 S. D. 349, 41 L.R.A. 530, 73 N. W. 196; *State* v. *Ward,* 61 Vt. 153, 17 Atl. 483, 8

To hold that the accused must, by his evidence, cover the exact time and the whole time during the commission of the crime charged, is error,[9] the general rule being well established that evidence of absence is relevant and competent, even though it does not cover the exact time nor all of the time.[10] Insufficiency of the evidence is not sufficient to exclude its consideration,[11] as the final question of its sufficiency to raise a reasonable doubt is for the jury to determine from all the evidence.[12]

Where the prosecution establishes a conspiracy on the part of two or more persons to do any unlawful act, an *alibi* can-

Am. Crim. Rep. 207; *Emery* v. *State,* 101 Wis. 627, 78 N. W. 145; *Hoge* v. *People,* 117 Ill. 44, 6 N. E. 796.

[9] *Parker* v. *State,* 136 Ind. 284, 35 N. E. 1105; *Peyton* v. *State,* 54 Neb. 188, 74 N. W. 597, 11 Am. Crim. Rep. 47; *Thompson* v. *State,* 42 Tex. Crim. Rep. 140, 57 S. W. 805; *Kaufman* v. *State,* 49 Ind. 248, 251; *Stuart* v. *People,* 42 Mich. 255, 3 N. W. 863.

But see *Briggs* v. *People,* 219 Ill. 330, 345, 76 N. E. 499; *Eckhardt* v. *People,* 116 Ill. App. 408; *Bacon* v. *State,* 22 Fla. 51; *Briceland* v. *Com.* 74 Pa. 463.

[10] *State* v. *Jaynes,* 78 N. C. 504; *Kaufman* v. *State,* 49 Ind. 248, 251; *Waters* v. *People,* 172 Ill. 367, 50 N. E. 148; *Parker* v. *State,* 136 Ind. 284, 35 N. E. 1105; *Peyton* v. *State,* 54 Neb. 188, 74 N. W. 597, 11 Am. Crim. Rep. 47; *State* v. *Ardoin,* 49 La. Ann. 1145, 62 Am. St. Rep. 678, 22 So. 620; *Thompson* v. *State,* 42 Tex. Crim. Rep. 140, 57 S. W. 805; *People* v. *Morris,* 3 Cal. App. 1, 84 Pac. 463; *Barr* v. *People,* 30 Colo. 522, 71 Pac. 392; *Fortson* v. *State,* 125 Ga. 16, 53 S. E. 767; *Tucker* v. *Territory,* 17 Okla. 56, 87 Pac. 307; *Mays* v. *State,* 72 Neb. 723, 101 N. W. 979.

[11] *State* v. *McGarry,* 111 Iowa, 709, 83 N. W. 718; *Harrison* v. *State,* 83 Ga. 129, 9 S. E. 542; *People* v. *Resh,* 107 Mich. 251, 65 N. W. 99; *Chappel* v. *State,* 7 Coldw. 92; *Dawson* v. *State,* 62 Miss. 241; *Wisdom* v. *People,* 11 Colo. 170, 17 Pac. 519; *Burns* v. *State,* 75 Ohio St. 407, 79 N. E. 929.

[12] *Albritton* v. *State,* 94 Ala. 76, 10 So. 426; *Pate* v. *State,* 94 Ala. 14, 10 So. 665; *Wisdom* v. *People,* 11 Colo. 170, 17 Pac. 519; *Pollard* v. *State,* 53 Miss. 410, 24 Am. Rep. 703; *Henry* v. *State,* 51 Neb. 149, 66 Am. St. Rep. 450, 70 N. W. 924; *State* v. *Fair,* 35 Wash. 127, 102 Am. St. Rep. 897, 76 Pac. 731; *Wright* v. *Territory,* 5 Okla. 78, 47 Pac. 1069; *State* v. *Waterman,* 1 Nev. 543; *Nightingale* v. *State,* 62 Neb. 371, 87 N. W. 158; *Ford* v. *State,* 101 Tenn. 454, 47 S. W. 703.

not be shown in defense, as, in a conspiracy, the presence or absence of one of the conspirators at the exact time, or the time covered by the offense, is immaterial, and an instruction upon the defense of *alibi* would be misleading.[13] But where a direct issue is raised as to absence at the time of the formation of the conspiracy,[14] *alibi* is a proper defense. But where it is sought to disprove the conspiracy, the state may contradict by proof of contrary statements or otherwise. Here, a material issue is the conspiracy, and the *alibi* testimony on that question is testimony upon a material issue.[15]

While some of the earlier cases have stated that an *alibi* was a defense of that character that should be carefully scrutinized,[16] it is error to call it "a well-worn defense," or to disparage it in any way.[17] *Alibi* is a legitimate defense.[18] Its failure is not to be taken to the prejudice of the accused in any higher degree than the failure of other good and legitimate defenses.[19]

[13] *State* v. *Gatlin,* 170 Mo. 354, 70 S. W. 885; *Cain* v. *State,* 42 Tex. Crim. Rep. 210, 59 S. W. 275.

[14] *Jenkins* v. *State,* 45 Tex. Crim. Rep. 173, 75 S. W. 312.

[15] *Ibid.*

[16] *Turner* v. *Com.* 86 Pa. 54, 27 Am. Rep. 683; *State* v. *Terrio,* 98 Me. 17, 56 Atl. 217; *State* v. *Worthen,* 124 Iowa, 408, 100 N. W. 330; *People* v. *Portenga,* 134 Mich. 247, 96 N. W. 17, 12 Am. Crim. Rep. 30.

[17] *State* v. *Crowell,* 149 Mo. 391, 73 Am. St. Rep. 402, 50 S. W. 893, 11 Am. Crim. Rep. 74; *People* v. *Lattimore,* 86 Cal. 403, 24 Pac. 1091; *Dawson* v. *State,* 62 Miss. 241; *Casey* v. *State,* 49 Neb. 403, 68 N. W. 643; *Miles* v. *State,* 93 Ga. 117, 44 Am. St. Rep. 140, 19 S. E. 805; *Kimbrough* v. *State,* 101 Ga. 583, 29 S. E. 39; *Com.* v. *Orr,* 138 Pa. 276, 20 Atl. 866.

[18] *Nelms* v. *State,* 58 Miss. 362, 364; *Williams* v. *State,* 45 Ala. 60.

[19] *Miller* v. *People,* 39 Ill. 457; *State* v. *Collins,* 20 Iowa, 85.

As to the evidence necessary to establish an *alibi,* all facts and circumstances relevant to the issue of the absence of the accused from the place of the *corpus delicti* may be invoked by him, and, on rebuttal or otherwise, the prosecution may show all relevant facts and circumstances tending to show his presence at the *corpus delicti. People* v. *McCrea,* 32 Cal. 98; *Lincoln* v. *People,* 20 Ill. 365; *Otmer* v. *People,* 76 Ill. 149; *Rogers* v. *People,* 98 Ill. 581; *State* v. *Beasley,* 84 Iowa, 83, 50 N. W. 570; *State* v. *Wilkins,* 66 Vt.

§ 334. **Provocation; proof of.**—Provocation[1] as a defense, which goes to negative premeditation and malice, must be regarded as a defense, traversing the essential ingredients of all offenses which require proof of premeditation and malice. Hence, while the burden of proof is on the defendant to prove provocation in all cases where he offers this defense,[2] yet, when the evidence on both sides is closed, he is entitled to a verdict of acquittal if he has offered proof enough to cast a reasonable doubt on the averments of premeditation and malice, in the indictment, where these averments are essential to sustain the charge.[3]

1, 28 Atl. 323; *Ratliff* v. *State,* 122 Ala. 104, 26 So. 123; *State* v. *McDowell,* 1 Penn. (Del.) 2, 39 Atl. 454; *State* v. *Lewis,* 10 Kan. 157; *Brown* v. *People,* 17 Mich. 429, 97 Am. Dec. 195; *People* v. *Hare,* 57 Mich. 505, 24 N. W. 843; *Blake* v. *State,* 38 Tex. Crim. Rep. 377, 43 S. W. 107; *State* v. *Manning,* 75 Vt. 185, 54 Atl. 181; *Goldsby* v. *United States,* 160 U. S. 70, 40 L. ed. 343, 16 Sup. Ct. Rep. 216; *State* v. *Maher,* 74 Iowa, 77, 37 N. W. 2; *State* v. *Delaney,* 92 Iowa, 467, 61 N. W. 189; *People* v. *Gibson,* 58 Mich. 368, 25 N. W. 316, 6 Am. Crim. Rep. 85; *State* v. *Scott,* 19 N. C. (2 Dev. & B. L.) 35; *State* v. *Phair,* 48 Vt. 366; *State* v. *Davis,* 6 Idaho, 159, 53 Pac. 678; *Hauser* v. *People,* 210 Ill. 253, 71 N. E. 416; *State* v. *White,* 99 Iowa, 46, 68 N. W. 564; *State* v. *King,* 174 Mo. 647, 74 S. W. 627, 15 Am. Crim. Rep. 616; *State* v. *Lee,* 63 N. J. L. 474, 43 Atl. 678; *Copeland* v. *State,* 36 Tex. Crim. Rep. 576, 38 S. W. 189.

[1] See Wharton, Homicide, Bowlby's 5th ed. for extended treatment on the law of provocation, pages 226 et seq.

[2] *Sawyer* v. *People,* 91 N. Y. 667; *State* v. *Jones,* 20 W. Va. 764.

[3] *People* v. *Schryver,* 42 N. Y. 1, 1 Am. Rep. 480; *Stokes* v. *People,* 53 N. Y. 164, 13 Am. Rep. 492; *State* v. *Jones,* 20 W. Va. 764. See *Sawyer* v. *People,* 91 N. Y. 667; *Com.* v. *Drum,* 58 Pa. 9; *O'Mara* v. *Com.* 75 Pa. 424; *State* v. *Willis,* 63 N. C. 26; *State* v. *Haywood,* 61 N. C. (Phill. L.) 376; *State* v. *Vincent,* 24 Iowa, 570, 95 Am. Dec. 753; *State* v. *Porter,* 34 Iowa, 131; *State* v. *Hill,* 69 Mo. 451.

See Day, J., in *State* v. *Porter,* 34 Iowa, 131; *Maher* v. *People,* 10 Mich. 212, 81 Am. Dec. 781; followed in *Stokes* v. *People,* 53 N. Y. 164, 13 Am. Rep. 492; post, § 721; Wharton, Homicide, Bowlby's 5th ed. pp. 266, et seq.

See *People* v. *Ah Kong,* 49 Cal. 7; *People* v. *West,* 49 Cal. 610; *Silvus* v. *State,* 22 Ohio St. 90, followed in *Weaver* v. *State,* 24 Ohio St. 584; supra, § 11.

See, generally, *Com.* v. *York,* 9

Provocation in law is used in the ordinary acceptation of the word,[4] and means that treatment of one person by another which arouses anger or passion.[5]

By mitigation, it may reduce the grade of an offense,[6] but it never justifies a crime.[7] In homicide it negatives the idea of premeditation and malice, because the hot blood engendered by provocation produces a temporary suspension of the reflective faculties, and the passion arosed excludes the idea of deliberation.[8] Hence, the rule as to the measure of proof is, after the evidence has been submitted on both sides, is it sufficient to cast a reasonable doubt on the essential averments of the indictment? If it is sufficient for this, the defendant is entitled to an acquittal.[9]

Met. 93, 43 Am. Dec. 373, s. c. Bennett, & H. Lead. Crim. Cas. 504; *Com.* v. *Webster,* 5 Cush. 316, 52 Am. Dec. 711 (see *Com.* v. *Hardiman,* 9 Gray, 136; *State* v. *McAllister,* 24 Me. 139; *State* v. *Upham,* 38 Me. 261; *Sattewhite* v. *State,* 28 Ala. 65); *Com.* v. *Hawkins,* 3 Gray, 463. See also *Com.* v. *Heath,* 11 Gray, 303; *State* v. *Knight,* 43 Me. 11; *State* v. *Patterson,* 45 Vt. 308, 12 Am. Rep. 200; *Tweedy* v. *State,* 5 Iowa, 434; *State* v. *Bertrand,* 3 Or. 61.

[4] *Ruble* v. *People,* 67 Ill. App. 439.

[5] *State* v. *Byrd,* 52 S. C. 480, 30 S. E. 482.

[6] *Reg.* v. *Fisher,* 8 Car. & P. 182; Wharton, Homicide, Bowlby's 5th ed. chap. 24; *Cyrus* v. *State,* 102 Ga. 616, 29 S. E. 917; *Parker* v. *State,* 31 Tex. 132; *State* v. *Botha,* 27 Utah, 289, 75 Pac. 731.

[7] See *State* v. *Wilson,* 38 Conn. 126; *Territory* v. *Drennan,* 1 Mont. 41; Wharton, Homicide, Bowlby's 5th ed. chap. 16; *Thompson* v. *State,* 25 Ala. 41; *Frank* v. *State,* 27 Ala. 38; *Moffatt* v. *State,* 35 Tex. Crim. Rep. 257, 33 S. W. 344; *Salisbury's Case,* 1 Plowd. 100; *Paulin* v. *State,* 21 Tex. App. 436, 1 S. W. 453; *Brown* v. *State,* 45 Tex. Crim. Rep. 139, 75 S. W. 33.

[8] *State* v. *Hurley,* Houst. Crim. Rep. (Del.) 28; *People* v. *Garretson,* 2 Wheeler, Crim. Cas. 347; *Darden* v. *State,* 73 Ark. 315, 84 S. W. 507; *Jackson* v. *State,* 82 Ga. 449, 9 S. E. 126; *Ex parte Moore,* 30 Ind. 197; *Kriel* v. *Com.* 5 Bush, 362; *Com.* v. *Webster,* 5 Cush. 295, 52 Am. Dec. 711; *State* v. *O'Hara,* 92 Mo. 59, 4 S. W. 422; *Brown* v. *State,* 62 N. J. L. 666, 42 Atl. 811; *State* v. *Smith,* 77 N. C. 488; *Com.* v. *Drum,* 58 Pa. 9; *Com.* v. *Ellenger,* 1 Brewst. (Pa.) 352; *Com.* v. *Bell,* Addison (Pa.) 156, 1 Am. Dec. 298.

[9] Supra § 1.

§ 335. Necessity as a defense; burden of proof.—The canon law, the basis of our jurisprudence in this respect, recognizes an excusable sacrifice of life [1] when two are in such extremity that one or the other must die.[2] This is also the case when a superior duty intervenes, as where it is necessary to sacrifice the life of a child to save that of the mother,[3] or other unusual emergencies [4] may create an inexorable necessity which the prescribed rules of human conduct can seldom compass.

But in criminal matters, the law recognizes no authority upon the part of one to command another to commit crime,[5] nor distinctions between master and servant,[6] principal and agent,[7] and except in those instances where the wife, under the common law, by reason of coverture,[8] is excused when

[1] Can. II. Dist. i. de consecrat.

[2] Cap. 3. x. de furt. (5. 18.), Cap. 4 x. de reg. jur. (5. 41.) Rossi, Traité ii. p. 212.

Berner, (*De impunitate propter summam necessitatem*), etc. (1861). Geib, Lehrbüch, ii. 225; Compendium in Holtzendorf, ii. 180; Wharton, Crim. Law, 10th ed. § 510.

[4] Wharton, Crim. Law, §§ 95, 96, 139, 144.

See *Territory* v. *Yee Dan*, 7 N. W. 439, 37 Pac. 1101; *United States* v. *Holmes* (1842), 1 Wall. Jr. 1, Fed. Cas. No. 15,383.

[5] *People* v. *Repke*, 103 Mich. 459, 61 N. W. 861; *Morgan* v. *State*, 3 Sneed, 475; *Thomas* v. *State*, 134 Ala. 126, 33 So. 130; *Carlisle* v. *State*, 37 Tex. Crim. Rep. 108, 38 S. W. 991; *People ex rel. Taylor* v. *Dunlay*, 66 N. Y. 162; *Com.* v. *Kolb*, 13 Pa. Super. Ct. 347.

[6] *People* v. *Richmond*, 29 Cal. 414; *Taylor* v. *State*, 5 Tex. App. 529; *Murphy* v. *State*, 6 Tex. App. 420.

[7] *Reese* v. *State*, 73 Ala. 18; *Klifield* v. *State*, 4 How. (Miss.) 304; *Allyn* v. *State*, 21 Neb. 593, 33 N. W. 212; *Douglass* v. *State*, 18 Ind. App. 289, 48 N. E. 9.

But see *State* v. *Rosenberg*, 162 Mo. 358, 62 S. W. 485, 982; *Thompson* v. *State*, 105 Tenn. 177, 51 L.R.A. 883, 80 Am. St. Rep. 875, 58 S. W. 213.

[8] *Com.* v. *Eagan*, 103 Mass. 71; *State* v. *Williams*, 65 N. C. 398.

See *United States* v. *Terry*, 42 Fed. 317; *Freel* v. *State*, 21 Ark. 212; *Edwards* v. *State*, 27 Ark. 493; *Bell* v. *State*, 92 Ga. 49, 18 S. E. 186; *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; *State* v. *Hendricks*, 32 Kan. 559, 4 Pac. 1050; *State* v. *Cleaves*, 59 Me. 298, 8 Am. Rep. 422; *Brown's Case*, 3 N. Y. City Hall Rec. 151; *Davis* v. *State*, 15

acting under her husband's coercion, the individual is responsible without regard to supposed authority.[9]

Hence, where a defendant sets up that he acted under compulsion or necessity of any kind, the burden is on him in such cases to prove the defense so set up, and he must establish it by a preponderance of proof, this being an extrinsic defense.[10] At the same time, if the defense goes to negative malice, where malice is an essential ingredient of the offense, then if, on the whole evidence, a reasonable doubt is created as to malice, the defendant is entitled to an acquittal.[11]

III. Insanity.

§ 335a. Legal insanity; evidence.—Insanity as an excuse for crime is fully treated in another work.[1] Courts concern themselves only with the degree of insanity that will enable them to determine the responsibility of the accused for the crime charged. It is a legal insanity which is required to relieve the accused from criminal responsibility.[2] Insanity *per se* does not relieve from criminal responsibility.[3] The accused may be criminally responsible though at the same time he suffers from derangement,[4] where he is still sufficiently

Ohio, 72, 45 Am. Dec. 559; Wharton, Crim. Law, 10th ed. §§ 78, et seq.; Russell, Crimes, 7th Eng. ed. pp. 91, et seq.

[9] Wharton, Crim. Law, 10th ed. §§ 94, et seq.; Russell, Crimes, 7th Eng. ed. pp. 90, 91.

[10] Wharton, Crim. Law, 10th ed. §§ 95, et seq.

[11] *Webb* v. *State,* 9 Tex. App. 490; *King* v. *State,* 9 Tex. App. 515.

[1] Wharton & S. Med. Jur. Bowlby's 5th ed. chap. 8 & 9.

[2] *Leache* v. *State, 22* Tex. App. 279, 58 Am. Rep. 638, 3 S. W. 539; *State* v. *Tyler,* 7 Ohio N. P. 443, 5 Ohio S. & C. P. Dec. 587; *People* v. *Hettick,* 126 Cal. 425, 58 Pac. 918; *State* v. *Kalb,* 7 Ohio N. P. 547, 5 Ohio S. & C. P. Dec. 738.

See *State* v. *Hockett,* 70 Iowa, 442, 30 N. W. 742.

[3] *People* v. *O'Connell,* 62 How. Pr. 436; *People* v. *Montgomery,* 13 Abb. Pr. N. S. 207; *Burgo* v. *State,* 26 Neb. 639, 42 N. W. 701.

[4] *State* v. *Murray,* 11 Or. 413, 5 Pac. 55; *Clark's Case,* 1 N. Y. City Hall Rec. 176; *State* v. *Pagels,* 92 Mo. 300, 4 S. W. 931; *Hornish* v.

under the guidance of his reason as to be legally responsible for his acts. The vital issue to be determined is, Is the accused responsible or irresponsible?

The general rule is that a person committing a crime, acting under the impulse of mental derangement, is not criminally responsible therefor;[5] that a person of insane mind cannot be punished for his criminal acts,[6] and that he is excused when insanity is the efficient cause of the criminal act.[7]

Where the commission of the criminal act has been established, the question of the existence of the insanity is one of fact for the jury,[8] to be determined like any other fact,[9] under the instructions of the court, and the weight and suffi-

People, 142 Ill. 620, 18 L.R.A. 237, 32 N. E. 677; *State* v. *Bundy,* 24 S. C. 439, 58 Am. Rep. 262; *Goodwin* v. *State,* 96 Ind. 550; *State* v. *Maier,* 36 W. Va. 757, 15 S. E. 991; *Hadfield's Case,* 27 How. St. Tr. 1282; *State* v. *Swift,* 57 Conn. 496, 18 Atl. 664.

[5] *Walker* v. *People,* 88 N. Y. 86; *Clark* v. *State,* 8 Tex. App. 350; *Smith* v. *State,* 22 Tex. App. 317, 3 S. W. 684; *Giebel* v. *State,* 28 Tex. App. 151, 12 S. W. 591; *Smith* v. *State,* 19 Tex. App. 95; *State* v. *Felter,* 25 Iowa, 67; *State* v. *Mewherter,* 46 Iowa, 88; *Hite* v. *Sims,* 94 Ind. 333; *Sage* v. *State,* 91 Ind. 141; *Cluck* v. *State,* 40 Ind. 263; *Goodwin* v. *State,* 96 Ind. 550; *Warner* v. *State,* 114 Ind. 137, 16 N. E. 189; *Abbott* v. *Com.* 107 Ky. 624, 55 S. W. 196; *Lilly* v. *People,* 148 Ill. 467, 36 N. E. 95; *State* v. *Jones,* 50 N. H. 369, 9 Am. Rep. 242; Russell, Crimes, 7th Eng. ed. pp. 62, et seq.

[6] *State* v. *Gardiner,* Wright (Ohio) 392; *State* v. *Miller,* 7 Ohio N. P. 458, 5 Ohio S. & C. P. Dec. 703.

[7] Note 5, supra.

[8] *Crews* v. *State,* 34 Tex. Crim. Rep. 533, 31 S. W. 373; *People* v. *Webster,* 59 Hun, 398, 13 N. Y. Supp. 414; *Jamison* v. *People,* 145 Ill. 357, 34 N. E. 486; *Hornish* v. *People,* 142 Ill. 620, 18 L.R.A. 237, 32 N. E. 677; *Plake* v. *State,* 121 Ind. 433, 16 Am. St. Rep. 408, 23 N. E. 273; *State* v. *Geier,* 111 Iowa, 706, 83 N. W. 718; *State* v. *Klinger,* 43 Mo. 127; *State* v. *Holme,* 54 Mo. 153; *State* v. *Pike,* 49 N. H. 399, 6 Am. Rep. 533; *People* v. *Pine,* 2 Barb. 566; *State* v. *Stark,* 1 Strobh. L. 479; *Clark* v. *State,* 8 Tex. App. 350; *Beasley* v. *State,* 50 Ala. 149, 20 Am. Rep. 292; *United States* v. *King,* 34 Fed. 302; *Dejarnette* v. *Com.* 75 Va. 867.

[9] *State* v. *Holme,* 54 Mo. 153; *McDougal* v. *State,* 88 Ind. 24.

ciency of the evidence to establish the question of insanity as a defense is exclusively for the jury.[10]

Where, on a plea of guilty, the question of sanity is an issue, it should be shown before conviction can be had,[11] and the evidence should be introduced at the time of entering the plea.

Insanity and self-defense are not inconsistent, and the accused may be acquitted on either if sustained by the evidence.[12]

Positive and direct testimony is not required to establish insanity as a defense,[13] nor specific acts of derangement;[14] an accused asserting his own sanity may be acquitted on the ground of insanity where the evidence justifies the finding.[15] But the accused's own testimony, that he did not know the nature of the act, is not sufficient to establish his legal insanity.[16]

As the prosecution must prove every essential element of the crime beyond a reasonable doubt, when insanity enters into the question of intent, then it is a part of the case of the prosecution to establish sanity beyond a reasonable doubt.[17]

[10] *Brown* v. *Com.* 14 Bush, 398; *Sharp* v. *State,* 161 Ind. 288, 68 N. E. 286; *Goodwin* v. *State,* 96 Ind. 550; *State* v. *Scott,* 49 La. Ann. 253, 36 L.R.A. 721, 21 So. 271, 10 Am. Crim. Rep. 585.

[11] *Burton* v. *State,* 33 Tex. Crim. Rep. 138, 25 S. W. 782.

[12] *State* v. *Wade,* 161 Mo. 441, 61 S. W. 800.

[13] *State* v. *Wright,* 134 Mo. 404, 35 S. W. 1145; *State* v. *Simms,* 68 Mo. 305; *Rinkard* v. *State,* 157 Ind. 534, 62 N. E. 14; *People* v. *Tripler,* 1 Wheeler, Crim. Cas. 48.

[14] *People* v. *Tripler,* 1 Wheeler, Crim. Cas. 48.

[15] *Reg.* v. *Pearce,* 9 Car. & P. 667; *State* v. *Reidell,* 9 Houst. (Del.) 470, 14 Atl. 550.

[16] *State* v. *Kluseman,* 53 Minn. 541, 55 N. W. 741; *Perry* v. *State,* 87 Atl. 30, 6 So. 425; *Knight* v. *Young,* 2 Ves. & B. 184.

[17] *Ford* v. *State,* 73 Miss. 734, 35 L.R.A. 117, 19 So. 665; *O'Connell* v. *People,* 87 N. Y. 377, 41 Am. Rep. 379; *People* v. *Holmes,* 111 Mich. 364, 69 N. W. 501; *People* v. *McCarthy,* 115 Cal. 255, 46 Pac. 1073; *Chase* v. *People,* 40 Ill. 352; *People* v. *Casey,* 231 Ill. 261, 83 N. E. 278; *People* v. *McCann,* 16 N. Y. 58, 69 Am. Dec. 642; *Walter* v. *People,* 32 N. Y. 147; *Walker* v. *People,* 88 N. Y. 81; *State* v. *Davis,* 109 N. C. 780,

As positive and direct testimony is not required to establish legal insanity, so the prosecution need not prove the sanity of the accused by direct and positive evidence. On the issue of sanity, at the outset and until rebutted, there is the presumption of law that everyone is sane, which is equivalent to proof.[18] Should it stop there, and the accused offer no affirmative evidence, his sanity is regarded as proved;[19] but if the evidence adduced on behalf of the accused casts a reasonable doubt on his sanity, then at that point his sanity must be established by the prosecution, beyond a reasonable doubt.[20]

§ 336. Presumption of sanity.—By the common law, every man is presumed to be sane until the contrary is proved.

14 S. E. 55; *State* v. *West,* Houst. Crim. Rep. (Del.) 371; *State* v. *Bartlett,* 43 N. H. 224, 80 Am. Dec. 154; *Ogletree* v. *State,* 28 Ala. 693; *Polk* v. *State,* 19 Ind. 170, 81 Am. Dec. 382; *Armstrong* v. *State,* 30 Fla. 170, 17 L.R.A. 484, 11 So. 618; *State* v. *Schaefer,* 116 Mo. 96, 22 S. W. 447; *State* v. *Coleman,* 20 S. C. 441; *Wright* v. *People,* 4 Neb. 407; *Com.* v. *Pomeroy,* 117 Mass. 143; *Davis* v. *United States,* 160 U. S. 469, 40 L. ed. 499, 16 Sup. Ct. Rep. 353; *State* v. *Johnson,* 40 Conn. 136; *Guetig* v. *State,* 66 Ind. 94, 32 Am. Rep. 99; *State* v. *Speyer,* 207 Mo. 540, 14 L.R.A.(N.S.) 836, 106 S. W. 505; *Fults* v. *State,* 50 Tex. Crim. Rep. 502, 98 S. W. 1057; *State* v. *Pressler,* 16 Wyo. 214, 92 Pac. 806, 15 A. & E. Ann. Cas. 93; *State* v. *Quigley,* 26 R. I. 263, 67 L.R.A. 322, 58 Atl. 905, 3 A. & E. Ann. Cas. 920; *Knights* v. *State,* 58 Neb. 225, 76 Am. St. Rep. 78, 78 N. W. 508; *Allams* v. *State,* 123 Ga. 500, 51 S. E. 506; *Wooten* v. *State,* 51 Tex. Crim. Rep. 428, 102 S. W. 416; Underhill, Crim. Ev. 2d ed. § 249.

[18] *Com.* v. *Eddy,* 7 Gray, 583; *United States* v. *Chisholm,* 153 Fed. 808; *Montag* v. *People,* 141 Ill. 75, 30 N. E. 337; *Com.* v. *Gerade,* 145 Pa. 289, 27 Am. St. Rep. 689, 22 Atl. 464; *Ford* v. *State,* 73 Miss. 734, 35 L.R.A. 117, 19 So. 665; *State* v. *Cloninger,* 149 N. C. 567, 63 S. E. 154; *State* v. *Pressler,* 16 Wyo. 214, 92 Pac. 806, 15 A. & E. Ann. Cas. 93.

[19] *People* v. *Suesser,* 142 Cal. 354, 75 Pac. 1093; *Boswell* v. *Com.* 20 Gratt. 860; *State* v. *Clark,* 34 Wash. 485, 101 Am. St. Rep. 1006, 76 Pac. 98; *Com.* v. *Wirback,* 190 Pa. 138, 70 Am. St. Rep. 625, 42 Atl. 542.

[20] *Ford* v. *State,* 73 Miss. 734, 35 L.R.A. 117, 19 So. 665; *Thomas* v. *State,* 55 Tex. Crim. Rep. 293, 116 S. W. 600; *State* v. *Craig,* 52 Wash. 66, 100 Pac. 167.

When insanity is alleged by a party, it must be proved as a substantitve fact by the party alleging it, on whom lies the burden of proof.[1]

In view of the legal presumption, and the rule of reasonable doubt always applying in criminal cases, courts proceed upon three different theories as to the degree of evidence required to justify a conviction on the issue of insanity.[2]

§ 337. First theory; insanity to be established beyond a reasonable doubt.—The first theory is that insanity as a defense is a confession and avoidance, and as such must be proved beyond a reasonable doubt. Then, when the commission of the crime is established, and the defense of insanity is not made out beyond a reasonable doubt, the jury ought to convict. This theory is expressed in New Jersey by Hornblower, Ch. J., as follows: "The proof of insanity at the time of committing the act ought to be as clear and satisfactory, in order to acquit him on the ground of insanity, as the proof of committing the act ought to be to find a sane man guilty." [1]

[1] Post, § 729; *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 Cranch, C. C. 514, Fed. Cas. No. 15,576; *Atty. Gen.* v. *Prantber,* 3 Bro. Ch. 441; *United States* v. *McGlue,* 1 Curt. C. C. 1, Fed. Cas. No. 15,679; *Com.* v. *Eddy,* 7 Gray, 583; *State* v. *Spencer,* 21 N. J. L. 202; *State* v. *West,* Houst. Crim. Rep. (Del.) 371; *State* v. *Stark,* 1 Strobh. L. 479; *State* v. *Brinyea,* 5 Ala. 244; *People* v. *Myers,* 20 Cal. 518; *Boswell* v. *Com.* 20 Gratt. 860; *Loeffner* v. *State,* 10 Ohio St. 599.

See also note in 36 L.R.A. 727.

[2] See Lawson, Insanity in Crim. Cas. pp. 11, et seq.

[1] *State* v. *Spencer,* 21 N. J. L. 196.

See, as countenancing this view, *State* v. *Hoyt,* 46 Conn. 330; *State* v. *Hurley,* Houst. Crim. Rep. (Del.) 28; *State* v. *Danby,* Houst. Crim. Rep. (Del.) 166; *State* v. *Pratt,* Houst. Crim. Rep. (Del.) 249; *Clark* v. *State,* 12 Ohio, 495, 40 Am. Dec. 481; *Bonfanti* v. *State,* 2 Minn. 123, Gil. 99.

The following English cases sustain the same view. *Reg.* v. *M'Naughton,* 4 State Tr. N. S. 847, 10 Clark & F. 200, 1 Car. & K. 130, note, 8 Scott. N. R. 595; *Reg.* v.

§ 338. Second theory; preponderance of evidence.—The second theory is that the jury (at least to find an affirmative verdict of lunacy) are to be governed by the preponderance of evidence, and in this view insanity is not to be established beyond a reasonable doubt. This is the rule in England [1] and in the following states.[2]

Stokes, 3 Car. & K. 188; *Reg.* v. *Taylor*, 3 Cox, C. C. 84.

It seems that in New Jersey at this time a preponderance is accepted. *Graves* v. *State*, 45 N. J. L. 203, 4 Am. Crim. Rep. 386.

As to establishing insanity beyond a reasonable doubt see, generally, the following cases: *People* v. *Allender*, 117 Cal. 81, 48 Pac. 1014; *People* v. *Barthleman*, 120 Cal. 7, 52 Pac. 112; *Graham* v. *Com.* 16 B. Mon. 587; *Portwood* v. *Com.* 104 Ky. 496, 47 S. W. 339; *State* v. *Scott*, 49 La. Ann. 253, 36 L.R.A. 721, 21 So. 271, 10 Am. Crim. Rep. 585; *Genz* v. *State*, 58 N. J. L. 482, 34 Atl. 816; *Winters* v. *State*, 61 N. J. L. 613, 41 Atl. 220; *Kelch* v. *State*, 55 Ohio St. 146, 39 L.R.A. 737, 60 Am. St. Rep. 680, 45 N. E. 6; *Com.* v. *Bezek*, 168 Pa. 603, 32 Atl. 110; *King* v. *State*, 91 Tenn. 617, 647, 20 S. W. 169; *Ryder* v. *State*, 100 Ga. 528, 38 L.R.A. 721, 62 Am. St. Rep. 334, 28 S. E. 246; *State* v. *Shuff*, 9 Idaho, 115, 72 Pac. 664, 13 Am. Crim. Rep. 443; *Hornish* v. *People*, 142 Ill. 620, 18 L.R.A. 237, 32 N. E. 677; *State* v. *Wright*, 134 Mo. 404, 35 S. W. 1145; *State* v. *Brinyea*, 5 Ala. 241. See *State* v. *Marler*, 2 Ala. 43, 36 Am. Dec. 398; *Maxwell* v. *State*, 89 Ala. 150, 7 So. 824; *State* v. *Pratt*, Houst. Crim. Rep. (Del.) 249; *State* v. *Clements*, 47 La. Ann. 1088, 17 So. 502, but see *State* v. *Johnston*, 118 La. 276, 42 So. 935.

See supra, § 335a; *O'Connell* v. *People*, 87 N. Y. 377, 41 Am. Rep. 379; *State* v. *Scott*, 36 L.R.A. 721, exhaustive note; *Bolling* v. *State*, 54 Ark. 588, 16 S. W. 658; *Carr* v. *State*, 96 Ga. 284, 22 S. E. 570, 10 Am. Crim. Rep. 329; *State* v. *Jones*, 64 Iowa, 349, 17 N. W. 911, 20 N. W. 470; *State* v. *Lawrence*, 57 Me. 574; *State* v. *Schaefer*, 116 Mo. 96, 22 S. W. 447; *State* v. *Hartley*, 22 Nev. 342, 28 L.R.A. 33, 40 Pac. 372; *State* v. *Lewis*, 20 Nev. 333, 22 Pac. 241, 8 Am. Crim. Rep. 574; *State* v. *Hansen*, 25 Or. 391, 35 Pac. 976, 36 Pac. 296 (see statute); *Com.* v. *Bezek*, 168 Pa. 603, 32 Atl. 109; *State* v. *Paulk*, 18 S. C. 514; *Leache* v. *State*, 22 Tex. App. 279, 58 Am. Rep. 638, 3 S. W. 539; *People* v. *Dillon*, 8 Utah, 92, 30 Pac. 150.

[1] *Reg.* v. *Layton*, 4 Cox, C. C. 149; *Reg.* v. *Higginson*, 1 Car. & K. 130; Russell, Crimes, pp. 62, et seq.

[2] Alabama.—*Boswell* v. *State*, 63 Ala. 307, 35 Am. Rep. 20; *Ford* v. *State*, 71 Ala. 385; *Parrish* v. *State*, 139 Ala. 16, 36 So. 1012; *Braham* v. *State*, 143 Ala. 28, 38 So. 919.

Arkansas.—*McKenzie* v. *State*, 26 Ark. 334; *Cavaness* v. *State*, 43 Ark. 331.

California.—*People* v. *Coffman*,

§ 339. Third theory; prosecution must prove sanity beyond a reasonable doubt.—A third view, sustained by several authoritative courts, is that in such an issue the prosecu-

24 Cal. 230; *People* v. *Wilson,* 49 Cal. 13, 1 Am. Crim. Rep. 358; *People* v. *Bell,* 49 Cal. 486; *People* v. *Messersmith,* 61 Cal. 246; *People* v. *Suesser,* 142 Cal. 354, 75 Pac. 1093; *People* v. *Willard,* 150 Cal. 543, 89 Pac. 124.

Georgia.—*Carter* v. *State,* 56 Ga. 463; *Keener* v. *State,* 97 Ga. 388, 24 S. E. 28.

Idaho.—*People* v. *Walter,* 1 Idaho, 386.

Iowa.—*State* v. *Felter,* 32 Iowa, 50; *State* v. *Bruce,* 48 Iowa, 536, 30 Am. Rep. 403; *State* v. *Thiele,* 119 Iowa, 659, 94 N. W. 256; *State* v. *Robbins,* 109 Iowa, 650, 80 N. W. 1061; *State* v. *Humbles,* 126 Iowa, 462, 102 N. W. 409.

Kentucky.—*Kriel* v. *Com.* 5 Bush, 362; *Ball* v. *Com.* 81 Ky. 662; *Moore* v. *Com.* 92 Ky. 630, 18 S. W. 833; *Phelps* v. *Com.* 17 Ky. L. Rep. 706, 32 S. W. 470.

Louisiana.—*State* v. *Coleman,* 27 La. Ann. 691.

Maine.—*State* v. *Lawrence,* 57 Me. 574.

Massachusetts.—*Com.* v. *Eddy,* 7 Gray, 583; *Com.* v. *Rogers,* 7 Met. 500, 41 Am. Dec. 458; *Com.* v. *Heath,* 11 Gray, 303.

Michigan.—*People* v. *Finley,* 38 Mich. 482.

But see *People* v. *Garbutt,* 17 Mich. 9, 97 Am. Dec. 162.

Minnesota.—*State* v. *Gut,* 13 Minn. 343, Gil. 315; *State* v. *Grear,* 28 Minn. 426, 41 Am. Rep. 296, 10 N. W. 472.

Missouri.—*State* v. *Hundley,* 46 Mo. 414; *State* v. *Klinger,* 43 Mo. 127; *State* v. *Smith,* 53 Mo. 267; *State* v. *McCoy,* 34 Mo. 531, 86 Am. Dec. 121; *State* v. *Simms,* 68 Mo. 305; *State* v. *Redemeier,* 71 Mo. 173, 36 Am. Rep. 462.

But see *State* v. *Lowe,* 93 Mo. 547, 5 S. W. 889; *State* v. *Barker,* 216 Mo. 532, 115 S. W. 1102.

Nevada.—*State* v. *Lewis,* 20 Nev. 333, 22 Pac. 241, 8 Am. Crim. Rep. 574.

New Jersey.—*Graves* v. *State,* 45 N. J. L. 347, 46 Am. Rep. 778.

New York.—*People* v. *McCann,* 16 N. Y. 58, 69 Am. Dec. 642, but see note under § 339 under New York for contra cases.

North Carolina.—*State* v. *Starling,* 51 N. C. (6 Jones, L.) 366; *State* v. *Brandon,* 53 N. C. (8 Jones, L.) 468; but see *State* v. *Vann,* 82 N. C. 631.

See *State* v. *Payne,* 86 N. C. 609; *State* v. *Davis,* 109 N. C. 780, 14 S. E. 55.

Ohio.—*Loeffner* v. *State,* 10 Ohio St. 599; *Bond* v. *State,* 23 Ohio St. 349. See, *Bergin* v. *State,* 31 Ohio St. 111; *Kelch* v. *State,* 55 Ohio St. 146, 39 L.R.A. 737, 60 Am. St. Rep. 680, 45 N. E. 6; *State* v. *Austin,* 71 Ohio St. 317, 104 Am. St. Rep. 778, 73 N. E. 218.

Pennsylvania.—*Meyers* v. *Com.* 83 Pa. 131; *Pannell* v. *Com.* 86 Pa. 260; *Sayres* v. *Com.* 88 Pa. 291; *Coyle* v. *Com.* 100 Pa. 573, 45 Am. Rep. 397; *Com.* v. *Bezek,* 168 Pa.

tion must prove sanity beyond a reasonable doubt.[1] The apparent conflict, however, between this position and that which

603, 32 Atl. 109; *Com.* v. *Heidler,* 191 Pa. 375, 43 Atl. 211.

See further, *Nevling* v. *Com.* 98 Pa. 322.

South Carolina.—*State* v. *Paulk,* 18 S. C. 514; *State* v. *Stark,* 1 Strobh. L. 479.

But see *State* v. *Coleman,* 20 S. C. 443.

Texas.—*Jones* v. *State,* 13 Tex. App. 1. See *Clark* v. *State,* 8 Tex. App. 350; *Johnson* v. *State,* 10 Tex. App. 571; *Fisher* v. *State,* 30 Tex. App. 502, 18 S. W. 90; *Carlisle* v. *State,* — Tex. Crim. Rep. — 56 S. W. 365; *McCullough* v. *State,* 50 Tex. Crim. Rep. 132, 94 S. W. 1056; *Stanfield* v. *State,* 50 Tex. Crim. Rep. 69, 94 S. W. 1057; *Fults* v. *State,* 50 Tex. Crim. Rep. 502, 98 S. W. 1057.

Virginia.—*Baccigalupo* v. *Com.* 33 Gratt. 807, 36 Am. Rep. 795; *Boswell* v. *Com.* 20 Gratt. 860.

West Virginia.—*State* v. *Strauder,* 11 W. Va. 747, 27 Am. Rep. 606.

[1] United States.—*Davis* v. *United States,* 160 U. S. 469, 40 L. ed. 499, 16 Sup. Ct. Rep. 353; *United States* v. *Lancaster,* 7 Biss. 440, Fed. Cas. No. 15,555; *United States* v. *Faulkner,* 35 Fed. 730; *Hotema* v. *United States,* 186 U. S. 413, 46 L. ed. 1225, 22 Sup. Ct. Rep. 895.

Alabama.—*State* v. *Marler,* 2 Ala. 43, 36 Am. Dec. 398, but see preceding § 338 note on Alabama.

Colorado.—*Jones* v. *People,* 23 Colo. 276, 47 Pac. 275.

Connecticut.—*State* v. *Johnson,* 40 Conn. 136.

Delaware.—*State* v. *Reidell,* 9 Houst. (Del.) 470, 14 Atl. 550.

Florida.—*Hodge* v. *State,* 26 Fla. 11, 7 So. 593; *Armstrong* v. *State,* 27 Fla. 366, 26 Am. St. Rep. 72, 9 So. 1; *Armstrong* v. *State,* 30 Fla. 170, 17 L.R.A. 484, 11 So. 618; *Brown* v. *State,* 40 Fla. 459, 25 So. 63.

Georgia.—*Anderson* v. *State,* 42 Ga. 9.

Idaho.—*State* v. *Shuff,* 9 Idaho, 115, 72 Pac. 664, 13 Am. Crim. Rep. 443.

Illinois.—*Hopps* v. *People,* 31 Ill. 385, 83 Am. Dec. 231; *Montag* v. *People,* 141 Ill. 75, 30 N. E. 337; *Jamison* v. *People,* 145 Ill. 357, 34 N. E. 486; *Lilly* v. *People,* 148 Ill. 467, 36 N. E. 95; *Hornish* v. *People,* 142 Ill. 620, 18 L.R.A. 237, 32 N. E. 677.

Indiana.—*Polk* v. *State,* 19 Ind. 170, 81 Am. Dec. 382; *Stevens* v. *State,* 31 Ind. 485, 99 Am. Dec. 634; *Guetig* v. *State,* 66 Ind. 94, 32 Am. Rep. 99; *Plake* v. *State,* 121 Ind. 433, 16 Am. St. Rep. 408, 23 N. E. 273; *Plummer* v. *State,* 135 Ind. 308, 34 N. E. 968.

Kansas.—*State* v. *Crawford,* 11 Kan. 32; *State* v. *Mohn,* 25 Kan. 182; *State* v. *Nixon,* 32 Kan. 205, 4 Pac. 159, 5 Am. Crim. Rep. 307.

Michigan.—*People* v. *Garbutt,* 17 Mich. 9, 97 Am. Dec. 162.

Mississippi.—*Cunningham* v. *State,* 56 Miss. 269, 31 Am. Rep. 360; *Caffey* v. *State,* — Miss. —, 24 So. 315.

Montana.—*State* v. *Peel,* 23 Mont.

makes a preponderance of proof requisite to establish insanity, may be reduced by adding the qualification that, when insanity enters into the question of intent, then it is a part of the case of the prosecution to establish sanity beyond a reasonable doubt.[2]

The third view is unquestionably the logical rule in criminal cases. While it is true that the presumption of sanity exists at the outset, it is also true that the prosecution affirms every essential ingredient of the crime charged, and hence affirms sanity as one of such essential ingredients, and the prosecution may rest that particular affirmation upon the presumption of sanity; yet, where the accused introduces evidence to rebut the presumption of sanity, then it is the duty to the state to prove the sanity of the accused beyond a reasonable doubt. The burden of proof is not changed, but the question of going forward and of producing the initial evidence devolves on the accused, for that is the logical order of proof.

§ 340. When in issue reasonable doubt should acquit.—The conflict which has just been noticed has arisen from the

358, 75 Am. St. Rep. 529, 59 Pac. 169.

Nebraska.—*Wright* v. *People,* 4 Neb. 407; *Knights* v. *State,* 58 Neb. 225, 76 Am. St. Rep. 78, 78 N. W. 508; *Snider* v. *State,* 56 Neb. 309, 76 N. W. 574.

New Hampshire.—*State* v. *Bartlett,* 43 N. H. 224, 80 Am. Dec. 154; *State* v. *Pike,* 49 N. H. 399, 6 Am. Rep. 533.

New Mexico.—*Faulkner* v. *Territory,* 6 N. M. 464, 30 Pac. 905.

New York.—*Walker* v. *People,* 26 Hun, 67; *Bratherton* v. *People,* 75 N. Y. 159, 3 Am. Crim. Rep. 218; *Maett* v. *People,* 85 N. Y. 373; *O'Connell* v. *People,* 87 N. Y. 377, 41 Am. Rep. 379; *People* v. *Taylor,* 138 N. Y. 398, 34 N. E. 275.

Oklahoma.—*Maas* v. *Territory,* 10 Okla. 714, 53 L.R.A. 814, 63 Pac. 960.

South Carolina.—*State* v. *Caleman,* 20 S. C. 441.

Tennessee.—*Stuart* v. *State,* 1 Baxt. 178; *Dove* v. *State,* 3 Heisk. 348; *King* v. *State,* 91 Tenn. 617, 20 S. W. 169.

Wisconsin.—*Revair* v. *State,* 82 Wis. 295, 52 N. W. 84.

See also *State* v. *Draper,* 1 Houst. Crim. Rep. (Del.) 291 (deaf mute); Lawson, Insanity in Crim. Cas. 11.

[2] Supra, 335.

view taken, that the statutory plea of insanity is a defense in the nature of confession and avoidance. Such is not the fact. In its nature it is nearer to a plea of jurisdiction than confession, as the defendant through his counsel comes and pleads that he is not amenable to penal jurisdiction; that he is insane, and hence not subject to penal discipline. Such a plea, when it is tendered for the purpose of showing entire unamenability, may be regarded as an application to be established by a preponderance of proof. To hold that a reasonable doubt of the defendant's insanity should result in permanent imprisonment as a dangerous lunatic would be to turn a beneficent maxim into an instrument of gross oppression. A man is tried for an assault. The jury, having a reasonable doubt of his insanity, find him, under the statutes, a dangerous lunatic; this is the necessary consequence of the doctrine under criticism. To extinguish a man's civil existence, to confine him for life, to take from him the control of his estate and the companionship of his family, requires something more than a reasonable doubt on question of his sanity. For so total an extinction, not only of liberty, but of civil and social capacity, we should, at least, exact a preponderance of proof. The difficulty is chiefly attributable to the fact that in the majority of cases where insanity is pleaded it arises in homicide cases, and to be decreed *civiliter mortuus* and to suffer imprisonment as criminally insane, is better than a verdict inflicting capital punishment. But the principle under discussion applies to all criminal prosecutions, and if a reasonable doubt as to sanity requires a verdict of criminal insanity, under the statutes in homicide cases, it also requires a like verdict in cases of assault, so that if homicide cases require an instruction to return a verdict of criminal insanity where a reasonable doubt exists as to sanity, the same instruction must apply in the case of an assault.

But, assuming that insanity is tendered as an issue merely to negative the averment of malice, the same rule cannot ap-

ply. Defendant may urge that he is not criminally insane so as to require his detention, but that a predisposition to insanity is such that, when excited, his reason is swept away by the force of the insane predisposition, so that he is incapable of deliberate intent. In such case it is logical to hold that, where the accused is charged with deliberate homicide, and he offers evidence to show that the condition of his mind, through his predisposition, was such that he was incapable of deliberation, the reasonable doubt as to such capacity for deliberation should be resolved in favor of the accused to the extent that it acquits him of the higher grade, and convicts him of the lower grade, of the offense. This is conceded even by those courts that hold that insanity must be established by a preponderance of proof.[1] In the Pennsylvania and Massachusetts cases, this distinction is the basis of those adjudications. To find a defendant wholly irresponsible requires a preponderance of proof, but where there are various grades to the offense, then a reasonable doubt as to the higher grade requires a finding of the lower grade. And when intent is an essential ingredient of the offense, a reasonable doubt as to intent requires acquittal. If there is any inconsistency in these views it is defended by the maxim, *indubio mitius.*[2]

If, however, on an indictment for an assault, insanity is suspected, and a verdict of criminal insanity would impose more rigorous punishment than the conviction of the assault, there can be no verdict of insanity on a reasonable doubt of sanity. But, in homicide, where a conviction of the charge would impose severer penalties than a verdict of criminal insanity, the doubt must be resolved in favor of the accused, and there ought, upon a reasonable doubt of sanity, to be a

[1] See Church, Ch. J., in *Brotherton* v. *People*, 75 N. Y. 162, 163, 3 Am. Crim. Rep. 218.
See 18 Cent. L. J. 402.

[2] *In pœnalibus causis benignius interpretandum est.* L. 155, § 2 D, 50, 17.

verdict of insanity. There is no inconsistency in these positions. On the one side a preponderance of proof is required to sustain a verdict finding insanity as a basis for confinement as criminally insane; and, on the other hand, where sanity is essential to intent, the sanity must be proved beyond a reasonable doubt.

§ 341. Burden of proof where facts are within the knowledge of a party.—As a rule affecting merely the time and manner of proof, but not for the purpose of affecting the merits of the testimony, when facts are peculiarly within the knowledge of a party, the burden is on him to prove such fact, whether the proposition be an affirmative or a negative one.[1] Thus where the defendant's whereabouts at the time of a crime is in question, the burden is on him to show where he was, as this knowledge is peculiarly within his power, even though the inference be an inference of fact, and not of law.[2] A court may therefore properly hold that, so far as concerns the mode of offering proof, but in no way touching the question of the degree of proof, it is incumbent on a party who has a particular proof in his possession to first produce such proof.[3] But this rule does not obtain where the prosecution might establish the same fact by secondary evidence.[4]

§ 342. Burden of proof as to licenses.—As a general rule a license to do a particular thing, when a purely extrinsic

[1] *Apothecaries' Co.* v. *Bentley,* Moody & R. 159, 1 Car. & P. 538; *United States* v. *Wright,* 16 Fed. 112; *Great Western R. Co.* v. *Bacon,* 30 Ill. 347, 83 Am. Dec. 199; *State* v. *McGlynn,* 34 N. H. 422; *State* v. *Keggon,* 55 N. H. 19, 3 Am. Crim. Rep. 285; *State* v. *Wilbourne,* 87 N. C. 529; *Ford* v. *Simmons,* 13 La. Ann. 397; *Jones* v. *State,* 13 Tex. App. 1.

See *Chaffee* v. *United States,* 18 Wall. 516, 21 L. ed. 908.

[2] *Toler* v. *State,* 16 Ohio St. 583. See *White* v. *State,* 31 Ind. 262; *State* v. *Josey,* 64 N. C. 56; *Gordon* v. *People,* 33 N. Y. 501.

[3] Supra, § 331.

[4] See *State* v. *Wilbourne,* 87 N. C. 529; post, § 749.

defense, is to be proved by the defendant by a preponderance of proof,[1] but whether the license is so extrinsic depends upon the concrete case. When the nonexistence of the license is not averred in the indictment, and the license is particularly within the knowledge of the party holding it, the burden is on him to produce such license in those cases in which the existence of the license is in question.[2] But where the nonexistence of the license is averred in the indictment, and is essential to the case of the prosecution, under the rules announced, the nonlicense must be proved by the party to whose case it is essential.[3] In several states this question is regulated by statute.[4] At common law, where licenses are the exception, the improbability of such a license, taken in connection with the rule that a party must produce all evidence peculiarly within his own knowledge, may throw the burden on the defendant of proving the license. When the prosecution has the burden of proving the negative, full proof "is not required, but even vague proof, or such as renders the existence

[1] Supra, § 331.

See Wharton, Crim. Pl. & Pr. §§ 238, 239; Wharton, Crim. Law, 10th ed. §§ 1499, 1500; *Goodwin* v. *Smith*, 72 Ind. 113, 37 Am. Rep. 144.

[2] *Smith* v. *Jefferies*, 9 Price, 257; *Morton* v. *Copeland*, 16 C. B. 517, 24 L. J. C. P. N. S. 169, 1 Jur. N. S. 979, 3 Week. Rep. 593; *Bluck* v. *Rackman*, 5 Moore, P. C. C. 305, 314; *Rex* v. *Turner*, 5 Maule & S. 206; *Apothecaries' Co.* v. *Bentley*, 1 Car. & P. 538, Moody & R. 159; *United States* v. *Hayward*, 2 Gall. 485, Fed. Cas. No. 15,336; *State* v. *Crowell*, 25 Me. 174; *State* v. *Woodward*, 34 Me. 294; *State* v. *McGlynn*, 34 N. H. 422; *Bliss* v. *Brainard*, 41 N. H. 256; *Garland* v. *Lane*, 46 N. H. 245; *State* v. *Keggon*, 55 N. H. 19, 3 Am. Crim. Rep. 285; *Geuing* v. *State*, 1 M'Cord, L. 573; *State* v. *Morrison*, 14 N. C. (3 Dev. L.) 299; *Wheat* v. *State*, 6 Mo. 455; *Medlock* v. *Brown*, 4 Mo. 379; *State* v. *Edwards*, 60 Mo. 490; *State* v. *Lipscomb*, 52 Mo. 32; *State* v. *Perkins*, 53 N. H. 435 (note in Bennett & H. Lead. Crim. Cas. 347).

[3] *Com.* v. *Thurlow*, 24 Pick. 374; *Com.* v. *Locke*, 114 Mass. 288; *Kane* v. *Johnston*, 9 Bosw. 154; *State* v. *Evans*, 50 N. C. (5 Jones, L.) 250; *Mehan* v. *State*, 7 Wis. 670; *State* v. *Hirsch*, 45 Mo. 429; *State* v. *Richeson*, 45 Mo. 575.

See *Conyers* v. *State*, 50 Ga. 103, 15 Am. Rep. 686, 1 Am. Crim. Rep. 237; post, § 719, 720.

[4] See *Com.* v. *Curran*, 119 Mass. 206.

of the negative probable, is, in some cases, sufficient to change the burden to the other party." [5] It has been held that want of authority may be inferred from circumstances.[6]

§ 343. Burden of proof of the formal requirements of documents.—When the validity of a document is dependent upon certain formalities in its execution, these formalities must be proved by the party offering such document in evidence. If, under a statute, a document is inoperative unless duly registered or stamped, then such document cannot be put in evidence without proof of such registry or stamp, but a prima facie compliance with the statute in this respect is sufficient to make out the case.[1] If the document, on its face, is duly executed, then it will be presumed [2] that the execution was regular, and the burden of contesting the execution falls on the party assailing the document.

§ 344. Instructions on presumptions of fact; limitation.—At common law where a presumption of fact exists against a party, the court may properly instruct the jury that the burden is on that party to remove the presumption, and that, if he does not, then the case must go against him on such point.[1] In some states this matter is regulated by statute.[2] In all jurisdictions, an erroneous charge is ground for reversal.[3] But it must be carefully observed that in penal prosecutions of all classes the doctrine just stated, however applicable, is limited by the cardinal principle of all criminal procedure, that the defendant is entitled to an acquittal when the jury has a reasonable doubt of his guilt.[4]

[5] Wharton, Crim. Law, 10th ed. 1500; *People ex rel. Smith* v. *Pease*, 27 N. Y. 45, 84 Am. Dec. 242; *Com.* v. *Bradford*, 9 Met. 268; *Beardstown* v. *Virginia*, 76 Ill. 44.

[6] *Com.* v. *Locke*, 114 Mass. 288.

[1] Weber, Heffter's ed. 192.

[2] Post, § 832.

[1] Wharton, Crim. Pl. & Pr. § 708; *Crane* v. *Morris*, 6 Pet. 598, 8 L. ed. 514; *Kelly* v. *Jackson*, 6 Pet. 622, 8 L. ed. 523; *United States* v. *Wiggins*, 14 Pet. 334, 8 L. ed. 481.

[2] Wharton, Crim. Pl. & Pr. § 798.

[3] Wharton, Crim. Pl. & Pr. § 794.

[4] *Chaffee* v. *United States*, 18 Wall. 516, 21 L. ed. 908.

CHAPTER IX.

WITNESSES.

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I. Attendance.

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of the court if it is a court of record, and, if not, under the hand of the magistrate, called a subpœna ad testificandum;[1] and upon such appearance, if the cause is continued, the witness may be required to enter into a recognizance binding him to appear at a future day.[2] The witness may also be committed to the jail in default of such recognizance, by statute, in many of the states. When a witness is required to produce books or papers, these must be ordinarily specified on the subpœna which is styled a subpœna duces tecum. The clerk or custodian of public records cannot be compelled by subpœna to bring such records, they not being within his power. But it is enough in other cases if the papers are in the possession of the witness, though the right to them belongs to other persons. If he possesses them, he may be compelled by subpœna to produce them in court. The question of their production for evidence on the trial is a matter to be subsequently

[1] Wharton, Ev. § 377; *Neyland* v. *State,* 13 Tex. App. 536.

A commissioner may also issue subpœna who has been appointed to take depositions through letters rogatory. *State* v. *Bourne,* 21 Or. 218, 27 Pac. 1048; Greenl. Ev. § 309.

As to power of court to call witnesses, see note in 57 L.R.A. 875.

As to restrictions on right of defendant in criminal case to compulsory process for attendance of witnesses, see note in 8 L.R.A. (N.S.) 509.

[2] *United States* v. *Durling,* 4 Biss. 509, Fed. Cas. No. 15,010; *United States* v. *Lloyd,* 4 Blatchf. 427, Fed. Cas. No. 15,614.

In the absence of a statute, the state is under no obligations to pay such witnesses summoned to testify for the state, because every citizen is supposed to assist gratuitously in the punishment of wrongdoers. Underhill, Crim. Ev. p. 309, citing *Shawnee County* v. *Ballinger,* 20 Kan. 590; *Hall* v. *Somerset County,* 82 Md. 618, 32 L.R.A. 449, 51 Am. St. Rep. 484, 34 Atl. 771.

The defendant is also of right entitled to compulsory process to obtain the attendance of his witness, where, by statute, he names such witnesses in an affidavit, stating that they are material and necessary, and that he cannot safely proceed to trial without them, and giving the places of their residence, —under some statutes not more than 100 miles from the place of the trial or in the same judicial district. *West* v. *State,* 1 Wis. 209; *State* v. *Massey,* 104 N. C. 877, 10 S. E. 608; 1 Mills's Anno. Stat. (Colo.) § 1507.

determined by the court. To sustain an order to this effect, it is necessary that they should be duly designated,—a notice generally to produce all papers relative to the issue not being sufficient,—and they must be in the possession of the witness or under his control. A witness neglecting to obey the writ is liable not merely to an attachment for contempt, but to a suit for damages. The sole object of this writ, however, is the production of documentary evidence; and personal property or chattels, or a weapon with which a crime is committed, cannot be brought into court or its production compelled. Nor can it be used to compel the production of writings which are not to be used as evidence, but to refresh the memory of a witness.[3]

§ 346. Service.—It is ordinarily sufficient to leave a copy of the substance of the subpœna, which is called a subpœna ticket, with the witness. This, however, must be done personally, and service on the wife or on a domestic in the house is not sufficient;[1] and the original writ must be shown to the witness with the impression of the seal of the court at the time of the service of the copy or the ticket on him.[2]

[3] Underhill, Crim. Ev. p. 311; *United States* v. *Tilden,* 10 Ben. 566, Fed. Cas. No. 16,522; *Re Shepard,* 18 Blatchf. 225, 3 Fed. 12; *Johnson Steel Street-Rail Co.* v. *North Branch Steel Co.* 48 Fed. 191.

And an examining magistrate has power to detain or arrest a witness to testify for the state in a criminal case. 14 Enc. Ev. p. 536; *Foat* v. *State,* 28 Tex. App. 527, 13 S. W. 867.

But in California, he cannot be unreasonably detained under the Constitution, and in the Federal courts, if hardship is imposed by such imprisonment, he will be discharged on such showing. *Ex parte Dressler,* 67 Cal. 257, 7 Pac. 645; *United States* v. *Lloyd,* 4 Blatchf. 427, Fed. Cas. No. 15,614.

[1] *Re Pyne,* 1 Dowl. & L. 703, 13 L. J. Q. B. N. S. 37, 7 Jur. 1109; *Doe ex dem. Jupp* v. *Andrews,* Cowp. pt. 2, p. 846; 1 Greenl. Ev § 315, p. 374.

[2] *Garden* v. *Creswell,* 2 Mees. & W. 319, 5 Dow, P. C. 461, Murph. & H. 44, 6 L. J. Exch. N. S. 84; *Wadsworth* v. *Marshall,* 1 Cromp. & M. 87, 3 Tyrw. 228, 2 L. J. Exch. N. S. 10; *Marshall* v. *York, N. & B. R. Co.* 11 C. B. 398.

Any substantial variance between the ticket or copy and the original precludes the summoning party from obtaining an attachment.[3] This process may be executed by the sheriff at any place within his jurisdiction, and in criminal cases can be served on Sunday. The officer may enter the house if he can obtain permission to so do, but cannot break doors, outer or inner, to accomplish his purpose.[4]

The service of subpœna should, like that of all other process, be made with due diligence and promptitude, and a reasonable time before trial, so that the witness may be able to put his affairs in order, and so attend on the court.[5] After such service, it is the duty of the officer to make a return, as this is the only basis for an order of attachment if the witness does not appear; and if the witness cannot be found, the return should state such fact.[6]

[3] *Chapman* v. *Davis,* 4 Scott, N. R. 319, s. c. 3 Mann. & G. 609, 1 Dowl. N. S. 239, 11 L. J. C. P. N. S. 51; *Doe ex dem. Clarke* v. *Thomson,* 9 Dowl. P. C. 948.

Each state has the right to establish the forms of pleading and process to be observed in its courts in both civil and criminal cases, subject to those provisions only of the Constitution of the United States involving the protection of life, liberty, and property in all the states of the Union. *Ex parte Reggel,* 114 U. S. 642, 29 L. ed. 250, 5 Sup. Ct. Rep. 1148, 5 Am. Crim. Rep. 218.

[4] Murfree, Sheriffs, § 356; *Hager* v. *Danforth,* 8 How. Pr. 435.

The rule of the common law that Sunday is *dies non juridicus,* and that process cannot be served on that day, has been much relaxed in many of the states, by statute, where delay would result injuriously to the plaintiff. In criminal cases, however, arrests may be made, process served, a verdict rendered and received, but not judgment entered on the verdict or sentence pronounced. 20 Enc. Pl. & Pr. p. 1196; *Baxter* v. *People,* 7 Ill. 578; *Johnston* v. *People,* 31 Ill. 469; *Weaver* v. *Carter,* 101 Ga. 206, 28 S. E. 869; *Stone* v. *United States,* 167 U. S. 178, 42 L. ed. 127, 17 Sup. Ct. Rep. 778; *People* v. *Lightner,* 49 Cal. 226, 1 Am. Crim. Rep. 539; *State* v. *McKinney,* 31 Kan. 570, 3 Pac. 356, 5 Am. Crim. Rep. 538; *McCorkle* v. *State,* 14 Ind. 39; *Ex parte White,* 15 Nev. 146, 37 Am. Rep. 466; *Shearman* v. *State,* 1 Tex. App. 215, 28 Am. Rep. 402.

[5] Murfee, Sheriffs, § 359; *Hammond* v. *Stewart,* 1 Strange, 510.

[6] Murfree, Sheriffs, § 359.

§ 347. Fees allowed to witnesses.—The costs and charges of a witness are settled in many states by statute. In England, the common-law courts have adopted a graduated scale suitable to the sacrifices of time made by witnesses in obeying the summons.[1] And even without a special statute, where foreign witnesses, or witnesses in any way out of the jurisdiction of the court, are brought in, proper allowance to them will be sustained by the court. However, this is largely regulated by statute, and the usual order now made is that the witnesses be paid each the mileage prescribed by law from the state line to the place of trial, and then *per diem*. However, where a witness has been detained in the county at great inconvenience to himself, but great benefit to public justice, in order to give his testimony, the court undoubtedly could make such further allowance as in justice and fairness might seem to be proper. Extraordinary causes also, it has been held, justify extraordinary costs. The practice, however, formerly quite common, of paying expert witnesses large sums of money to testify for the people, while the defense was confined to such witnesses as it could afford to pay, is now generally frowned upon by the courts, and, in many instances, such expert witnesses have been compelled to attend and testify for the same fees as those paid any ordinary witness.[2] And in many instances it has been held that witnesses for the state are not entitled to compensation for their services at all, as it is deemed that they, like jurors, should at all

[1] Taylor, Ev. § 1126.

[2] *Flinn* v. *Prairie County*, 60 Ark. 204, 27 L.R.A. 669, 46 Am. St. Rep. 168, 29 S. W. 459; *Contra*, *Snyder* v. *Iowa City*, 40 Iowa, 646; *Re Attorney General*, 104 Mass. 537; *People* v. *Montgomery*, 13 Abb. Pr. N. S. 207.

The modern rule seems to be that the compensation of expert witnesses rests in the discretion of the court. 14 Enc. Ev. p. 555; *State* v. *Dollar*, 66 N. C. 626.

As to fees of expert witnesses, see also 27 L.R.A. 669.

See also § 426a, infra.

times be willing to render services for their own and the public good.[3]

§ 348. Fees need not be paid in felony cases.—In civil cases an attachment will not issue to compel attendance unless the reasonable expenses of the witness, as such expenses are legally defined, have been paid, or at least tendered in advance. It is otherwise at common law in criminal prosecutions. And in all of the states, in the absence of a statute on the subject, where the practice and procedure is as at the common law, the rule is that all witnesses summoned by the defendant or the prosecution are compelled to attend without payment or tender of their legal fees, and if default is made by such witnesses, it is no defense on an attachment issued that such fees were not paid or tendered.[1]

[3] *Israel* v. *State,* 8 Ind. 467; *O'Kane* v. *People,* 46 Ill. App. 225; 14 Enc. Ev. p. 550.

But a witness served with a subpœna in criminal case is not entitled to his fees in advance, and if arrested for disobedience to the writ on a proceeding in contempt, he cannot justify on the plea that, while he demanded his fees of the officer, they were not paid him. *Huckins* v. *State,* 61 Neb. 871, 86 N. W. 485.

As to right of state to require services of witness without compensation, see note in 39 L.R.A. 116.

[1] "In England," to adopt Mr. Roscoe's exposition (Roscoe, Crim. Ev. 8th ed. § 110), "where a subpœna is served on a person in one part of the United Kingdom for his appearance in another, under 45 Geo. III. chap. 92, it is provided that the witness shall not be punishable for default unless a sufficient sum of money has been tendered to him, on the service of the subpœna, for defraying the expenses of coming, attending, and returning. In this case, therefore, in order that the subpœna may be effectual, the expenses must be tendered. But this only applies to a witness brought from one great division of the United Kingdom, as England or Ireland, to another. It has, indeed, been doubted whether in other criminal cases a witness may not, unless a tender of his expenses has been made, lawfully refuse to obey a subpœna, and the doubt is founded upon the provision of the above statute. 1 Chitty, Crim. Law, 613. The better opinion, however, seems to be, and it is so laid down in books of authority, that witnesses making default on the trial of criminal prosecutions (whether fel-

§ 349. Attachment and contempt.—If, in disobedience of the command of the writ, the witness fails to attend, an ap-

onies or misdemeanors) are not exempted from attachment on the ground that their expenses were not tendered at the time of the service of the subpœna, although the court would have good reasons to excuse them for not obeying the summons, if, in fact, they had not the means of defraying the necessary expenses of the journey. 2 Phillips, Ev. 9th ed. 383; 2 Russell, Crimes, by Greaves, 947. 'It is,' says Mr. Starkie, 'the common practice in criminal cases, for the court to direct the witness to give his evidence, notwithstanding his demurrer on the ground that his expenses have not been paid.' 1 Ev. 2d ed. 83 (a). And, accordingly, at the York summer assizes, 1820, Bayley, J., ruled that an unwilling witness who required to be paid before he gave evidence had no right to demand such payment. His lordship said: 'I fear I have not the power to order you your expenses;' and, on asking the bar if anyone recollected an instance in point, Scarlett answered: 'It is not done in criminal cases.' 1 Anon. Chetw. Burn. 1001; 2 Russell, Crimes, by Greaves, 948 (2). So, on the trial of an indictment which had been removed into the Queen's bench by certiorari, a witness for the defendant stated, before he was examined, that at the time he was served with the subpœna no money was paid him, and asked the judge to order the defendant to pay his expenses before he was examined. Park, J., having conferred with Garrow, B., said: 'We are of opinion that I have no authority in a criminal case to order a defendant to pay a witness his expenses, though he has been subpœnaed by such defendant; nor is the case altered by the indictment being removed by certiorari, and coming here as a civil cause.' *Rex* v. *Cooke,* 1 Car. & P. 321. In *Reg.* v. *Cousens,* Gloucester Spr. Ass. 1843, 2 Russell, Crimes, by Greaves, 948 (2), Wightman, J., directed an officer of the ecclesiastical court, who had brought a will from London under a subpœna duces tecum, to go before the grand jury, although he objected on the ground that his expenses had not been paid. But the court might refuse to grant an attachment in the case of a poor witness, if his expenses were not paid."

In New York the same rule is applied to felonies, but not to misdemeanors. *Andrews* v. *Andrews,* 2 Johns. Cas. 109; *Ex parte Chamberlain,* 4 Cow. 49.

Witnesses for the prosecution are, as a general rule, entitled to recover their fees from the county. *Coward* v. *Jackson County,* 137 N. C. 299, 49 S. E. 207; *Alston* v. *Verby,* 108 Ala. 480, 18 So. 559; *Sargent* v. *Cavis,* 36 Cal. 552; *Murphy* v. *Madden,* 130 Cal. 674, 63 Pac. 80; *Donnelly* v. *Johnson County,* 7 Iowa, 419; *Huckins* v. *State,* 61 Neb. 871, 86 N. W. 485; *Freeble* v. *Graves,* 114 Ga. 418, 40 S. E.

plication for an attachment [1] against the witness may be made to the court, and to sustain it, it must be made to appear that the subpœna was regularly issued and served, with due time to prepare for attendance. It is a contempt to disobey any rule or order made in the progress of a trial,[2] to obstruct it in any way, to disregard the command of prerogative writs, or to act in any way that indicates a purpose to disregard the court's authority. It is a due and constant exercise of the judicial power to command the performance of any duty that any person or corporation is legally bound to perform, either to the public or to an individual, and to do it under such modes and forms of procedure as the legislative power shall have prescribed.[3] And statutes attempting to deprive the court of jurisdiction to punish contempt without the intervention of a jury are unconstitutional,[4] as such issue is not triable by jury, as not required by "due process of law," and the further reason that courts have the inherent power to try and determine

243; *Climie* v. *Appanoose County*, 125 Iowa, 292, 101 N. W. 98; *Perry* v. *Howe Co-op. Creamery Co.* 125 Iowa, 415, 101 N. W. 150.

Witnesses for the defense cannot, in the absence of a statute, recover fees from the county. *Donnelly* v. *Johnson County*, 7 Iowa, 419; *Pengelly* v. *Ashland County*, 11 Ohio S. & C. P. Dec. 620.

Duty of citizens to attend. *O'Kane* v. *People*, 46 Ill. App. 225; *Morin* v. *Multnomah County*, 18 Or. 163, 22 Pac. 490.

[1] As to practice in contempt, see Wharton, Crim. Pl. & Pr. § 954.

[2] 4 Bl. Com. 284; *Nebraska Children's Home Soc.* v. *State*, 57 Neb. 765, 78 N. W. 267.

Where a witness telegraphed to the court falsely, "sick with typhoid fever,"—held contempt. *Carter* v. *Com.* 96 Va. 791, 45 L.R.A. 310, 32 S. E. 780, 11 Am. Crim. Rep. 303.

[3] *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447, 38 L. ed. 1047, 4 Inters. Com. Rep. 545, 14 Sup. Ct. Rep. 1125; U. S. Rev. Stat. § 725, 1 Stat. at L. 83, chap. 20, 4 Stat. at L. 487, chap. 99, U. S. Comp. Stat. 1901, p. 583; *United States* v. *Hudson*, 7 Cranch, 32, 3 L. ed. 259; *Anderson* v. *Dunn*, 6 Wheat, 204, 5 L. ed. 242; *Ex parte Robinson*, 19 Wall. 505, 22 L. ed. 205; *Ex parte Terry*, 128 U. S. 289, 32 L. ed. 405, 9 Sup. Ct. Rep. 77; *Cartwright's Case*, 114 Mass. 230; *Kilbourn* v. *Thompson*, 103 U. S. 168, 26 L. ed. 377.

[4] *Carter* v. *Com.* 96 Va. 791, 45 L.R.A. 310, 32 S. E. 780, 11 Am. Crim. Rep. 303.

such issues. The defendant is no more entitled in such instance to demand a jury trial, than is a defendant in a proceeding by mandamus to compel him as a ministerial to perform a duty.[5]

Due service also requires, as has been seen, that the writ should be exhibited to the witness, and either a copy or a ticket giving its substance left with him. It has been said that it is essential, in order to obtain an attachment, to prove that the witness wilfully refused to attend. But wilfulness is to be presumed from the very fact of nonattendance after summons,[6] and ordinarily it is enough in criminal cases for a party to prove such summons in order to obtain a rule to show cause why an attachment should not issue. If otherwise, there would be no way of bringing negligent witnesses into court. If the testimony of the witness, however, is immaterial, and no actual contempt is disclosed, the attachment may be refused.[7] In all cases pending the hearing, bail may be taken.[8] The power to punish contempts is universally recognized as inherent in all superior courts, and this power is now generally accorded to inferior courts as well, and the exercise of this power by summary attachment proceedings is as old as the common law. It antedates in the common law all Constitutions and all statutes, even that of Magna Charta. Mr. Blackstone says: "We find it actually exercised as early

[5] *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447, 38 L. ed. 1047, 4 Inters. Com. Rep. 545, 14 Sup. Ct. Rep. 1125.

[6] *Walker* v. *State*, 13 Tex. App. 618; *State* v. *Thomas*, 11 Lea, 113.

[7] Wharton, Ev. § 383; *State* v. *Simmons*, 1 Ark. 265; *Hughes* v. *People*, 5 Colo. 436; *Thistlethwaite* v. *State*, 149 Ind. 319, 49 N. E. 156.

[8] 2 Hawk. P. C. chap. 2, § 1; 4 Bl. Com. 287; 1 Tidd. Pr. 481; Hochheimer, Crim. Law, p. 332.

To justify punishment by indictment for disobedience to a subpœna, as in the case of a criminal contempt, the mandate, process, or order disobeyed must have been lawfully issued by a court of record duly organized; and this does not include a subpœna issued by the district attorney in a criminal case. *Sherwin* v. *People*, 100 N. Y. 351, 3 N. E. 465, 5 Am. Crim. Rep. 192.

as the annals of our law extend, and though a very learned author seems inclined to derive this process from the statute of Westm. 2 (13 Edw. I, chap. 39), yet he afterwards more justly concludes that it is a part of the law of the land, and as such is confirmed by the statute of Magna Charta." [9]

§ 350. Attachment on rule to show cause.—As has been seen, the English and American practice is for the summoning party to apply first for a rule to show cause, which is granted on the filing of the affidavit and other *ex parte* proof. Yet where the delay incident on such a rule would be pernicious to the case of the summoning party, the rule, if not dispensed with, may be shaped in such a way as to secure immediate attendance, and in many jurisdictions in this country the attachments issue instanter, without a rule, on proof of service and refusal to attend. If it appears upon a rule to show cause that the witness is too ill to attend, or is in any

[9] Hammond's Bl. Com. bk. 4, p. 365; *State* v. *Knight,* 3 S. D. 509, 44 Am. St. Rep. 809, 54 N. W. 412, 9 Am. Crim. Rep. 221.

To criminal contempt belong such acts as misconduct by attorneys or other officers, disobedience of subpœnas and other process, etc. 4 Bl. Com. chap. 20; *Teller* v. *People,* 7 Colo. 451, 4 Pac. 48; *Welch* v. *Barber,* 52 Conn. 147, 52 Am. Rep. 567; Rapalje, Contempts, § 21; *Phillips* v. *Welch,* 11 Nev. 187; *Crook* v. *People,* 16 Ill. 534; *Ex parte Hardy,* 68 Ala. 303; *Re Watson,* 3 Lans. 408; *Hawley* v. *Bennett,* 4 Paige, 163. See also Rapalje, Contempts, §§ 10, 112; 2 Bishop, Crim. Law, § 268; Cooley, Const. Lim. p. 390, note 3; *Cooper* v. *People,* 13 Colo. 337, 6 L.R.A. 430, 22 Pac. 790; *Thomas* v. *People,* 14 Colo. 254, 9 L.R.A. 569, 23 Pac. 326; *Ex parte Grace,* 12 Iowa, 208, 79 Am. Dec. 529; *Mullin* v. *People,* 15 Colo. 437, 9 L.R.A. 566, 22 Am. St. Rep. 414, 24 Pac. 880; *State ex rel. Warfield* v. *Becht,* 23 Minn. 411; *Gandy* v. *State,* 13 Neb. 445, 14 N. W. 143; *Arnold* v. *Com.* 80 Ky. 300, 44 Am. Rep. 480; *Neel* v. *State,* 9 Ark. 259, 50 Am. Dec. 209; *State* v. *Matthews,* 37 N. H. 450.

"The practice generally recognized throughout the United States, and, according to Blackstone, frequently followed in England, is to set forth by affidavit the material facts relied on as a foundation for the order of attachment." *State* v. *Knight,* 3 S. D. 509, 44 Am. St. Rep. 809, 54 N. W. 412, 9 Am. Crim. Rep. 221.

other way incapacitated,[1] or has been led to believe that his attendance was not really required,[2] the rule will be discharged. But in other cases it may be granted at the discretion of the court, upon due proof of service and of its disregard.[3]

An attachment may be granted even though the jury is not sworn,[4] though the witness's name be not called,[5] and though the case be not reached.[6] But it should be stated in the affidavit that the testimony of the witness is material and necessary, and that without it the summoning party cannot safely proceed to trial.[7]

It is well, however, to bear carefully in mind in all cases the distinction between civil contempts and those criminal in their character. A civil contempt may go beyond the statutory enumeration, and include what was usual or permissible at common law; but a public or criminal contempt is precisely defined and barred in by the statute enumeration, if there is such a statute.[8]

[1] *State* v. *Benjamin*, 7 La. Ann. 47.

See, as to the sufficiency of the affidavit, *Drach* v. *Camberg*, 187 Ill. 385, 58 N. E. 370; *Ross* v. *Demoss*, 45 Ill. 447; *Frear* v. *Drinker*, 8 Pa. 521; *Hart* v. *Grant*, 8 S. D. 248, 66 N. W. 322; *Finlay* v. *De Castroverde*, 68 Hun, 59, 22 N. Y. Supp. 716.

[2] *Rex* v. *Sloman*, 1 Dowl. P. C. 618; *State* v. *Nixon*, Wright (Ohio) 763; *Beaulieu* v. *Parsons*, 2 Minn. 37, Gil. 26.

[3] *Ex parte Judson*, 3 Blatchf. 89, Fed. Cas. No. 7,561; *Stephens* v. *People*, 19 N. Y. 549; *State* v. *Trumbull*, 4 N. J. L. 139; *West* v. *State*, 1 Wis. 209; Wharton, Pl. & Pr. §§ 967, 968; Wharton, Ev. § 383.

[4] *Mullett* v. *Hunt*, 1 Cromp. & M. 752, 3 Tyrw. 875, 2 L. J. Exch. N. S. 287.

[5] *Rex* v. *Stretch*, 3 Ad. & El. 503, 4 Dowl. P. C. 30, 5 Nev. & M. 178, 1 H. & W. 322; *Dixon* v. *Lee*, 5 Tyrw. 180, 3 Dowl. P. C. 259, 1 Cromp. M. & R. 645.

[6] *Barrow* v. *Humphreys*, 3 Barn. & Ald. 598.

[7] *Tinley* v. *Porter*, 2 Mees. & W. 822, 5 Dowl. P. C. 744, 6 L. J. Exch. N. S. 233.

[8] *People ex rel. Munsell* v. *Oyer & Terminer Ct.* 101 N. Y. 245, 54 Am. Rep. 691, 4 N. E. 259, 6 Am. Crim. Rep. 163; *Re El'erbe*, 4 McCrary, 449, 13 Fed. 530; *Kirk* v. *Milwaukee Dust Collector Mfg. Co.*

§ 351. Habeas corpus for witnesses confined in jail.—The attendance of a witness in prison may be secured by a habeas corpus ad testificandum.[1] This right proceeds upon the doctrine that the defendant has not only a right to a speedy trial, but to any and all substantial and proper aids

26 Fed. 501; *Baltimore & O. R. Co.* v. *Wheeling*, 13 Gratt. 57.

A proceeding in contempt in a Federal court is a criminal case to be prosecuted in the name of the United States *Ex parte Kearney*, 7 Wheat. 38, 5 L. ed. 391; *New Orleans* v. *New York Mail S. S. Co.* 20 Wall. 387, 22 L. ed. 354; *Com.* v. *Myers*, 1 Va. Cas. 188; 1 Hawk. P. C. 1; Bl. Com. pp. 4, 5; *Williamson's Case*, 26 Pa. 9, 67 Am. Dec. 374; *Riggs* v. *Johnson County*, Woolw. 377, Fed. Cas. No. 4,191; *United States* v. *Berry*, 24 Fed. 780; *Herdman* v. *State*, 54 Neb. 626, 74 N. W. 1097, 11 Am. Crim. Rep. 298; *O'Chander* v. *State*, 46 Neb. 10, 64 N. W. 373. See also *State* v. *Frew*, 24 W. Va. 416, 49 Am. Rep. 257; *Hale* v. *State*, 55 Ohio St. 210, 36 L.R.A. 254, 60 Am. St. Rep. 691, 45 N. E. 199; *Re Shortridge*, 99 Cal. 526, 21 L.R.A. 755, 37 Am. St. Rep. 78, 34 Pac. 227; *Storey* v. *People*, 79 Ill. 45, 22 Am. Rep. 158; *Holman* v. *State*, 105 Ind. 513, 5 N. E. 556; *Little* v. *State*, 90 Ind. 338, 46 Am. Rep. 224; *Baldwin* v. *State*, 126 Ind. 24, 25 N. E. 820; *Ex parte Crenshaw*, 80 Mo. 447; *Wyatt* v. *People*, 17 Colo. 252, 28 Pac. 961; *Langdon* v. *Wayne Circuit Judges*, 76 Mich. 367, 43 N. W. 319; *Ex parte Schenck*, 65 N. C. 353; *Green* v. *State*, 17 Fla. 669; *Com.* v. *Carter*, 11 Pick. 277; *State* v. *Copp*, 15 N. H. 212; *Stephens* v. *People*, 19 N. Y. 549; *State* v. *Trumbull*, 4 N. J. L. 139; *United States* v. *Smith*, 3 Wheeler, C. C. 100, Fed. Cas. No. 16,342. And cases cited in notes to *Baker* v. *State*, 4 L.R.A. 128, and *State* v. *Kaiser*, 8 L.R.A. 584.

Justices of the peace have authority to compel witnesses to attend before them, but such authority is conferred and measured by the statute. 2 Enc. Ev. p. 122; *State* v. *Copp*, 15 N. H. 212; *Piper* v. *Pearson*, 2 Gray, 120, 61 Am. Dec. 438.

Meaning of "wilful disobedience." *People ex rel. Connor* v. *Stapleton*, 18 Colo. 568, 23 L.R.A. 787, 33 Pac. 167; *Telegram Newspaper Co.* v. *Com.* 172 Mass. 294, 44 L.R.A. 159, 70 Am. St. Rep. 280, 52 N. E. 445.

[1] *Rex* v. *Roddam*, Cowp. pt. 2, p. 672; *State* v. *Kennedy*, 20 Iowa, 569; *People* v. *Sebring*, 14 Misc. 31, 35 N. Y. Supp. 237; Underhill, Crim. Ev. p. 318; Chase's Bl. Com. 3d ed. 687.

Such writ will also compel and procure the attendance of a witness in the military or naval service. *People* v. *Sebring*, 14 Misc. 31, 35 N. Y. Supp. 237; *McCanologue's Case*, 107 Mass. 154; *Re Wall*, 8 Fed. 85.

in the power of the prosecution to grant. So, the right to an immediate trial may be enforced by a motion to discharge, motion to dismiss, or habeas corpus, but such right cannot be claimed if there be good cause arising from necessary regulation or procedure, or to give the prosecution reasonable time to prepare for trial, or if the delay originate from the defendant himself.[2] To this writ it is ordinarily a prerequisite that the party desiring the attendance of the witness should make affidavit before the judge that the witness is material, but is confined, whether on civil or criminal process.[3] A party to the record who is entitled to testify in the case, if he be in prison, is entitled to use this writ in order that he himself may be brought into court.[4] The same writ has been issued to secure the presence in court of a person confined as a lunatic.[5] But where the party who applies is himself the defendant, testimony taken on the hearing, though reduced to writing, cannot be used against him on the trial.[6]

§ 352. Witnesses may be required to give bond.— Where there is ground to suspect that a material witness may abscond or secrete himself before the trial, he may, on

[2] Abbott, Trial Brief, Crim. 158; *Nixon* v. *State,* 2 Smedes & M. 497, 41 Am. Dec. 601; *People* v. *Shufelt,* 61 Mich. 237, 28 N. W. 79; *State* v. *Billings,* 140 Mo. 193, 41 S. W. 778; *State* v. *Steen,* 115 Mo. 474, 22 S. W. 461; *United States* v. *Fox,* 3 Mont. 512.

[3] Chitty, Forms, 60; *Marsden* v. *Overbury,* 18 C. B. 34, 25 L. J. C. P. N. S. 200; *Gordon's Case,* 2 Maule & S. 580; *Browne* v. *Gisborne,* 2 Dowl. N. S. 963, 12 L. J. Q. B. N. S. 297, 7 Jur. 328; *Graham* v. *Glover,* 5 El. & Bl. 591, 25 L. J. Q. B. N. S. 10, 2 Jur. N. S. 160, 4 Week. Rep. 25.

[4] *Ex parte Corbett,* 4 Jur. N. S. 145; *Holley* v. *State,* 15 Fla. 688, 2 Am. Crim. Rep. 250; *Finch* v. *State,* 15 Fla. 633; *Lumm* v. *State,* 3 Ind. 293; *Ex parte Eagan,* 18 Fla. 194; *Re Reynolds,* Fed. Cas. No. 11,721; *Re Snyder,* 17 Kan. 542, 2 Am. Crim. Rep. 228; *People* v. *Tompkins,* 1 Park. Crim. Rep. 224.

[5] *Fennell* v. *Tait,* 1 Cromp. M. & R. 584, 5 Tyrw. 218.

[6] 6 Enc. Ev. p. 354; *Childers* v. *State,* 30 Tex. Crim. Rep. 160, 28 Am. St. Rep. 899, 16 S. W. 903.

good ground laid, be held to bail to appear at the trial, and be committed on failure to procure bail.[1] While this practice is well-nigh universal, and must be and is warranted by express statutes in almost all the states, it is nevertheless most mischievous in its operation and effect, from the practice that has grown up of allowing such witnesses, who may be unable so to recognize, and who are also impecunious, fees for their *per diem* while so confined and awaiting the trial, possibly months away. Knowing that they are to be so compensated, they very naturally favor the side of the prosecution, and distort the facts to the injury of the defendant when placed on the witness stand.[2]

[1] *State* v. *Lane,* 11 Kan. 458; *Gwynn* v. *State,* 64 Miss. 324, 1 So. 237; *Evans* v. *Rees,* 12 Ad. & El. 55, 4 Perry & D. 32, 4 Jur. 1032; *Ashton's Case,* 7 Q. B. 169, 1 New Sess. Cas. 581, 14 L. J. Mag. Cas. N. S. 99, 9 Jur. 727; *United States* v. *Butler,* 1 Cranch, C. C. 422, Fed. Cas. No. 14,698; *State* v. *Zellers,* 7 N. J. L. 220.

See, however, *Bickley* v. *Com.* 2 J. J. Marsh. 572, where it is said that the court cannot compel the witness to give surety.

See also *State ex rel. Howard* v. *Grace,* 18 Minn. 398, Gil. 359, holding that, while bail, either with or without a surety may be required, a witness who is unable to give bail cannot be committed without proof of any intention on his part not to appear and testify.

[2] This practice grows out of the holding of many of the courts that, inasmuch as the detention of the witness is the misfortune rather than the fault of the witness, he is entitled to fees for the whole time he is detained. *Robinson* v. *Chambers,* 94 Mich. 471, 20 L.R.A. 57, 54 N. W. 176; *Hutchins* v. *State,* 8 Mo. 288; *State* v. *Stewart,* 4 N. C. (1 Car. Law Repos. 524); *Hall* v. *Somerset County,* 82 Md. 618, 32 L.R.A. 449, 51 Am. St. Rep. 484, 34 Atl. 771. Contra, denying right of compensation, *Marshall County* v. *Tidmore,* 74 Miss. 317, 21 So. 51; *Morin* v. *Multnomah County,* 18 Or. 163, 22 Pac. 490; *People ex rel. Troy* v. *Pettit,* 19 Misc. 280, 44 N. Y. Supp. 256; *Shutt* v. *Canon,* 5 Pa. Dist. R. 167; *Shaddock's Case,* 2 Mart. (La.) 207.

In exercising the power of binding a witness to appear at a trial, a strict compliance with the statutes is necessary. *State* v. *Calhoun,* 99 Ala. 279, 13 So. 425. See also *Comfort* v. *Kittle,* 81 Iowa, 179, 46 N. W. 988; *Markwell* v. *Warren County,* 53 Iowa, 422, 5 N. W. 570; *Re Petrie,* 1 Kan. App. 184, 40 Pac. 118; *State ex rel. Howard* v. *Grace,* 18 Minn. 398, Gil. 359.

But the commitment of a wit-

II. The Oath and its Incidents.

§ 353. Oath is an appeal to a higher sanction.—An oath is an assurance of the truth of an assertion by and through an appeal to a superior sanction.[1] Every witness to facts or opinion, before he can give evidence, is required to be sworn to testify to the truth, the whole truth, and nothing but the truth, unless allowed by law to vouch for the truth in some other manner. At the common law the proper method of administering the oath to a witness varied according to what the witness himself considered most obligatory. Although it is highly desirable that witness should be sworn according to the form which he considers most binding on himself, yet, if he takes the oath in the ordinary form without objection, and upon being questioned whether he considers the oath taken as binding on his conscience, he answers in the affirmative, he cannot be further asked whether there is any other mode of swearing more binding on his conscience than that which he has already used.[2] This definition must be extended, however, if we are now to regard an affirmation as equivalent to an oath when given under the same sanction, as in the case of atheists and others, who are frequently permitted to appeal to their own sense of right and make solemn affirmation. So that the fact that falsehood uttered after such an affirmation is indictable as perjury, it gives an assurance amounting to prima facie proof that the assertion made by the witness corresponds with his consciousness of right and truth. *Est*

ness who is willing to enter into an undertaking is unauthorized. *State ex rel. Howard* v. *Grace,* 18 Minn. 398, Gil. 359.

[1] In *Rex* v. *White,* 1 Leach, C. L. 430, the court defines an oath as "a religious asseveration by which a person renounces the mercy, and imprecates the vengeance, of Heaven, if he does not speak the truth." Also "as an outward pledge given by the person taking it that his attestation or promise is made under an immediate sense of his responsibility to God." Underhill, Crim. Ev. 247.

[2] 3 Russell, Crimes, 7th Eng. ed. p. 2295.

enim jus jurandum affirmatio religiosa. It is final so far as the case is concerned, for an oath is administered to a witness but once in a cause, no matter how often he may be recalled.[3] The usual form of affirmation or declaration is that the witness does "solemnly, sincerely, and truly declare and affirm," then proceeding with the oath prescribed by the statute,—omitting any words of imprecation or calling to witness, but substituting "under the pains and penalties of perjury."

It is a question for the court in its exercise of discretion to ascertain and determine whether a witness should affirm instead of swear, but no questions are permitted if the witness is examined on the matter relative to the details of the belief or want of belief of the person claiming the privilege of affirming.[4]

It is also provided by statute in most of the states that the person swearing shall, with his hand uplifted, swear by the ever-living God, and shall not be compelled to lay the hand on or kiss the Gospel.[5] But swearing falsely in a matter or proceeding without the authority of any court, or where no oath is required by the statute, cannot be assigned as perjury.[6]

[3] *Bullock* v. *Koon,* 9 Cow. 30.

[4] Russell, Crimes, 7th Eng. ed. p. 2299.

[5] Rev. Stat. (Ill.) 725, § 3.

[6] Hughes, Crim. Law & Proc. § 1617; *United States* v. *Babcock,* 4 McLean, 115, Fed. Cas. No. 14,488; *Lamden* v. *State,* 5 Humph. 83; *Biggerstaff* v. *Com.* 11 Bush, 169, 1 Am. Crim. Rep. 497; *State* v. *McCarthy,* 41 Minn. 59, 42 N. W. 599; Roscoe, Crim. Ev. § 674; 1 Hawk. P. C. chap. 69, § 4.

The rule founded upon public policy, which requires the acts of *de facto* officers to be treated for many purposes as valid and binding, does not apply when an oath administered by such an officer is made the foundation of a prosecution for perjury. *Biggerstaff* v. *Com.* 11 Bush, 169, 1 Am. Crim. Rep. 497.

In such cases, however, the burden is on the prisoner of showing want of proper legal authority. 3 Greenl. Ev. § 190.

So swearing falsely in a void proceeding or before a body illegally constituted is not perjury, regard-

§ 354. Manner of taking to be in form most obligatory.—While the common and regular way of swearing by a Christian is by the ever-living God, the general rule is that witnesses are to be sworn after a form the obligation of which they acknowledge.

A Jew may be sworn on the Pentateuch or Old Testament with his head covered,[1] a Mohammedan on the Koran,[2] a Gentoo touching with his hand the foot of a Brahmin or priest of his religion, a Brahmin by touching the hand of another such priest,[3] a Chinese by breaking a china saucer.[4] However, a witness cannot be interrogated as to his belief in a Supreme Being who would punish him for false swearing, for the pur-

less of the corrupt intention in so doing. Hughes, Crim. Law & Proc. § 1611; *Johnson* v. *State,* 30 Tex. App. 420, 28 Am. St. Rep. 930, 17 S. W. 1070; *Weaver* v. *State,* 34 Tex. Crim. Rep. 554, 31 S. W. 400.

But an objection that a witness was not properly sworn cannot be raised for the first time on a motion for a new trial. It should be reserved at the trial. *Goldsmith* v. *State,* 32 Tex. Crim. Rep. 112, 22 S. W. 405.

[1] *Gomez Serra* v. *Munes,* 2 Strange, 821. See *Rex* v. *Bosworth,* 2 Strange, 1113.

[2] *Rex* v. *Morgan,* 1 Leach, C. L. 54.

[3] *Omichund* v. *Barker,* Willes, Rep. 545, 1 Atk. 21.

[4] *Reg.* v. *Enterchman,* Car. & M. 248.

In this country a Chinaman who stated that he did not know the name of the book he was sworn on, but that he believed that if he should state anything untrue, the court would punish, and that after his death he would "go down there," making an emphatic gesture downward with his hand, was held to be a competent witness. *The Merrimac,* 1 Ben. 490, Fed. Cas. No. 9,474.

See generally *Fuller* v. *Fuller,* 17 Cal. 605. As to Indians, see *Priest* v. *State,* 10 Neb. 393, 6 N. W. 468.

In 25 Alb. L. J. 301, we have the following: A few days ago in England a Parsee, being called as a witness, and refusing to be sworn either upon the Old or New Testament or upon the Koran, was permitted to bind his conscience by holding openly in his hand a sacred relic which he was accustomed to carry about his person, and thus taking the oath. The judge at the same time remarked that, strictly speaking, a Parsee should be sworn holding the tail of a cow. Tyler, in his History of Oaths, says that Sir James Mackintosh told him that at Bombay he once had a cow brought into court for this purpose.

pose of affecting his credibility, under constitutional provisions that no person shall be incompetent to be a witness on account of his religious belief, and abrogating all disqualification from civil rights on account of such beliefs.[5]

But if a witness declares that he acknowledges the sanctity of the oath in the usual form, further questions are unnecessary. It is true that in whatever form he consents to be sworn, *e. g.*, if, though a Christian, he declines to be sworn on the Old Testament,[6] he may be asked if he considers such oath as binding on his conscience, but not whether he considers any other more binding.[7]

The fact that a witness permits himself to be sworn by an oath he does not deem binding does not relieve him from a prosecution for perjury, if his testimony be wilfully false[8] as regards matters material to the issue.[9] But in an indictment for perjury, it is sufficient to charge generally that the matter sworn to in the false oath was material to the issue, without showing particularly how it was material.[10]

[5] *Brink* v. *Stratton*, 176 N. Y. 150, 63 L.R.A. 182, 68 N. E. 148.

[6] *Edmonds* v. *Rowe*, Ryan & M. 77.

[7] *Sells* v. *Hoare*, 3 Brod. & B. 232, 7 J. B. Moore, 36.

[8] *Sells* v. *Hoare*, 3 Brod. & B. 232, 7 J. B. Moore, 36; *State* v. *Keene*, 26 Me. 33; *Com.* v. *Knight*, 12 Mass. 274, 7 Am. Dec. 72; *Campbell* v. *People*, 8 Wend. 636; *Thomas* v. *Com.* 2 Rob. (Va.) 795; *McKinney* v. *People*, 7 Ill. 540, 43 Am. Dec. 65; Wharton, Crim. Law, 10th ed. § 1251.

[9] *People* v. *Ostrander*, 110 Mich. 60, 67 N. W. 1079; *Com.* v. *Grant*, 116 Mass. 17, 1 Am. Crim. Rep. 500; *State* v. *Trask*, 42 Vt. 152; *State* v. *Hobbs*, 40 N. H. 229; *Sanders* v. *People*, 124 Ill. 218, 16 N. E. 81; *State* v. *Murphy*, 101 N. C. 697, 8 S. E. 142; *State* v. *Aikens*, 32 Iowa, 403; *Wood* v. *People*, 59 N. Y. 117; *People* v. *Ah Sing*, 95 Cal. 657, 30 Pac. 797; *Morford* v. *Territory*, 10 Okla. 741, 54 L.R.A. 513, 63 Pac. 958; *State* v. *Gibbs*, 10 Mont. 213, 10 L.R.A. 749, 25 Pac. 289.

[10] *Lea* v. *State*, 64 Miss. 278, 1 So. 235; *State* v. *Wood*, 110 Ind. 82, 10 N. E. 639; *State* v. *Feulason*, 7 Am. Crim. Rep. 495, and note, 79 Me. 117, 8 Atl. 459.

§ 355. Statutes defining "oath," etc.—Statutes provide in all jurisdictions in this country that the word "oath" shall be deemed to include "affirmation," and the word "sworn" to include the word "affirmed." Swearing witnesses by the uplifted hand is legal swearing independent of the statute,[1] and as to the religious belief of the witness, anyone who believes in the existence of a God and of a future state is competent, although he does not believe in future punishment.[2] But the right to be affirmed in those states, which make conscientious objection the test, cannot be granted to a witness who has no conscientious objection to an oath.[3]

III. Immunity from Arrest.

§ 356. Witness not privileged as to criminal arrest, but otherwise as to civil.—A witness, when in attendance on a court of justice, is not protected from arrest on a criminal prosecution,[1] no matter how surreptitious and improper may have been the process by which he was brought within the range of the arrest.[2] From arrest on civil process, a witness is protected, not only when in attendance on the court, but when going and returning from it. The rule is the same whether the witness attends voluntarily or on compulsion, and whether the tribunal he attends be a court and jury or a commissioner or other officer authorized to take testimony.[3] And

[1] *Gill* v. *Caldwell,* Breese (Ill.) 28.

[2] *Noble* v. *People,* Breese (Ill.) 29.

[3] *Williamson* v. *Carroll,* 16 N. J. L. 217.

Nor is it requisite that the defendant in perjury should have been served with a subpœna, or have been compelled to testify. The mere fact of his testifying is enough. *Com.* v. *Knight,* 12 Mass. 274, 7 Am. Dec. 72; 2 Wharton, Crim. Law, § 1255.

[1] *Re Douglas,* 3 Q. B. 837, 3 Gale & D. 509, 12 L. J. Q. B. N. S. 49, 7 Jur. 39.

[2] Wharton, Crim. Pl. & Pr. § 27.

[3] Wharton, Ev. § 389; *Martin* v. *Whitney,* 74 N. H. 505, 69 Atl. 888; *Finucane* v. *Warner,* 194 N. Y. 160,

the better opinion is that a witness from another state who comes into the state solely to attend the trial is privileged from even a summons;[4] otherwise, however, where he remains after the trial, attending to his own private business.[5] And a non-resident attorney who comes into a state to conduct a suit is not exempt from service.[6]

IV. Competency and Credibility.

§ 357. Competency for the court to decide.—While the court will always instruct the jury that they are the sole judges of the credibility of the witnesses and the weight and value to be given their testimony, competency is exclusively for the court.[1] It is a question of fact to be determined by the trial judge by personal inspection and oral examination, and his decision is not subject to revision unless, perhaps, in the gross abuse of judicial discretion. The history of criminal procedure in this and the mother country abounds in illustrations of a judicial care, which seeks to secure on the one hand whatever pertinent testimony may bring a guaranty of conscious moral responsibility, and on the other, to admit none that may be offered without it.[2] Whatever may be the objection to the

86 N. E. 1118; *Minnich* v. *Packard*, 42 Ind. App. 371, 85 N. E. 787.

[4] *Re Healey*, 53 Vt. 695, 38 Am. Rep. 713; *Person* v. *Grier*, 66 N. Y. 124, 23 Am. Rep. 35.

[5] *Finucane* v. *Warner*, 194 N. Y. 160, 86 N. E. 1118.

[6] *Kutner* v. *Hodnett*, 59 Misc. 21, 109 N. Y. Supp. 1068; 12 Current Law, p. 1429 and notes 11–14, 16.

[1] That the order of evidence is under the control of the court, see *Campbell* v. *State*, 38 Ark. 498; *State* v. *Michael*, 37 W. Va. 565, 19 L.R.A. 605, 16 S. E. 803.

[2] *State* v. *Scanlan*, 58 Mo. 204, 1 Am. Crim. Rep. 185.

Before a witness testifies in chief, counsel for the respondent has the right to examine her for the purpose of showing that she is not competent to testify for want of intellectual capacity, and it is error to deny him this privilege on the ground that the judge has in another case investigated the matter, and determined her to be competent. *White* v. *State*, 52 Miss. 216, 2 Am. Crim. Rep. 454.

In a prosecution of defendant for burning his divorced wife's house,

competency of a witness, whether interests, insanity, infancy, or public policy, if it goes to incompetency for the purpose of which the witness is called, it must be determined by the court. Ordinarily, as we shall see, the objection must be taken, when known, before the witness is sworn. In order to substantiate the objection, the witness may be examined according to the old practice on the *voir dire;* or being sworn in chief, his examination may be arrested by interrogatories from the opposite party, as to his competency.[3] But the court always alone determines the objection whenever made on this ground.[4]

Under the common law and early legislation, the defendant in a criminal case was not competent as a witness,[5] but by subsequent legislation he is now permitted to take the stand

it was error to read in the hearing of the jury the record of the court in the divorce proceedings, to establish the competency of the wife as a witness, it being a question solely for the court to determine. *State* v. *Hannett,* 54 Vt. 83, 4 Am. Crim. Rep. 38.

[3] Wharton, Ev. § 392.

[4] *Reg.* v. *Perkins,* 2 Moody, C. C. 135, 9 Car. & P. 395; *State* v. *Whittier,* 21 Me. 341, 38 Am. Dec. 272; *Dole* v. *Thurlow,* 12 Met. 157; *Com.* v. *Burke,* 16 Gray, 33; *State* v. *Lattin,* 29 Conn. 389; *Peterson* v. *State,* 47 Ga. 524. And cases cited in Wharton, Ev. § 392.

[5] 30 Am. & Eng. Enc. Law, 2d ed. p. 916; *Whelchell* v. *State,* 23 Ind. 89; *State* v. *Laffler,* 38 Iowa, 422; *State* v. *Darrington,* 47 Iowa, 518.

Competency as affected by knowledge or meaning of oath. *Lee* v. *Missouri P R. Co.* 67 Kan. 402, 63 L.R.A. 271, 73 Pac. 110; *Pumphrey* v. *State,* 23 L.R.A.(N.S.) 1023, and note, 84 Neb. 636, 122 N. W. 19, 18 A. & E. Ann. Cas. 979.

Religious belief. *Brink* v. *Stratton,* 176 N. Y. 150, 63 L.R.A. 182, 68 N. E. 148; *State* v. *Washington,* 42 L.R.A. 553, and note, 49 La. Ann. 1602, 22 So. 841.

Dying declarations as affected by the competency or incompetency of declarant. *Harper* v. *State,* 56 L.R.A. 432.

Competency of criminals before grand jury. *Com.* v. *Hayden,* 28 L.R.A. 319.

Right of colored persons to be. *Louisville Safety Vault & T. Co.* v. *Louisville & N. R. Co.* 14 L.R.A. 581.

Deaf and dumb persons as. *State* v. *Weldon,* 24 L.R.A. 126.

Husband and wife as. *State* v. *Woodrow,* 58 W. Va. 527, 2 L.R.A. (N.S.) 862, 112 Am. St. Rep. 1001, 52 S. E. 545, 6 A. & E. Ann. Cas. 180; *State* v. *Orth,* 22 L.R.A.(N.S.) 240, and note, 79 Ohio St. 130, 86 N. E. 476; *Evans* v. *State,* 2 L.R.A.

as a witness, should he so elect; but his failure so to do would not warrant the jury in weighing such circumstance for or against him.[6] And it is proper for the judge so to charge the jury in all criminal cases where the defendant testifies or elects not so to do.

§ 358. Witness presumed competent.—When a witness takes the stand to testify, the law, on grounds of public policy, presumes that he is not only competent, but credible. Incompetency must be shown by the party objecting to him. If he

(N.S.) 619, and note, 165 Ind. 369, 74 N. E. 244, 75 N. E. 651, 6 A. & E. Ann. Cas. 813; *Morgan* v. *Kennedy*, 30 L.R.A. 529.

Pardon, as affecting. *Boyd* v. *United States*, 142 U. S. 450, 35 L. ed. 1077, 12 Sup. Ct. Rep. 292; *Singleton* v. *State*, 34 L.R.A. 251, note.

Effect of marrying witness to prevent testimony. *Moore* v. *State*, 67 L.R.A. 499.

Wife as a witness before grand jury. *Com.* v. *Hayden*, 28 L.R.A. 322.

Admissibility of dying declarations of husband or wife against each other. *Worthington* v. *State*, 56 L.R.A. 353, and note, 92 Md. 222, 84 Am. St. Rep. 506, 48 Atl. 355.

Judge or prosecuting attorney or justice. *Rogers* v. *State*, 31 L.R.A. 465, 466, and note, 60 Ark. 76, 46 Am. St. Rep. 154, 29 S. W. 894; *State* v. *Tabor*, 55 L.R.A. 231, and note, 63 Kan. 542, 66 Pac. 237.

Insanity, morphinism.

Morphine. *Edwards* v. *State*, 39 L.R.A. 263; *State* v. *Gleim*, 17 Mont. 17, 31 L.R.A. 294, 52 Am. St. Rep. 655, 41 Pac. 998, 10 Am. Crim. Rep. 46.

Insanity. *State* v. *Meyers*, 37 L.R.A. 423, and note, 46 Neb. 152, 64 N. W. 697.

Children. *State* v. *Michael*, 19 L.R.A. 605.

Conviction of crimes. *United States* v. *Sims*, 161 Fed. 1008; Underhill, Crim. Ev. 2d ed. § 206.

In all cases it is the duty of the court, on motion of the accused, where the incompetency of the witness appears for any reason, to exclude the evidence from the jury; and it would be error for the court to refer the question of competency to the jury, either by instruction or otherwise. *State* v. *Michael*, 19 L.R.A. 606.

[6] Underhill, Crim. Ev. 2d ed. 166; *Graves* v. *United States*, 150 U. S. 118, 37 L. ed. 1021, 14 Sup. Ct. Rep. 40; *Wilson* v. *United States*, 149 U. S. 60, 37 L. ed. 650, 13 Sup. Ct. Rep. 765; *Quinn* v. *People*, 123 Ill. 333, 15 N. E. 46; *Hinshaw* v. *State*, 147 Ind. 334, 47 N. E. 157.

is not credible, this must be shown either by facts elicited on his examination or by impeaching evidence *aliunde*. Hence, so far as competency is concerned, if the evidence is in equipoise, the witness should be permitted to testify.[1]

§ 359. Incompetency, if known, to be raised before witness is sworn.—The proper course is to at once object to the testimony of an incompetent witness, as soon as the testimony is offered and before the witness is sworn. A party who knows of objections to the competency of a witness cannot refrain from objection on such ground until the witness has been examined, and then raise the objection if the witness's testimony has been unfavorable. But it is otherwise when the objecting party is not aware of the full force of the objection until the examination is begun.[1] And any animus or feeling of the witness toward the defendant can be shown as affecting his competency and credibility. So where the witness on the night before the homicide had a quarrel with the defendant, and said: "I will see you again, and shoot a hole in you a yellow dog can jump through; I am all wool, a yard wide, and hard to curry,"—evidence of such statements is admissible to show the bias of the witness and his hostility against the defendant.[2] And this rule always applies

[1] Wharton, Ev. § 392.

Objections should be made as soon as the incompetency appears. *Cole* v. *State,* 40 Tex. 147; *Harmon* v. *State,* 3 Tex. App. 51.

The objection to the inadmissibility cannot be availed of after verdict, when no objection was interposed at the time the evidence was admitted. See *Daffin* v. *State,* 11 Tex. App. 76.

[1] *Reg.* v. *Whitehead,* L. R. 1 C. C. 33, s. c. 10 Cox, C. C. 234, 35 L. J. Mag. Cas. N. S. 186, 14 L. J. N. S. 489, 14 Week. Rep. 677; *Vaughn* v. *Worrall,* 2 Madd. Ch. 322; *Selway* v. *Chappell,* 12 Sim. 113; *State* v. *Damery,* 48 Me. 327; *Shurtleff* v. *Willard,* 19 Pick. 202; *Andre* v. *Bodman,* 13 Md. 241, 71 Am. Dec. 628; *Veiths* v. *Hagge,* 8 Iowa, 163; *Com.* v. *Green,* 17 Mass. 515; *Howser* v. *Com.* 51 Pa. 332.

[2] *Bonnard* v. *State,* 25 Tex. App. 173, 8 Am. St. Rep. 431, 7 S. W. 862, 7 Am. Crim. Rep. 462.

to questions as to quarrels between the witness and the party against whom he is called,[3] that, as to hostility, interest, or bias against a defendant, he, the witness, may be contradicted, if he denies them, by evidence of his own statements or other implicatory facts. Any objection to the testimony on this score, if discovered during the examination in chief, must be made before cross-examination.[4] When a witness after verdict is discovered to have been incompetent, and this without any laches on the part of the objecting party, a new trial will be granted if the evidence of the witness was material, or if the party offering the witness is tainted with suspicion of impropriety in concealing the fact.[5] But where the objection could have been taken during the trial, a new trial will be refused, nor is the objection available on writ of error.[6] And an impeaching witness may be cross-examined by the adverse party as to the extent of his knowledge and its sources, before testifying as to the reputation of the witness he is called to impeach.[7]

§ 360. Distinction between secondary and primary does not apply to witnesses.—If a witness speaks of something perceived by himself, and not through the medium of a third party, his testimony cannot be excluded because, at the time of perception, his attention was not given closely to the thing perceived, or because his attention at the time was distracted. He may have an impression of what took place, which, from the nature of things is far fainter than that of

[3] 1 Greenl. Ev. 13th ed. 455; *Hart* v. *State,* 15 Tex. App. 202, 49 Am. Rep. 188; *Newcomb* v. *State,* 37 Miss. 383; *Bonnard* v. *State,* 25 Tex. App. 173, 8 Am. St. Rep. 431, 7 S. W. 862, 7 Am. Crim. Rep. 462.

The motive which operates upon the mind of a witness when he testifies are never regarded as immaterial or collateral matters. *Gaines* v. *Com.* 50 Pa. 319.

[4] *Brooks* v. *Crosby,* 22 Cal. 42.

[5] Wharton, Crim. Pl. & Pr. §§ 876–881; *Wade* v. *Simeon,* 2 C. B. 342.

[6] Ibid.

[7] *Territory* v. *Paul,* 2 Mont. 314, 2 Am. Crim. Rep. 332.

a witness not called, but he is not on this ground to be excluded. Disabilities of this kind go not to competency, but to credibility.[1] A witness, no matter how reliable, cannot be permitted to give the contents of a written instrument that could be produced; but no witness, no matter how unreliable, can be excluded because another more authoritative is not called.[2] A witness who has heard a party or his agent say certain things can be received, though the party or agent himself might have been examined, but is not;[3] and hence the admissions of a party can be proved though the party himself is in court to be examined as to such admissions.[4] And, as we have already seen, a person not an expert may be permitted to state facts as to which an expert could be produced, who would speak much more authoritatively;[5] and a party cognizant with another's writing may be called to state his knowledge, as well as the writer himself.[6] If the contents of a document are fully proved by secondary evidence, no presumption unfavorable in its character arises from failure to produce it.[7]

§ 360a. Statutes not unconstitutional as ex post facto.— Statutes regulating the admissibility of witnesses are not unconstitutional as *ex post facto* in respect to antecedent crimes, unless they should materially impair the defendant's rights.[1]

[1] *Lanham* v. *State,* 7 Tex. App. 126; infra, § 373.

[2] *Governor* v. *Roberts,* 9 N. C. (2 Hawks) 26; *Green* v. *Cawthorn,* 15 N. C. 1 (4 Dev. L.) 409; *State* v. *Cain,* 9 W. Va. 559.

[3] *Badger* v. *Story,* 16 N. H. 168; *Featherman* v. *Miller,* 45 Pa. 96; infra §§ 623 et seq.

[4] Infra, § 685; Wharton, Ev. §§ 1094, 1175, et seq.

[5] Supra, § 160; *Edwards* v. *State,* 39 Fla. 753, 23 So. 537.

[6] Infra, § 549.

[7] *Cartier* v. *Troy Lumber Co.* 138 Ill. 533, 14 L.R.A. 470, 28 N. E. 932; *Bott* v. *Wood,* 56 Miss. 136; *East Tennessee, V. & G. R. Co.* v. *Kane,* 92 Ga. 187, 22 L.R.A. 315, 18 S. E. 18.

[1] Wharton, Am. Law, §§ 474, 494.

In *Hopt* v. *Utah,* 110 U. S. 574, 28 L. ed. 262, 4 Sup. Ct. Rep. 202, 4 Am. Crim. Rep. 417, we have the following from Harlan, J., giving the opinion of the court: "Stat-

§ 361. Atheism at common law disqualifies.—By the English common law the oath is an essential prerequisite to the admission of a witness to testify. *In judicio non creditur nisi juratis.*[1] In the leading case on this topic[2] the question came up on the admissibility in evidence of depositions which had been made by some Gentoos before a chancery commission in the East Indies. It had been thought up to that time, on the authority of Coke,[3] that none but Christians were competent witnesses. He laid it down that "an infidel cannot be a witness," and it was clear that, under the designation of infi-

utes which simply enlarge the class of persons who may be competent to testify in criminal cases are not *ex post facto* in their application to prosecutions for crime committed prior to their passage, for they do not attach criminality to any act previously done, and which was innocent when done; nor aggravate any crime theretofore committed; nor provide a greater punishment therefor than was prescribed at the time of its commission; nor do they alter the degree, or lessen the amount or measure of the proof which was made necessary to convict when the crime was committed. The crime for which the present defendant was indicted, the punishment prescribed therefor, and the quantity or the degree of proof necessary to establish his guilt, all remained unaffected by the subsequent statute. Any statutory alteration of the legal rules of evidence, which would authorize conviction upon less proof, in amount or degree, than was required when the offense was committed, might in respect of that offense be obnoxious to the constitutional inhibition upon *ex post facto* laws. But alterations which do not increase the punishment, nor change the ingredients of the offense, or the ultimate facts necessary to establish guilt, but—leaving untouched the nature of the crime and the amount or degree of proof essential to conviction—only remove existing restrictions upon the competency of certain classes of persons as witnesses, relate to modes of procedure only, in which no one can be said to have a vested right, and which the state, upon grounds of public policy, may regulate at pleasure. Such regulations of the mode in which the facts constitute guilt may be placed before the jury can be made applicable to prosecutions or trials thereafter had, without reference to the commission of the offense charged. And see *Sutton* v. *Fox,* 55 Wis. 531, 42 Am. Rep. 744, 13 N. W. 477.

[1] *Banbury's Case,* 2 Salk. 512; 1 Bl. Com. 402.

[2] *Omichund* v. *Barker,* Willes, Rep. 538, 1 Atk. 21, 11 Eng. Rul. Cas. 126; 1 Smith, Lead. Cas. 194.

[3] Co. Litt. 6 b.

del, he classified all who were not Christians. But Willes, Ch. J., ruled that Lord Coke's proposition was "without foundation, either in Scripture, reason, or law;" and proceeded to declare in an opinion which has not since been questioned that "such infidels who believe in God, and that he will punish them if they swear falsely (in some cases and under some circumstances), may and ought to be admitted as witnesses in this, though a Christian country." And "such infidels, if any such there be, who either do not believe in God, or if they do, do not think that he will either reward or punish them in this world or in the next, cannot be witnesses under any case or under any circumstances, for the plain reason because an oath cannot possibly be any tie or obligation upon them." [4] It may therefore be regarded as settled by the English common law that an atheist is inadmissible as a witness, independently of the statutes permitting affirmations to be substituted for oaths,[5] though it is sufficient for admissibility that the witness proposed believes in a Supreme Being who dispenses retribution in this life alone.[6] By statute, however, in many jurisdictions, religious unbelief no longer disqualifies; nor at common law can defect in such belief be a ground of exclusion in jurisdictions which permit the substitution of an affirmation for an oath.[7]

[4] *Bright* v. *Com.* 120 Ky. 298, 117 Am. St. Rep. 590, 86 S. W. 527. See *Maden* v. *Catanach,* 7 Hurlst. & N. 360, 31 L. J. Exch. N. S. 118, 5 L. T. N. S. 288, 10 Week. Rep. 112.

That an Indian not understanding the obligation of an oath may be excluded, see *Priest* v. *State,* 10 Neb. 393, 6 N. W. 468.

[5] *Maden* v. *Catanach,* 7 Hurlst. & N. 360, 31 L. J. Exch. N. S. 118, 5 L. T. N. S. 288, 10 Week. Rep. 112; *Smith* v. *Coffin,* 18 Me. 157; *Norton* v. *Ladd,* 4 N. H. 444; *Arnold* v. *Arnold,* 13 Vt. 363; *Thurston* v. *Whitney,* 2 Cush. 104; *Beardsly* v. *Foot,* 2 Root, 399; *Atwood* v. *Welton,* 7 Conn. 66; *People* v. *M'Garren,* 17 Wend. 460; *Anderson* v. *Maberry,* 2 Heisk. 653.

Otherwise when an affirmation is permitted. See *Carter* v. *State,* 63 Ala. 52, 35 Am. Rep. 4, supra, § 353.

[6] Wharton, Ev. § 395.

[7] Supra, § 353; *Com.* v. *Burke,* 16 Gray, 33; *Perry* v. *Com.* 3 Gratt. 632; *People* v. *Jenness,* 5 Mich. 305; *Bush* v. *Com.* 80 Ky. 244; *Fuller* v.

In all civilized communities some ceremony or solemn act is prescribed as a condition precedent to giving testimony. In nations or states professing the Christian religion, there is an appeal to Almighty God, or an adjuration on the Holy Evangelists, that the testimony to be given shall be the truth. This is a most solemn recognition of an all-seeing, omnipotent Ruler who will reward or punish in this world or the next, according to the deeds done in the body. This is the sanction which the law exacts and imposes upon the conscience before

Fuller, 17 Cal. 605; *Ake* v. *State,* 6 Tex. App. 398, 32 Am. Rep. 586.

The following summary of the older cases may be still not without value. In Pennsylvania, it was directly decided that the true test of the competency of a witness, on the ground of his religious principles, is whether he believes in the existence of a God who will punish him if he swears falsely. *Cubbison* v. *M'Creary,* 2 Watts & S. 262. See *Com.* v. *Winnemore,* 2 Brewst. (Pa.) 378; *Blair* v. *Seaver,* 26 Pa. 274.

Hence those are competent who believe future punishment not to be eternal. *Cubbinson* v. *M'Creary,* 2 Watts. & S. 262. See *Butts* v. *Swartwood,* 2 Cow. 431; *Blocker* v. *Burness,* 2 Ala. 354; *United States* v. *Kennedy,* 3 McLean, 175, Fed. Cas. No. 15,524.

In Ohio, it is held that a witness's belief that punishments for false swearing are inflicted in this life only might go to his credibility. *United States* v. *Kennedy,* 3 McLean, 175, Fed. Cas. No. 15,524.

In Connecticut, it was formerly decided that those who believe in a God and in rewards and punishments only in this world are not competent witnesses. *Atwood* v. *Welton,* 7 Conn. 66. The legislature of that state has since enacted that such persons shall be received as witnesses.

In Massachusetts, is has been said that mere disbelief in a future existence goes only to the credibility. *Hunscom* v. *Hunscom,* 15 Mass. 184.

In Maine, a belief in the existence of the Supreme Being is rendered sufficient, without any reference to rewards or punishments. Stat. 1833, chap. 68; *Smith* v. *Coffin,* 18 Me. 157.

In South Carolina, a belief in God and His provinces has been held sufficient. *Jones* v. *Harris,* 1 Strobh. L. 160.

In Illinois, it has been said that a person who has no religious belief nor belief in a Supreme Being, and who, though recognizing his amenability to human law in case he testifies falsely, has no sense of moral accountability, is inadmissible. *Central Military Tract R. Co.* v. *Rockafellow,* 17 Ill. 541; *People* v. *Frindel,* 58 Hun, 482, 12 N. Y. Supp. 498.

it permits a witness to testify.[8] And to be competent as a witness, one must have a conscience alive to the conviction of accountability to a higher power than human law. Solely his regard of society or his fear of punishment is not sufficient.[9]

§ 362. Evidence to show religious belief.—Witnesses may be sworn in a body before any of them testify,[1] and it is too late after so swearing to inquire as to what form of oath is most binding,[2] or to object because of the religious unbelief of any of the witnesses. The burden of prov-

[8] *Chappell* v. *State,* 71 Ala. 322; *State* v. *Tom,* 8 Or. 177; *McKinney* v. *People,* 7 Ill. 540, 43 Am. Rep. 65; *Hawks* v. *Baker,* 6 Me. 72, 19 Am. Dec. 191.

No particular form necessary at common law. Any form permissible binding the conscience. 30 Am. & Eng. Enc. Law, p. 911, and cases cited; *Ake* v. *State,* 6 Tex. App. 398, 32 Am. Rep. 586.

[9] *Com.* v. *Winnemore,* 2 Brewst. (Pa.) 378.

A person is not disqualified as a witness by reason of birthplace, race, color, sex or theological or religious profession of belief. Wigmore, Ev. §§ 516–518; *Brink* v. *Stratton,* 176 N. Y. 150, 63 L.R.A. 182, 68 N. E. 148.

An adult citizen of the Empire of Japan is prima facie competent to take an oath and testify in a criminal prosecution; and if the defendant conceives that such a witness does not understand or will not give heed to the oath administered, he must at his peril interrogate the witness before he is sworn, or prove his incompetency by other relevant evidence. *Pumphrey* v. *State,* 84 Neb. 636, 23 L.R.A.(N.S.) 1023, 122 N. W. 19, 18 A. & E. Ann. Cas. 979. See also *Lee* v. *Missouri P. R. Co.* 67 Kan. 402, 63 L.R.A. 271, 73 Pac. 110; *State* v. *Langford,* 45 La. Ann. 1177, 40 Am. St. Rep. 277, 14 So. 181.

In *Reg.* v. *Entrehman,* Car. & M. 248, the witness, a Chinese, knelt, and in his hand was placed a china saucer which he struck and broke against the rail in front of the witness box, after which the oath was administered in these words, "You shall tell the truth, and the whole truth. The saucer is cracked, and if you do not tell the truth your soul will be cracked like the saucer."

For notes on question of religious belief as qualification of witness, see 42 L.R.A. 553, and 23 L.R.A.(N.S.) 1023.

[1] *State* v. *Crea,* 10 Idaho, 88, 76 Pac. 1013; *Donnelly* v. *State,* 26 N. J. L. 463; *Anderson* v. *Maberry,* 2 Heisk. 653.

[2] *State* v. *Davis,* 186 Mo. 533, 85 S. W. 354.

ing religious unbelief in a person tendered as a witness is on the party making the objection in apt time. It is competent under such a rule, at any time before the witness is sworn, to introduce testimony to show his defect in this relation. He can be examined as on *voir dire* without the prior tendering of an oath,[3] for it is a *petitio principii* to swear a person to determine whether he can be sworn.[4] Even when this objection does not apply, as where the objection goes not to competency, but to credibility, a witness cannot be compelled to answer as to special phases of his creed.[5] When the question is competency, the proper course, in order to prove such defect in religious belief as argues a deficiency in a sense of moral accountability, is to put in evidence the witness's own declarations.[6] And it is held that his declarations exhibiting

[3] *Rex* v. *White,* 1 Leach, C. L. 430; *Maden* v. *Catanach,* 7 Hurlst. & N. 360, 31 L. J. Exch. N. S. 118, 5 L. T. N. S. 288, 10 Week. Rep. 112; *Reg.* v. *Serva,* 2 Car. & K. 56; 1 Den. C. C. 104; *Scott* v. *Hooper,* 14 Vt. 535; *Harrel* v. *State,* 1 Head, 125.

In *Arnd* v. *Amling,* 53 Md. 192, it was held that a witness objected to on this ground could be examined on his *voir dire* at the discretion of the court.

[4] Infra, § 447.

[5] *Donkle* v. *Kohn,* 44 Ga. 266; infra, § 475; *Bright* v. *Com.* 120 Ky. 298, 117 Am. St. Rep. 590, 86 S. W. 527; *Clark* v. *Finnegan,* 127 Iowa, 644, 103 N. W. 970.

"It has sometimes been allowed to counsel," says Mr. Justice Talfourd, "to question witnesses on their *voir dire* as to their religious belief; but it may be doubted whether a witness would not be justified in insisting, when so questioned, on the simple answer that he considers the oath administered in the usual form binding on his own conscience, and in declining to answer further; for a confession thus forced from him of a disbelief in a state of retribution would certainly be esteemed disgraceful in a court of justice, and there seems no reason why a person should thus be taxed, perhaps to his own infinite prejudice, merely because he appears to perform a public duty in obedience to a subpœna. At all events, it is quite clear that a witness may properly refuse to answer any questions which go beyond an inquiry into his belief in a Superior Being to whom man is answerable; and that it is the duty of counsel to refuse, however urged, to put such questions, which are altogether impertinent and vexatious." 6 Dick. Q. S. 535.

[6] *Wakefield* v. *Ross,* 5 Mason, 19, Fed. Cas. No. 17,050; *Central Mili-*

a change of opinion may be shown by those to whom such declarations were uttered.[7] If on cross-examination it appears that the witness has not the moral sense requisite to make him a competent witness, the court, at its discretion, may strike out his testimony, or leave it to the jury with proper instructions as to its weight.[8]

§ 363. Infamy incapacitated at common law.—At common law, persons convicted in courts of record[1] of crimes which render them infamous are excluded from being witnesses. "Infamous" crime in this sense is regarded as comprehending treason, felony, and *crimen falsi*.[2] In most jurisdictions, however, the disqualification of infamy is removed by statute, though a conviction may be proved to affect credibility.[3]

tary Tract R. Co. v. *Rockefellow,* 17 Ill. 541; *Curtiss* v. *Strong,* 4 Day, 51, 4 Am. Dec. 179; *Jackson ex dem. Tuttle* v. *Gridley,* 18 Johns. 98. See *Priest* v. *State,* 10 Neb. 393, 6 N. W. 468.

[7] *United States* v. *White,* 5 Cranch, C. C. 38, Fed. Cas. No. 16,675; *Smith* v. *Coffin,* 18 Me. 157; *Com.* v. *Wyman,* Thacher, Crim. Cas. 432; *Atwood* v. *Welton,* 7 Conn. 66; *Jackson ex dem. Tuttle* v. *Gridley,* 18 Johns. 98; *State* v. *Townsend,* 2 Harr. (Del.) 543; *Com.* v. *Bacheler,* 4 Am. Jur. 79.

[8] *People* v. *Harper,* 1 Edm. Sel. Cas. 180.

When the question is credibility, it is for the jury to determine what weight is to be given to the testimony of one whose immoral and degraded life shows a want of religious sentiment, or a disregard of personal character or reputation. *Bowman* v. *Smith,* 1 Strobh. L. 246.

[1] That a summary conviction before a magistrate does not incapacitate, see *Cheatham* v. *State,* 59 Ala. 40.

[2] Phillips, Ev. Am. ed. p. 17; 2 Hale, P. C. 277; 1 Starkie, Ev. 94; 1 Greenl. Ev. §§ 372, 373.

The infamy of a person, evidence of whose declarations is sought to be introduced as part of the *res gestæ,* does not effect their admissibility. *State* v. *Dellwood,* 33 La. Ann. 1229; supra, § 291.

[3] Such statutes provide in substance, "neither parties, nor other persons who have an interest in the event of an action or proceeding, shall be excluded; nor those who have been convicted of crime; nor persons on account of their opinions on matters of religious be-

§ 364. A convict as a party at common law.—Even at common law, where a convict was a party to a suit, that he

lief, although in every case the credibility of the witness may be drawn in question, as now provided by law; but the conviction of any person for any crime may be shown for the purpose of affecting the credibility of such witness." 2 Mills's Anno. Stat. (Colo.) § 4822; *Lamkin* v. *Burnett,* 7 Ill. App. 143; Ill. Rev. Stat. 410, § 426; *Com.* v. *Gorham,* 99 Mass. 420; Mass. Rev. Stat. Supp. 607, 803.

New York.—*Donohue* v. *People,* 56 N. Y. 208; *People* v. *McGloin,* 91 N. Y. 241; *Perry* v. *People,* 86 N. Y. 353.

Michigan.—*Dickinson* v. *Dustin,* 21 Mich. 561.

Ohio.—*Brown* v. *State,* 18 Ohio St. 496.

Georgia.—*Frain* v. *State,* 40 Ga. 529.

Indiana.—*Glenn* v. *Clore,* 42 Ind. 60. And see *United States* v. *Biebusch,* 1 McCrary, 42, 1 Fed. 213, per McCrary, Ch. J. See, for other cases, infra, § 489.

See as to impeaching witnesses in this way, infra, § 489. In New York, however, as late as 1869 all convictions of offenses punishable by death or imprisonment in the state prison made the convict incompetent as a witness. See, as applying this provision, *People* v. *Park,* 41 N. Y. 21, affirming s. c. 1 Lans. 263; *People* v. *Putnam,* 129 Cal. 258, 61 Pac. 961; *State* v. *Sullivan,* 20 R. I. 114, 37 Atl. 673; *Keith* v. *State.* — Tex. Crim. Rep. —, 56 S. W. 628.

As there are still states which retain the disqualification of infamy, and as in several states conviction of infamous offenses can be introduced to impeach credibility, it may be proper to append a summary of the rulings as to infamy.

Renders infamous:

Forgery.—*Rex* v. *Davis,* 5 Mod. 74; *Poage* v. *State,* 3 Ohio St. 230.

Perjury. — Greel. Ev. § 673; *Rex* v. *Teal,* 11 East, 307, 10 Revised Rep. 516.

Subornation of perjury.—Co. Litt. 6b; 6 Comyns's Dig. 353; *Re Sawyer,* 2 Gale & D. 141, 2 Q. B. 721, 11 L. J. Q. B. N. S. 234.

Bribery to suppress testimony, and conspiracy to procure absence of witness.—*Clancey's Case,* Fortescue, 208; *Bushel* v. *Barrett,* Ryan & M. 434.

Conspiracy to accuse of crime.—2 Hale, P. C. 277; 2 Hawk. P. C. chap. 46; Co. Litt. 6b; *Rex* v. *Priddle,* 1 Leach, C. L. 442; *Crowther* v. *Hopwood,* 3 Starkie, 21; 1 Starkie, Ev. 95; *Ville de Varsovie,* 2 Dodson, Adm. 191.

Barratry.—*Rex* v. *Ford,* 2 Salk. 690, Bull, N. P. 292.

But it is said not to be so with the mere attempt to procure the absence of a witness. *State* v. *Keyes,* 8 Vt. 57, 30 Am. Dec. 450.

Grand or petit larceny.—*Pendock ex dem. Mackinder* v. *Mackinder,* Willes, Rep. 665; *Com.* v. *Keith,* 8 Met. 531; *State* v. *Gardner,* 1 Root, 485; *Lyford* v. *Farrar,* 31 N. H. 314.

might not be wholly remediless, he could make an affidavit necessary to his exculpation or defense, or for relief against

In New York, however, the latter has been ruled to go only to the credibility of a witness. *Carpenter* v. *Nixon,* 5 Hill, 260.

The statutes in Alabama have not changed the common-law rule in regard to burglary or grand larceny. *Taylor* v. *State,* 62 Ala. 164.

If a statute declare the perpetrator of a crime "infamous," this, it seems, renders him incompetent to testify. 1 Phillips, Ev. p. 18; 1 Gilbert, Ev. Lofft's ed. 256, 257.

As to infamy in Illinois, see *Bartholomew* v. *People,* 104 Ill. 601, 44 Am. Rep. 97.

In Massachusetts, it was said at common law that a person convicted of the offense of receiving stolen goods, knowing them to have been stolen, is not a competent witness. *Com.* v. *Rogers,* 7 Met. 500, 41 Am. Dec. 458.

In Pennsylvania, however, the contrary doctrine has been advanced. *Com.* v. *Murphy,* 3 Clark (Pa.) 290.

In Louisiana, convicted felons are inadmissible. *State* v. *Mullen,* 33 La. Ann. 159, 4 Am. Crim. Rep. 181.

As to Texas, see *Webster* v. *Mann,* 56 Tex. 119, 42 Am. Rep. 688.

Assault and battery with intent to kill does not render infamous. *United States* v. *Brockius,* 3 Wash. C. C. 99, Fed. Cas. No. 14,652.

Conviction of bribing a voter. —*Com.* v. *Shaver,* 3 Watts & S. 338.

False pretenses.—*Utley* v. *Merrick,* 11 Met. 302.

Obstructing cars on railroad.—*Com.* v. *Dame,* 8 Cush. 384.

Common prostitute.—*State* v. *Randolph,* 24 Conn. 363.

Keeping a gaming or bawdyhouse. —*Rex* v. *Grant,* Ryan & M. 270; *Deer* v. *State,* 14 Mo. 348; *Bickel* v. *Fasig,* 33 Pa. 463.

Cutting timber.—*Holler* v. *Ffirth,* 3 N. J. L. 294.

Conspiracy to defraud.—1 Greenl. Ev. § 373. Contra: *United States* v. *Porter,* 2 Cranch, C. C. 60, Fed. Cas. No. 16,072.

Conviction of playing faro.—*Holloway* v. *Com.* 11 Bush, 344.

Under N. Y. Penal Code, § 314, providing that a person convicted of felony is a competent witness, an indictment may be found on his evidence. *People* v. *Stokes,* 30 Abb. N. C. 200.

Ky. Crim. Code, § 107, and Ky. Civ. Code, § 606, where it is provided that an indictment may be based on testimony of a convict. *Com.* v. *Minor,* 89 Ky. 555, 13 S. W. 5.

And in *Rex* v. *Shaftesbury,* 8 How. St. Tr. 759, 771, 774, 775, 780, 781, the court refused to allow the grand jury to prosecute the inquiry as to the witnesses before them having been criminals. See *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.

In the states of Virginia, Florida, Alabama, Maryland, Mississippi,

Pennsylvania, Vermont, Washington, and West Virginia, no person convicted of perjury is competent as a witness: Va. Code, 3598; Fla. Thomp. Dig. 344; W. Va. Code, chap. 152; Ala. Code, § 2766; Md. Gen. Laws, art. 35, § 1; Miss. Rev. Code, 1880, § 1600; Pa. Laws, 1887, chap. 89, § 2; Vt. Rev. Stat. 1880, § 1008; Wash. Code, vol. 2, § 1647.

"In a few of the states, a witness who has been convicted of a capital crime or of certain felonies which involve or indicate great moral degeneration, such for example, as burglary, forgery, rape, arson, perjury, bigamy, sodomy, etc., is by statute incompetent to testify." Underhill, Ev. § 209, citing Ark. Code, § 2859; Tenn. Code, § 4562; Tex. Code, Crim. Proc. 730; Va. Code, 1887, § 3898.

Under the Virginia statute providing that "a person convicted of felony shall not be a witness, unless he has been pardoned or punished therefor," a person who has been convicted of a felony, and has been subjected to a sentence of fine and imprisonment, is not a competent witness, unless he has paid the fine and costs of prosecution, even though he has served out his term of imprisonment and has been held for an additional term under a capias pro fine. *Quillin* v. *Com.* 105 Va. 874, 54 S. E. 333, 8 A. & E. Ann. Cas. 818.

In the absence of a controlling statute on the subject, the incompetency of a witness by reason of his prior conviction of felony cannot be shown upon his examination, but only by a production of the record or of an exemplified copy thereof. *Bise* v. *United States,* 74 C. C. A. 1, 144 Fed. 374, 7 A. & E. Ann. Cas. 165; 2 Wigmore, Ev. § 1270; 1 Greenl. Ev. 14th ed. §§ 375, 475; *United States* v. *Biebusch,* 1 McCrary, 42, 1 Fed. 213; *United States* v. *Woods,* 4 Cranch, C. C. 484, Fed. Cas. No. 16,760; *Com.* v. *Green,* 17 Mass. 515; *Com.* v. *Quin,* 5 Gray, 478; *Vance* v. *State,* 70 Ark. 272, 68 S. W. 37; *Johnson* v. *State,* 48 Ga. 116; *People* v. *Herrick,* 13 Johns. 82, 7 Am. Dec. 364; *Baltimore & O. R. Co.* v. *Rambo,* 8 C. C. A. 6, 16 U. S. App. 277, 59 Fed. 75; *Scott* v. *State,* 49 Ark. 156, 4 S. W. 750; *Bartholomew* v. *People,* 104 Ill. 606, 44 Am. Rep. 97; *Kirby* v. *People,* 123 Ill. 436, 15 N. E. 33; *Leftridge* v. *United States,* 6 Ind. Terr. 305, 97 S. W. 1018; *Com.* v. *Sullivan,* 161 Mass. 59, 36 N. E. 583; *Olden* v. *Hendricks,* 100 Mo. 533, 13 S. W. 821; *Moore* v. *State,* 96 Tenn. 209, 33 S. W. 1046; *State* v. *Payne,* 6 Wash. 563, 34 Pac. 317; *Ingalls* v. *State,* 48 Wis. 647, 4 N. W. 785.

But such fact can be shown by the admission of the witness if not objected to. *State* v. *Rockett,* 87 Mo. 666; *White* v. *State,* 33 Tex. Crim. Rep. 177, 26 S. W. 72; *Bratton* v. *State,* 34 Tex. Crim. Rep. 477, 31 S. W. 379.

Pardon.—Where the incompetency of a person as a witness has been established by the production of a record, it is presumed that he continues to be incompetent, and if a pardon is relied on to re-establish his competency, a copy of the pardon must be produced. *Schell* v.

State, 2 Tex. App. 30; *Cooper* v. *State,* 7 Tex. App. 194.

But where evidence of the conviction is given orally, such conviction is sufficiently rebutted by oral evidence of the pardon. *Howser* v. *Com.* 51 Pa. 332; *State* v. *Anderson,* 24 S. C. 109.

In the absence of the record, the statements of the accused are not even prima facie evidence of conviction. *Boyd* v. *State,* 94 Tenn. 505, 29 S. W. 901.

The court will not take judicial notice of it, as the record itself must be produced, although the conviction may have been had before the same judge in another county. *State* v. *Edwards,* 19 Mo. 674.

The record must show not only the fact of conviction, but that it was followed by a judgment. *Blaufus* v. *People,* 69 N. Y. 107, 25 Am. Rep. 148; *Boyd* v. *State,* 94 Tenn. 505, 29 S. W. 901.

If judgment was arrested, the conviction is a nullity. *State* v. *Valentine,* 29 N. C. (7 Ired. L.) 225.

Insanity.—Under the Idaho statute which provides that persons "of unsound mind at the time of their production" cannot be witnesses, a person who can comprehend the obligation of an oath, and is capable of giving a fairly accurate account of the things he has seen or heard, is competent as a witness, although he may be afflicted with some form of insanity. *State* v. *Simes,* 12 Idaho, 310, 85 Pac. 914, 9 A. & E. Ann. Cas. 1216.

An insane person is competent to be a witness if he understands the obligation of an oath, and has a sufficient mental power to give a correct account of what he has seen or heard. *District of Columbia* v. *Armes,* 107 U. S. 519, 27 L. ed. 618, 2 Sup. Ct. Rep. 840; 1 Wigmore, Ev. §§ 492, 497; 2 Elliott, Ev. §§ 751–759; *Walker* v. *State,* 97 Ala. 85, 12 So. 83; Underhill, Crim. Ev. §§ 202, 203; 30 Am. & Eng. Enc. Law, 2d ed. p. 934.

For a learned and interesting case stating the English rule, see *Reg.* v. *Hill,* 5 Cox, C. C. 259, 2 Den. C. C. 254, Temple & M. 512, 20 L. J. Mag. Cas. N. S. 222, 15 Jur. 470.

As to competency to testify in prosecutions for rape of prosecutrix mentally incapable of giving consent, see 9 A. & E. Ann. Cas. p. 1218, and case note; *Gore* v. *State,* 119 Ga. 418, 100 Am. St. Rep. 182, 46 S. E. 671; *State* v. *Atherton,* 50 Iowa, 189, 32 Am. Rep. 134; *State* v. *Enright,* 90 Iowa, 520, 58 N. W. 901.

In *Lee* v. *State,* 43 Tex. Crim. Rep. 285, 64 S. W. 1047, under a statute providing that an insane person is not competent to testify when insane at the time of the occurrence of the event or when offered as a witness, it was held that imbecility of such a character as would deprive her of power to consent would also at the time of the trial, render her incompetent as a witness to prove the *corpus delicti* of the offense,—a decision declared by Mr. Wigmore as "an atrocity in the name of the law." 1 Wigmore, Ev. § 498, note 4.

Incapacity to give intelligent and legal consent to the commission of

an irregular judgment, or the like,[1] but it was held that his affidavit could not be read in support of a criminal charge.[2] But the same principle that renders a wife competent to testify against her husband, as in cases of violence committed on herself, should render a convict competent to obtain redress for personal injury, even where other evidence could be obtained. To deny this right is to affirm that crimes and wrongs may be committed against convicts with impunity, and that the convict's disqualification could be used as a means of violating the law of the land in those cases where the object of the crime was helpless.

That this principle does prevail is seen in the tendency of courts and legislatures to extend the competency of parties[3] as witnesses, and to allow the testimony of the facts as to the disqualification to go only to the credibility of such party as a witness.[4]

It is to be observed, however, that the Federal statute which disqualifies for perjury prevails in the Federal courts, without regard to the state statutes covering the same matter;[5]

an act does not necessarily imply incapacity thereafter to narrate correctly and truthfully the facts constituting the commission of the act. *State* v. *Simes,* supra.

A Chinaman who says he believes in the Christian religion, that he can tell what he knows, and that he will tell the truth, is not rendered incompetent to testify against the defendant in a prosecution for murder, by the fact that he is unable to tell the nature of the oath administered to him, where there is no attempt to show that he does not understand the obligations of his oath or the penalty for perjury. *State* v. *Lu Sing,* 34 Mont. 31, 85 Pac. 521, 9 A. & E. Ann. Cas. 344.

[1] *Davis's Case,* 2 Salk. 461; *Rex* v. *Gardner,* 2 Burr. 1117; *Atcheson* v. *Everett,* Cow. pt. 1, p. 382; *Skinner* v. *Perot,* 1 Ashm. (Pa.) 57.

As to competency of criminals as witnesses before grand jury, see note in 28 L.R.A. 319.

[2] *Walker* v. *Kearney,* 2 Strange, 1148; *Rex* v. *Gardner,* 2 Burr. 1117.

[3] *United States* v. *Sims,* 161 Fed. 1008.

[4] See statutes collated in note No. 6.

[5] *Wise* v. *Williams,* 162 Fed. 161.

but as to convictions as to other crimes than perjury, the statutes of the state govern as to competency in Federal courts.[6]

[6] Ibid.

The statutes of the various states are as follows:

Alabama.—Code, § 1795. Persons convicted of crime competent as witnesses, except convictions of perjury or subornation of perjury; conviction of other infamous crimes goes to credibility only.

Arizona.—Statute, § 2037. Persons convicted of crimes competent as witnesses, although credibility may be always drawn in question.

Arkansas. — Statutes, § 2916. Persons convicted of crime competent as witnesses, except where convicted of a capital offense, perjury, subornation of perjury, burglary, robbery, larceny, receiving stolen goods, forgery, or counterfeiting; and they may testify with consent of parties.

California.—Civil Code. Persons convicted of crimes are competent as witnesses, although credibility may always be drawn in question.

Colorado.—Statutes, 1908, § 2027. Persons convicted of crime competent as witnesses, although credibility may always be drawn in question.

Connecticut. — Statutes, § 1094. Persons convicted of crime competent as witnesses, but conviction may be shown for purpose of affecting credibility.

Delaware. — Revised Statutes, chap. 107, § 3. Persons convicted of felony competent as witnesses, but evidence of the fact may be adduced to affect credibility.

Florida.—Revised Statutes, 1096, disqualifies all persons as witnesses who have been convicted of murder, perjury, piracy, forgery, larceny, robbery, arson, sodomy, or buggery, and even a pardon to one convicted of perjury does not remove the disqualification. Persons convicted of like crimes in other states, or any other crime, may be questioned as to it as affecting their credibility.

Georgia.—Criminal Code. No person charged with an indictable offense or any offense punished on summary conviction shall be competent or compellable to give evidence for or against himself.

Idaho.—Revised Statutes, § 5697. All persons are competent as witnesses who can perceive and make their perceptions known to others; conviction of crime does not disqualify, the exceptions being the same as in civil actions.

Illinois.—Revised Statutes. Persons convicted of a crime are competent as witnesses, but the conviction may be shown to affect credibility.

Indiana.—Revised Statutes, § 1889. All persons are competent as witnesses who can testify in civil action, and all questions affecting the moral character of a witness may be given in evidence as affecting credibility.

Iowa.—Code, § 4106. All persons are competent as witnesses who have sufficient capacity to understand the obligations of an oath,

§ 365. Pardon; effect of; proof of.—At common law, the incompetency of a witness caused by his conviction of an infamous crime is removed by a full and unconditional par-

but facts which formerly caused the exclusion of testimony may be given in evidence to affect credibility.

Kansas.—General Statutes. All persons are competent as witnesses notwithstanding conviction of crime, but the conviction may be shown for the purpose of affecting credibility.

Kentucky.—Statutes. All persons convicted of false swearing, subornation of perjury, or making certain designated affidavits or reports falsely, are disqualified as witnesses in any proceeding.

Louisiana.—Revised Laws. All persons of proper understanding are competent witnesses in criminal matters.

Maine.—Pub. Stats. § 105. All persons are competent as witnesses in criminal matters, notwithstanding the conviction of an offense, which may be shown as affecting credibility.

Maryland.—Public Laws. All persons are competent as witnesses notwithstanding the conviction of a crime, except the crime of perjury.

Massachusetts.—Revised Laws. All persons are competent as witnesses notwithstanding conviction for a crime, but such conviction may be shown to affect credibility.

Michigan.—Compiled Laws. No person is excluded by reason of crime from testifying in any proceeding, but such crime may be shown to affect the credibility of such person.

Minnesota.—General Statutes. All persons who have the faculty of perception and making their perceptions known are competent as witnesses, notwithstanding conviction of crime, but the conviction may be shown as affecting credibility.

Mississippi.—General Laws. All persons are competent as witnesses notwithstanding conviction of any crime, except perjury and subornation of perjury, and in that event neither pardon nor punishment suffered removes the disqualification.

Missouri.—Revised Statutes. No person excluded by reason of conviction of a crime, but the conviction may be shown as affecting credibility.

Montana.—Codes and Statutes. Conviction of crime does not render incompetent. § 1242.

Nebraska.—Compiled Statutes. Competency not affected by conviction for crime, but the same may be shown as affecting credibility.

Nevada.—Compiled Laws. All persons are competent as witnesses notwithstanding conviction of crime, which conviction may be shown as affecting credibility, of which credibility the jury is the sole judge.

New Hampshire.—Public Statutes. Conviction of an infamous crime does not disqualify, but the record of conviction can be used

to affect the credit of the party as a witness.

New Jersey.—General Statutes. Conviction of crime does not disqualify, but such conviction may be shown on cross-examination or by the record thereof, to affect credibility of such person.

New Mexico.—Compiled Laws. Conviction and sentence for any felony or infamous crime disqualifies, unless pardoned and restored to citizenship.

New York.—Code. Conviction of crime does not disqualify, but it may be shown for the purpose of affecting the weight of the witness's testimony or cross-examination, or by record, and on such examination he is compellable to answer any relevant inquiry with reference to it.

North Carolina.—No person excluded by reason of crime.

North Dakota.—Code. No person excluded by reason of crime, except perjury or subornation of perjury, which disqualifies him in his own behalf or between adverse parties, where objection is made, until judgment for perjury is reversed, save that an innocent person shall not be prejudiced by the illegal admission of the testimony of an infamous person.

Ohio.—Revised Statutes. No person excluded by reason of conviction of a crime, but such conviction may be shown for the purpose of affecting credibility.

Oklahoma.—Statutes. No person disqualified by reason of crime, except that the conviction may be shown for the purpose of affecting credibility, or where the conviction is for perjury or subornation of perjury, which renders such person incompetent on his own behalf or in behalf of adverse parties, until the judgment for perjury is reversed, and provided that no innocent person shall suffer by reason of the admission of the testimony of such person.

Oregon.—Codes and Laws. No person excluded by reason of a conviction of crime, but the conviction may be shown for the purpose of drawing the credibility of such person in question.

Pennsylvania.—Laws. All persons competent as witnesses except those convicted of perjury, including subornation of perjury, which disqualifies for any purpose, even where punishment has been undergone, until judgment is judicially reversed, save that in actions for violence or wrong done to the witness he may testify.

Rhode Island.—General Laws. Conviction of crime does not exclude as witness, except the conviction of a crime or misdemeanor may be shown to affect the credibility of such witness.

South Carolina.—Code. Parties are competent equally in civil and criminal proceedings.

South Dakota.—Statutes. All persons competent notwithstanding conviction of crime, except for perjury and subornation of perjury, which disqualifies.

Tennessee.—Code. Persons are rendered incompetent as witnesses by conviction and sentence for abuse of a female child, arson, and felonious burning, bigamy, burglary, felonious breaking and

entering mansion house, bribery, buggery, counterfeiting, or violating any of the laws to suppress same, destroying will, forgery, housebreaking, incest, larceny, perjury, robbery, receiving stolen goods, rape, sodomy, stealing bills of exchange or other valuable papers, and subornation of perjury, unless restored to full citizenship.

Texas.—Revised Statutes. Conviction of felony in the state or any other jurisdiction disqualifies, unless conviction set aside or convict legally pardoned, but no person convicted of perjury or false swearing can have his competency restored by pardon, unless such pardon in terms restore his competency to testify in court.

Utah.—Code. All persons competent notwithstanding conviction of crime, but which conviction may be shown for drawing in question the credibility of the witness, which may be done by the manner and character of his testimony, or by evidence affecting his character, or contradictory evidence.

Vermont. — Statutes. Persons competent otherwise are not incompetent on account of conviction of crime other than perjury, subornation of perjury, or inciting another to commit perjury, but conviction of any crime involving moral turpitude may be shown to affect the credibility of such witness.

Virginia.—Code. Persons convicted of perjury or subornation of perjury forever adjudged incapable of giving evidence as witnesses, and pardon or punishment does not restore competency for such crimes, but conviction of other felony does not disqualify, where the party has been pardoned or punished therefor.

Washington.—Code. Conviction of crime does not disqualify, though conviction may be shown for purpose of affecting credibility, except for crime of perjury, which renders the party incompetent in any case, unless the conviction shall have been reversed or he shall have received a pardon.

West Virginia.—Code. Conviction of felony disqualifies, except where the party has been punished or pardoned; but such person may, by leave of court, be examined in a criminal case, except where sentenced for perjury, even though he has not been pardoned or punished, but neither pardon nor punishment removes the disqualification of perjury.

Wisconsin.—Statutes. Persons convicted of crime are competent as witnesses notwithstanding such conviction, but the same may be shown to affect credibility of the witness.

Wyoming.—Revised Statutes. Persons otherwise competent not excluded by reason of conviction of crime.

United States.—Competency of witnesses determined by the laws of the state where the district court trying the cause is situate, except for perjury and included crimes, which disqualifies without regard to state laws.

England.—Statutes 61 & 62 Vict. chap. 36. Conviction of crime does not disqualify; witness not to be asked concerning any other crime, unless proof of the offense of which he was convicted tends to

don,[1] as well as by reversal of the judgment or suspension of the sentence.

But where conditions are inserted in the pardon by the pardoning power,[2] those conditions are substantive and binding on the party, and it is only effective so long as there is a com-

convict of the immediate offense charged, or he has offered character evidence, or charged any other person with the same offense.

[1] *United States* v. *Jones*, 2 Wheeler, C. C. 451; *United States* v. *Hughes*, 175 Fed. 238; *Boyd* v. *United States*, 142 U. S. 450, 35 L. ed. 1076, 12 Sup. Ct. Rep. 292; *United States* v. *Wilson*, 7 Pet. 150, 8 L. ed. 640; *Ex parte Wells*, 18 How. 307, 315, 15 L. ed. 421, 425; *Ex parte Garland*, 4 Wall. 333, 18 L. ed. 366; *United States* v. *Hall*, 53 Fed. 352; *Singleton* v. *State*, 38 Fla. 297, 34 L.R.A. 251, 56 Am. St. Rep. 177, 21 So. 21; *Martin* v. *State*, 21 Tex. App. 1, 17 S. W. 430; *State* v. *Blaisdell*, 33 N. H. 388; *Rivers* v. *State*, 10 Tex. App. 177; *Hester* v. *Com.* 85 Pa. 139; *Com.* v. *Bush*, 2 Duv. 264; *State* v. *Baptiste*, 26 La. Ann. 134; 2 Hawk. P. C. 547; *State* v. *Dodson*, 16 S. C. 453; *State* v. *Foley*, 15 Nev. 64, 37 Am. Rep. 458; *People* v. *Bowen*, 43 Cal. 439, 13 Am. Rep. 148; *Hunnicutt* v. *State*. 18 Tex. App. 498, 51 Am. Rep. 330.

[2] *People* v. *Potter*, 1 Park. Crim. Rep. 47; *Ex parte Lockhart*, 1 Disney (Ohio) 105; *Com.* v. *Haggerty*, 4 Brewst. (Pa.) 326; *State* v. *Smith*, 1 Bail. L. 283, 19 Am. Dec. 679; *State* v. *Barnes*, 32 S. C. 14, 6 L.R.A. 743, 17 Am. St. Rep. 832, 10 S. E. 611; *State* v. *Horne*, 52 Fla. 125, 7 L.R.A.(N.S.) 719, 42 So. 388; *Re Prout*, 12 Idaho, 494, 5 L.R.A.(N.S.) 1064, 86 Pac. 275, 10 A. & E. Ann. Cas. 199; *Osburn* v. *United States*, 91 U. S. 474, 23 L. ed. 388; *United States* v. *Six Lots of Ground*, 1 Woods, 234, Fed. Cas. No. 16,299; *Ex parte Hunt*, 10 Ark. 284; *Ex parte Marks*, 64 Cal. 29, 49 Am. Rep. 684, 28 Pac. 109; *Woodward* v. *Murdock*, 124 Ind. 439, 24 N. E. 1047; *Re Boyd*, 34 Kan. 570, 9 Pac. 240. See *Rood* v. *Winslow*, Walk. Ch. (Mich.) 340; *Ex parte Reno*, 66 Mo. 266, 27 Am. Rep. 337. But see *People* v. *Potter*, 1 Edm. Sel. Cas. 235 (impossible conditions rendering pardon absolute); *Re Whalen*, 65 Hun, 619, 47 N. Y. S. R. 313, 19 N. Y. Supp. 915; *People* v. *Burns*, 143 N. Y. 665, 39 N. E. 21; *Huff* v. *Dyer*, 4 Ohio C. C. 595, 2 Ohio C. D. 727; *State* v. *Addington*, 2 Bail. L. 516, 23 Am. Dec. 150; *Lee* v. *Murphy*, 22 Gratt. 789, 12 Am. Rep. 563; *Fuller* v. *State*, 122 Ala. 32, 45 L.R.A. 502, 82 Am. St. Rep. 17, 26 So. 146; *Ex parte Brady*, 70 Ark. 376, 68 S. W. 34; *Alvarez* v. *State*, 50 Fla. 24, 111 Am. St. Rep. 102, 39 So. 481, 7 A. & E. Ann. Cas. 88. See *State ex rel. Davis* v. *Hunter*, 124 Iowa, 569, 104 Am. St. Rep. 361, 100 N. W. 510; *People* v. *Marsh*, 125 Mich. 410, 51 L.R.A. 461, 84 Am. St. Rep. 584, 84 N. W. 472; *Taylor* v. *State*, 41 Tex. Crim. Rep.

pliance with them, which compliance must be shown;[3] or where the question is controlled by statute, the pardon and its operation depend entirely on the statute.[4]

Without pardon, infamy still attaches,[5] unless by statute service of the sentence of itself restores competency.[6]

When an absolute pardon has been accepted, it cannot be revoked.[7] Where a pardon is granted for the purpose of restoring competency, such pardon, if full and unconditional, is not open to attack, though granted for a special purpose.[8]

In proof of a pardon, it is essential to establish the identity of the witness with the person pardoned;[9] it must correctly recite the offense, as a nonrecital or a misrecital will render it inoperative.[10] The pardon to an individual, being a private act, must be proved,[11] which is done by the production of the

148, 51 S. W. 1106 (void condition); *Re Convicts,* 73 Vt. 414, 56 L.R.A. 658, 51 Atl. 10; *Re McKenna,* 79 Vt. 34, 64 Atl. 77 (when at large under condition, time not treated as part of sentence served).

[3] *Haym* v. *United States,* 7 Ct. Cl. 443; *Waring* v. *United States,* 7 Ct. Cl. 501; *Scott* v. *United States,* 8 Ct. Cl. 457; *Re Ruhl,* 5 Sawy. 186, Fed. Cas. No. 12,124; *McKay* v. *Woodruff,* 77 Iowa, 413, 42 N. W. 428; *Flavell's Case,* 8 Watts & S. 197.

[4] *State* v. *Richardson,* 18 Ala. 109; *McGee* v. *State,* 29 Tex. App. 596, 16 S. W. 422; *Blanc* v. *Rodgers,* 49 Cal. 15. See supra, § 364, note 7; Russell, Crimes, 7th Eng. ed. pp. 252, 253.

[5] *State* v. *Benoit,* 16 La. Ann. 273; Wharton, Crim. Pl. & Pr. § 522. But see Russell, Crimes, 7th Eng. ed. p. 253.

[6] *State* v. *Williams,* 14 W. Va. 851. See statutes various states.

[7] *Rosson* v. *State,* 23 Tex. App. 287, 4 S. W. 897; *Re Williams,* 149 N. C. 436, 22 L.R.A.(N.S.) 238, 63 S. E. 108.

[8] *Boyd* v. *United States,* 142 U. S. 450, 35 L. ed. 1076, 12 Sup. Ct. Rep. 292.

[9] *Com.* v. *Hanlon,* 3 Brewst. (Pa.) 471; Wharton, Crim. Pl. & Pr. §§ 521 et seq.

[10] *Stetler's Case,* 1 Phila. 302, Fed. Cas. No. 13,380; Kane, J.; *People* v. *Bowen,* 43 Cal. 439, 13 Am. Rep. 148. See *Ex parte Reno,* 66 Mo. 266, 27 Am. Rep. 337 (not void because no entry made by secretary of state, though required to keep register of executive acts); *Ex parte Higgins,* 14 Mo. App. 601; *Re Edymoin,* 8 How. Pr. 478; *Sutton* v. *McIlhany,* 1 Ohio Dec. Reprint, 235.

[11] *Hunnicutt* v. *State,* 18 Tex. App. 498, 51 Am. Rep. 330; *United States* v. *Wilson,* 7 Pet. 150, 8 L. ed. 640; *State* v. *Baptiste,* 26 La.

instrument itself, or a properly certified copy. A general proclamation of amnesty, being a public act, will be judicially noticed, and need not be proved.[12]

Upon any question of doubt, pardons, like grants, are to be construed favorably to the grantee.[13]

Ann. 134; *Parson* v. *Com.* 33 Ky. L. Rep. 1051, 112 S. W. 617.

[12] *United States* v. *Hall,* 53 Fed. 352; *United States* v. *Wilson,* 7 Pet. 150, 8 L. ed. 640; *State* v. *Blalock,* 63 N. C. (Phill. L.) 242; *State* v. *Keith,* 63 N. C. 140; *State ex rel. Anheuser-Busch Brewing Asso.* v. *Eby,* 170 Mo. 497, 71 S. W. 52; *State ex rel. Wm. J. Lemp Brewing Asso.* v. *Eby,* 170 Mo. 528, 71 S. W. 1133; *State ex rel. St. Louis Brewing Asso.* v. *Eby,* 170 Mo. 529, 71 S. W. 1133; *State ex rel. Columbia Brewing Asso.* v. *Eby,* 170 Mo. 530, 71 S. W. 1133.

[13] *Wyrral's Case,* 5 Coke, 49b; 2 Hawk. P. C. § 13; *Com. use of Lawson* v. *Ohio & P. R. Co.* 1 Grant, Cas. 330; *Ex parte Hunt,* 10 Ark. 284; Wharton, Crim. Pl. & Pr. §§ 522 et seq.; *Puryear* v. *Com.* 83 Va. 51, 1 S. E. 512; *State* v. *Foley,* 15 Nev. 64, 37 Am. Rep. 458; *Ex parte Garland,* 4 Wall. 333, 18 L. ed. 366; *Re Executive Communication,* 14 Fla. 318; *Redd* v. *State,* 65 Ark. 475, 47 S. W. 119. See *People ex rel. Colorado Bar Asso.* v. *Monroe,* 26 Colo. 232, 57 Pac. 696; *Singleton* v. *State,* 38 Fla. 297, 34 L.R.A. 251, 56 Am. St. Rep. 177, 21 So. 21; *Manlove* v. *State,* 153 Ind. 80, 53 N. E. 385; *Spafford* v. *Benzie Circuit Judge,* 136 Mich. 25, 98 N. W. 741 (proper method of calling pardon to attention of court); *Roberts* v. *State,* 160 N. Y. 217, 54 N. E. 678; *Re Deming,* 10 Johns. 483. Contra, see *Edwards* v. *Com.* 78 Va. 39, 49 Am. Rep. 377, 4 Am. Crim. Rep. 460; *Territory* v. *Richardson,* 9 Okla. 579, 49 L.R.A. 440, 60 Pac. 244, 15 Am. Crim. Rep. 552; *Spellings* v. *State,* 99 Tenn. 201, 41 S. W. 444 (not release costs); *Ex parte Mann,* 39 Tex. Crim. Rep. 491, 73 Am. St. Rep. 961, 46 S. W. 828. See *Miller* v. *State,* 46 Tex. Crim. Rep. 59, 79 S. W. 567, 3 A & E. Ann. Cas. 645; *Wilkerson* v. *Allan,* 23 Gratt. 10.

A pardon obtained by fraud is void. See Wharton, Crim. Pl. & Pr. § 532, 2 Hawk. P. C. 533, §§ 8, 9; *Roy* v. *Maddocks,* 1 Sid. 430; *Com. ex rel. Crosse* v. *Halloway,* 44 Pa. 210, 84 Am. Dec. 431; *State* v. *McIntire,* 46 N. C. (1 Jones, L.) 1, 59 Am. Dec. 566; *State* v. *Leak,* 5 Ind. 359; *Rosson* v. *State,* 23 Tex. App. 287, 4 S. W. 897. But such pardon can only be impeached in a direct, and not in a collateral, proceeding. *Territory* v. *Richardson,* 9 Okla. 579, 49 L.R.A. 440, 60 Pac. 244, 15 Am. Crim. Rep. 552. It is not invalid because granted on the ground that the convict's testimony is needed, as the motives of the executive are not subject to question by the courts. *Locklin* v. *State,* — Tex. Crim. Rep. —, 75 S. W. 305. Remitting the punishment does not

§ 366. Rule as to the admissibility of the testimony of children.—A child may be far from maturity, but equally far from incapacity; his memory may be indistinct, but this peculiarity affects the mature as well as the young; he may not be able to express himself with precision, but this is also true of a multitude of other witnesses whose competency is unquestioned. On the other hand, a child is generally free from those prepossessions through which the perceptive powers are frequently distorted, his memory is impressible,[1] and, usually, he cannot maintain a consistent false narrative. These observations, however, apply only to the borderland age between infancy and maturity. To permit a child under four years of age to be sworn and examined as a witness would be to trifle with public justice. Hence the dying declarations of a child of four years have been properly held inadmissible,[2] and the admissibility of children of that age, as witnesses, is, on the same reasoning, disputed.[3] But the testimony of a child of between four and five years of age,[4] and that of a child be-

restore competency as a witness. *Perkins* v. *Stevens,* 24 Pick. 277; *State* v. *Blaisdell,* 33 N. H. 388. Where a man is found guilty at common law for perjury, a pardon will restore competency, but not where adjudged guilty under stat. 5 Eliz. chap. 9. See *Rex* v. *Ford,* 2 Salk. 689; *Dover* v. *Maestaer,* 5 Esp. 92, 94; Russell, Crimes, 7th Eng. ed. p. 252; *Rex* v. *Greepe,* 2 Salk. 513, 514; Bull. N. P. 292; *Houghtaling* v. *Kelderhouse,* 1 Park. Crim. Rep. 241; *United States* v. *Wilson,* 7 Pct. 150, 8 L. ed. 640. Unless otherwise provided by statute, a pardon granted after sentence or punishment served restores competency. *United States* v. *Jones,* 2 Wheeler, C. C. 451; Wharton, Crim. Pl. & Pr. §§ 522 et seq.

It seems that the time specified in a pardon for a party to leave does not begin to run during the sickness or incapacity of the party. See *Ex parte Hunt,* 10 Ark. 284. Acceptance of pardon inferred. *Re Victor,* 31 Ohio St. 206. As to foreign pardon, see Wharton, Confl. L. § 938.

[1] See post, § 801.

[2] *Rex* v. *Pike,* 3 Car. & P. 598, supra, § 290.

[3] Post, § 387; *State* v. *Tom,* 8 Or. 179; *People* v. *McNair,* 21 Wend. 608; *Givens* v. *Com.* 29 Gratt. 835.

[4] *Reg.* v. *Holmes,* 2 Fost. & F. 788.

tween six and seven, has been received on the trial of an indictment charging an attempt to ravish.[5] Four years has been assigned as the minimum age, but after this age the question of admissibility is to be decided by the court,[6] by the exami-

[5] *Rex* v. *Brasier,* 1 Leach, C. L. 199, 1 East, P. C. 443; *Com.* v. *Hutchinson,* 10 Mass. 225; *Johnson* v. *State,* 61 Ga. 35; *State* v. *Morea,* 2 Ala. 275. See *Reg.* v. *Perkins,* 2 Moody, C. C. 135; *Anonymous,* 3 N. J. L. 930. *Washburn* v. *People,* 10 Mich. 372; *State* v. *LeBlanc,* 1 Treadway, Const. 354; *Wade* v. *State,* 50 Ala. 164; *Givens* v. *Com.* 29 Gratt. 835; *Hill* v. *State,* 5 Lea, 725. See *Coon* v. *People,* 99 Ill. 368, 39 Am. Rep. 28; *Holmes* v. *State,* 88 Ind. 145; *Kelly* v. *State,* 75 Ala. 21, 51 Am. Rep. 422; *Flanagin* v. *State,* 25 Ark. 92; *Warner* v. *State,* 25 Ark. 447; *Moore* v. *State,* 79 Ga. 498, 5 S. E. 51; *McAmore* v. *Wiley,* 49 Ill. App. 615; *State* v. *Whittier,* 21 Me. 341, 38 Am. Dec. 272; *State* v. *Severson,* 78 Iowa, 653, 43 N. W. 533; *McGuire* v. *People,* 44 Mich. 286, 38 Am. Rep. 265, 6 N. W. 669; *State* v. *Scanlon,* 58 Mo. 204, 1 Am. Crim. Rep. 185; *Davis* v. *State,* 31 Neb. 247, 47 N. W. 854; *Brown* v. *State* 2 Tex. App. 115; *Hawkins* v. *State,* 27 Tex. App. 273, 11 S. W. 409; *People* v. *Bernal,* 10 Cal. 66; *State* v. *Denis,* 19 La. Ann. 119; *State* v. *Richie,* 28 La. Ann. 327, 26 Am. Rep. 100; *State* v. *Jefferson,* 77 Mo. 136; *State* v. *Doyle,* 107 Mo. 36, 17 S. W. 751; *Territory* v. *DeGutman,* 8 N. M. 92, 42 Pac. 68; *People* v. *Smith,* 86 Hun, 485, 33 N. Y. Supp. 989; *State* v. *Jackson,* 9 Or. 457; *State* v. *Juneau,* 88 Wis. 180, 24 L.R.A. 857, 43 Am. St. Rep. 877, 59 N. W. 580 (child of five).

[6] *People* v. *Bradford,* 1 Cal. App. 41, 81 Pac. 712; *People* v. *Stouter,* 142 Cal. 146, 75 Pac. 780; *Peterson* v. *State,* 47 Ga. 524; *State* v. *Jefferson,* 77 Mo. 136; *State* v. *Doyle,* 107 Mo. 36, 17 S. W. 751; *State* v. *Nelson,* 132 Mo. 184, 33 S. W. 809; *Territory* v. *DeGutman,* 8 N. M. 92, 42 Pac. 68; *People* v. *Smith,* 86 Hun, 485, 33 N. Y. Supp. 989; *State* v. *Jackson,* 9 Or. 457; *Hawkins* v. *State,* 27 Tex. App. 273, 11 S. W. 409; *State* v. *Juneau,* 88 Wis. 180, 24 L.R.A. 857, 43 Am. St. Rep. 877, 59 N. W. 580; *Hicks* v. *State,* 105 Ga. 627, 31 S. E. 579; *White* v. *Com.* 96 Ky. 180, 28 S. W. 340; *Com.* v. *Reagan,* 175 Mass. 335, 78 Am. St. Rep. 496, 56 N. E. 577; *State* v. *Sawtelle,* 66 N. H. 488, 32 Atl. 831, 10 Am. Crim. Rep. 347; *State* v. *Manuel,* 64 N. C. 601; *State* v. *Reddington,* 7 S. D. 368, 64 N. W. 170; *Freasier* v. *State,* — Tex. Crim. Rep. —, 84 S. W. 360; *Burke* v. *Ellis,* 105 Tenn. 702, 58 S. W. 855.

When the incompetency of the child appears, it is the duty of the judge to exclude the testimony from the jury; it is error to refer the question of competency to the jury by instruction or otherwise. *State* v. *Michael,* 37 W. Va. 565, 19 L.R.A.

nation of the child as to its knowledge, its understanding of an oath, and the religious and secular penalties of perjury,[7] but the weight and credibility to be given the child's testimony, as in the case of all other testimony, is exclusively for the jury, under the instructions of the court.[8]

§ 367. Rule admitting testimony of children; basis of.— It is the rule with regard to the testimony of children, that, after the age of four years, the admissibility of their testimony depends upon the degree of intelligence and sense of responsibility in the concrete case.[1] Hence, where there is intelligence enough to observe and truly to narrate, a child having a due sense of the obligation of an oath can be admitted to testify.[2]

605, 16 S. E. 803. The judge's decision of the question of competency will not be disturbed save in a clear case of abuse of discretion. *Williams* v. *United States,* 3 App. D. C. 335; *State* v. *Levy,* 23 Minn. 104, 23 Am. Rep. 678, 3 Am. Crim. Rep. 272; *Shannon* v. *Swanson,* 208 Ill. 52, 69 N. E. 869; *Gabler* v. *State,* 49 Tex. Crim. Rep. 623, 95 S. W. 521; *Com.* v. *Furman,* 211 Pa. 549, 107 Am. St. Rep. 594, 60 Atl. 1089; *Clinton* v. *State,* 53 Fla. 98, 43 So. 312, 12 A. & E. Ann. Cas. 150; *State* v. *Meyer,* 135 Iowa, 507, 124 Am. St. Rep. 291, 113 N. W. 322, 14 A. & E. Ann. Cas. 1; *State* v. *Tolla,* 72 N. J. L. 515, 3 L.R.A.(N.S.) 523, 62 Atl. 675.

[7] *Rex* v. *White,* 1 Leach, C. L. 430; *Reg.* v. *Nicholas,* 2 Car. & K. 246; Powell, Ev. 4th ed. 29; *Ake* v. *State,* 6 Tex. App. 398, 32 Am. Rep. 586; *State* v. *Douglas,* 53 Kan. 669, 37 Pac. 172; *Williams* v. *State,* 12 Tex. App. 127.

[8] *Hawkins* v. *State,* 27 Tex. App. 273, 11 S. W. 409; *Hodge* v. *State,* 26 Fla. 11, 7 So. 593; *People* v. *Frindel,* 58 Hun, 482, 12 N. Y. Supp. 498; *Com.* v. *Robinson,* 165 Mass. 426, 43 N. E. 121; *State* v. *Sawtelle,* 66 N. H. 488, 32 Atl. 831, 10 Am. Crim. Rep. 347; *State* v. *Michael,* 19 L.R.A. 605 (note); *State* v. *Reddington,* 7 S. D. 368, 64 N. W. 170 (caution as to child's testimony); *State* v. *Le Blanc,* 3 Brev. 339; *People* v. *Gralleranzo,* 54 App. Div. 360, 66 N. Y. Supp. 514 (as to corroboration).

For note on competency of children as witnesses, see 19 L.R.A. 605.

[1] *Rex* v. *Williams,* 7 Car. & P. 320; *McGuire* v. *People,* 44 Mich. 286, 38 Am. Rep. 265, 6 N. W. 669.

See *Com.* v. *Hutchinson,* 10 Mass. 225; *State* v. *Doherty,* 2 Overt. 80, as to prima facie incompetency. 4 Bl. Com. 214 (corroboration); 1 Phillips, Ev. 9th ed. 6; Roscoe, Crim. Ev. 8th ed. 115.

[2] *Rex* v. *Powell,* 1 Leach, C. L. 110; *Rex* v. *Brasier,* 1 Leach, C. L. 199; *Rex* v. *Williams,* 7 Car. &

The degree of intelligence and sense of responsibility, and not an arbitrary age, is the test that determines the competency of the child witness.[3]

§ 368. Examination to determine competency of child.—The preliminary examination to determine the competency of the child should be undertaken exclusively by the trial court.[1] Such examination must be public, and not

P. 320; *Rex* v. *Travers,* 2 Strange, 700; *State* v. *DeWolf,* 8 Conn. 98, 20 Am. Dec. 90; *Jackson ex dem. Tuttle* v. *Gridley,* 18 Johns. 98; *People* v. *McGee,* 1 Denio, 19; *Com.* v. *Carey,* 2 Brewst. (Pa.) 404; *Blackwell* v. *State,* 11 Ind. 196; *Wade* v. *State,* 50 Ala. 164; *Vincent* v. *State,* 3 Heisk. 120.

For statutory limit as to age and construction of such statutes, see *State* v. *Scanlan,* 58 Mo. 204, 1 Am. Crim. Rep. 185; *Holmes* v. *State,* 88 Ind. 145.

[3] *Shannon* v. *Swanson,* 208 Ill. 52, 69 N. E. 869, affirming 109 Ill. App. 274; *Clinton* v. *State,* 53 Fla. 98, 43 So. 312, 12 A. & E. Ann. Cas. 150; supra, § 366, notes 6 and 7; *Castleberry* v. *State,* 135 Ala. 24, 33 So. 431; *Eatman* v. *State,* 139 Ala. 67, 36 So. 16; *People* v. *Swist,* 136 Cal. 520, 69 Pac. 223; *State* v. *Lattin,* 29 Conn. 389; *Moore* v. *State,* 79 Ga. 498, 5 S. E. 51; *State* v. *Douglas,* 53 Kan. 669, 37 Pac. 172; *Howard* v. *Com.* 114 Ky. 372, 70 S. W. 1055; *Bright* v. *Com.* 120 Ky. 298, 117 Am. St. Rep. 590, 86 S. W. 527; *State* v. *Williams,* 111 La. 179, 35 So. 505; *State* v. *Tolla,* 72 N. J. L. 515, 3 L.R.A.(N.S.) 523, 62 Atl. 675; *Trim.* v. *State,* — Miss. —, 33 So. 718; *Com.* v. *Furman,* 211 Pa. 549, 107 Am. St. Rep. 594, 60 Atl. 1089; *State* v. *Edwards,* 79 N. C. 648; *Moore* v. *State,* 49 Tex. Crim. App. 449, 96 S. W. 327; *Logston* v. *State,* 3 Heisk. 414; *McLain* v. *Chicago,* 127 Ill. App. 489; *Sokel* v. *People,* 212 Ill. 238, 72 N. E. 382; *State* v. *Meyer,* 135 Iowa, 507, 124 Am. St. Rep. 291, 113 N. W. 322, 14 A. & E. Ann. Cas. 1.

Ignorance of the punishment prescribed for perjury, or the fact that the child is too young to be punished for perjury, does not affect the competency of a child witness otherwise competent: *Blackwell* v. *State,* 11 Ind. 196; *Com.* v. *Robinson,* 165 Mass. 426, 43 N. E. 121; *Johnson* v. *State,* 61 Ga. 35.

[1] *Reg.* v. *Perkins,* 2 Moody, C. C. 135; *State* v. *Whittier,* 21 Me. 341, 38 Am. Dec. 273; *Com.* v. *Hutchinson,* 10 Mass. 225; *Com.* v. *Mullins,* 2 Allen, 295; *State* v. *Lattin,* 29 Conn. 389; *Den* v. *Vancleve,* 5 N. J. L. 589; *Simpson* v. *State,* 31 Ind. 90; *State* v. *Edwards,* 79 N. C. 648; *State* v. *Le Blanc,* 3 Brev. 339; *Peterson* v. *State,* 47 Ga. 524; *Flanagin* v. *State,* 25 Ark. 94; *People* v. *McNair,* 21 Wend. 608; *Peo-*

private.[2] The ruling of the trial court on such examination will not be reversed, unless there is a clear abuse of such discretion,[3] and to the prejudice of the defendant.[4] Where the incompetency appears due to want of instruction as to the nature of an oath and the responsibility, the practice is to postpone the case, so that the child may be properly instructed.[5]

When, however "the infirmity," to use the language of Pollock, C. B., "arises from no neglect, but from the child being too young to have been taught, I doubt whether the loss in point of memory would not more than counteract the gain in point of religious instruction."[6] A temporary suspension, however, to enable a child to recover from agitation, is not only unobjectionable, but proper,[7] for the child, if intelligent, is competent, though he may not have been told the nature of an oath nor its obligations until he learns them in court.[8]

ple v. *Bernal*, 10 Cal. 66. See *State* v. *Richie*, 28 La. Ann. 327, 26 Am. Rep. 100; *Clinton* v. *State*, 53 Fla. 98, 43 So. 312, 12 A. & E. Ann. Cas. 150.

[2] *Simpson* v. *State*, 31 Ind. 90; *State* v. *Morea*, 2 Ala. 275; *People* v. *McNair*, 21 Wend. 608; *State* v. *Edwards*, 79 N. C. 648; *Young* v. *State*, 122 Ga. 725, 50 S. E. 996.

[3] *Anonymous*, 3 N. J. L. 930; *Peterson* v. *State*, 47 Ga. 524; *State* v. *Jefferson*, 77 Mo. 136; *Williams* v. *United States*, 3 App. D. C. 335; *People* v. *Craig*, 111 Cal. 460, 44 Pac. 186; *People* v. *Baldwin*, 117 Cal. 244, 49 Pac. 186; *State* v. *Levy*, 23 Minn. 104, 23 Am. Rep. 678, 3 Am. Crim. Rep. 272; *Clinton* v. *State*, 53 Fla. 98, 43 So. 312, 12 A. & E. Ann. Cas. 150; *State* v. *Tolla*, 72 N. J. L. 515, 3 L.R.A.(N.S.) 523, 62 Atl. 675; *Com.* v. *Furman*, 211 Pa. 549, 107 Am. St. Rep. 594, 60 Atl. 1089; *Moore* v. *State*, 49 Tex. App. 449, 96 S. W. 327.

[4] *Peterson* v. *State*, 47 Ga. 524.

[5] *Rex* v. *White*, 1 Leach, C. L. 430; *Carter* v. *State*, 63 Ala. 53, 35 Am. Rep. 4; *Clinton* v. *State*, 53 Fla. 98, 43 So. 312, 12 A. & E. Ann. Cas. 150; *Rex* v. *Wade*, 1 Moody, C. C. 86; *Com.* v. *Lynes*, 142 Mass. 577, 56 Am. Rep. 709, 8 N. E. 408; 3 Russell, Crimes, 7th Eng. ed. 2267; *Reg.* v. *Cox*, 62 J. P. 89; *Reg.* v. *Bayles*, 4 Cox, C. C. 23; *Rex* v. *Armstrong*, 12 Can. Crim. Cas. 545. But see *Rex* v. *Williams*, 7 Car. & P. 320; *Reg.* v. *Nicholas*, 2 Car. & K. 246, 2 Cox, C. C. 136.

[6] *Reg.* v. *Nicholas*, 2 Car. & K. 246, 2 Cox, C. C. 136.

[7] *State* v. *Scanlan*, 58 Mo. 206, 1 Am. Crim. Rep. 185.

[8] Supra, note 5.

§ 369. Deficiency in capacity that will exclude a witness.—Capacity to perceive the facts testified to, at the time of the occurrence, is one of the conditions of credibility.[1] The incapacity that is ground for the exclusion of the witness must be absolute, and must involve an extinction of the faculty by which the particular object could have been perceived. Loss of the perceptive sense after the occurrence of the fact does not affect the admissibility of the testimony. Hence, a blind man can testify to what he saw prior to his blindness, or a deaf man to what he heard prior to his deafness.[2] A person incapable of perception is *pro tanto* incapable of testifying. If the incapacity to perceive is total, then the incapacity for giving testimony is total.[3] Where, however, the capacity to perceive is partial only, the capacity to give testimony cannot be extended beyond the limit of perception;[4] thus a blind man, incapacitated on account of loss of sight, can testify to what he has heard, while a deaf man, partially incapacitated by his loss of hearing, can testify to what he has seen.[5] Stupefaction, no matter from what cause, may always be shown to affect credibility.[6] Whether a person drunk or asleep or etherized, at the time of the occurrence, is competent, is discussed elsewhere.[7]

[1] Post, § 373.

[2] Weiske, Rechtslexicon, xv. 253; Schneider, Lehre der Beweis, § 112; post, § 374.

[3] *Coleman* v. *Com.* 25 Gratt. 865, 18 Am. Rep. 711.

[4] Post, § 373.

[5] *Harrod* v. *Harrod,* 1 Kay & J. 9, 18 Jur. 853; *Morrison* v. *Lennard,* 3 Car. & P. 127; *Rex* v. *Powell,* 1 Leach, C. C. 110; *Rex* v. *Travers,* 2 Strange, 700; *Rex* v. *Ruston,* 1 Leach, C. L. 408; *Rex* v. *Wade,* 1 Moody, C. C. 86; *Com.* v. *Hill,* 14 Mass. 207; *State* v. *De Wolf,* 8 Conn. 93, 20 Am. Dec. 90.

[6] Wharton & S. Med. Jur. 4th ed. § 245; *Tuttle* v. *Russell,* 2 Day, 201, 2 Am. Dec. 89; *Hartford* v. *Palmer,* 16 Johns. 143; *Sisson* v. *Conger,* 1 Thomp. & C. 564; *Duffy* v. *Com.* 6 W. N. C. 311; *Fleming* v. *State,* 5 Humph. 564; post, § 384a.

[7] 3 Wharton & S. Med. Jur. 4th ed. 594.

It is clearly the reasonable rule, and being rapidly adopted by the decisions, that the capacity to ob-

§ 370. Insanity as affecting competency.—The fundamental value of all testimony is its trustworthiness. Anything that goes either to establish this, or to disprove it, is relevant, and may be shown. No rule can be framed applicable alike to each case, but by the application of those principles which experience has developed and found of value when applied to human affairs, the trustworthiness of any testimony can be accurately determined in the specific case.

On this basis is founded the modern, prevailing rule, that a person is competent as a witness where, at the time he is offered to be sworn, he possesses such an understanding that he can retain in memory, and can accurately narrate, the events of which he has been a witness,[1] and that he comprehends the sanctity and obligations of an oath.[2] Without these testi-

serve and truly narrate is the basis of competency. That this capacity varies from the infant of four years, to the maturity and training of the most accurately developed scientific mind is daily manifest in the courts. The question is one of degree only, and to define or limit by any rule other than the discretion of the trial court in the concrete case would work injustice. In this, the discretion of the court must control. *People* v. *Robinson,* 19 Cal. 40; *Dickson* v. *Waldron,* 135 Ind. 507, 24 L.R.A. 483, 41 Am. St. Rep. 440, 34 N. E. 506, 35 N. E. 1; *State* v. *White,* 10 Wash. 611, 39 Pac. 160, 41 Pac. 442; *Isler* v. *Dewey,* 75 N. C. 466; *Hoard* v. *State,* 15 Lea, 321.

[1] *Walker* v. *State,* 97 Ala. 85, 12 So. 83; *Tucker* v. *Shaw,* 158 Ill. 326, 41 N. E. 914; *Worthington* v. *Mercer,* 96 Ala. 310, 17 L.R.A. 407, 11 So. 72; *Cannady* v. *Lynch,* 27 Minn. 435, 8 N. W. 164; *Guthrie* v. *Shaffer,* 7 Okla. 459, 54 Pac. 698; *Coleman* v. *Com.* 25 Gratt. 865, 18 Am. Rep. 711; *Hiett* v. *Shull,* 36 W. Va. 563, 15 S. E. 146; *District of Columbia* v. *Armes,* 107 U. S. 519, 27 L. ed. 618, 2 Sup. Ct. Rep. 840; *Reg.* v. *Hill,* 2 Den. C. C. 254, 5 Cox, C. C. 259, Temple & M. 512, 20 L. J. Mag. Cas. N. S. 222, 15 Jur. 470, 5 Eng. L. & Eq. 547; *Fennell* v. *Tait,* 1 Cromp. M. & R. 584, 5 Tyrw. 218; *Spittle* v. *Walton,* L. R. 11 Eq. 420, 40 L. J. Ch. N. S. 368, 24 L. T. N. S. 18, 19 Week. Rep. 405; *Allen* v. *State,* 60 Ala. 19. See *State* v. *Brown,* 2 Marv. (Del.) 380, 36 Atl. 458; *State* v. *Crouch,* 130 Iowa, 478, 107 N. W. 173; *State* v. *Simes,* 12 Idaho, 310, 85 Pac. 914, 9 A. & E. Ann. Cas. 1216.

[2] *Tucker* v. *Shaw,* 158 Ill. 326, 41 N. E. 914. See note 1, supra; 3 Russell, Crimes, 7th Eng. ed. 2266.

monial qualifications he is incompetent, without regard to the character or kind or degree of incapacity.[3] Hence, measured by this standard, insanity is not a ground for absolute exclusion from the witness box.[4]

§ 370a. Insanity as affecting credibility.—It is admissible, however, in order to affect the credibility of the witness, to prove that he was or is subject to insane delusions;[1] that his mind and memory are impaired by disease;[2] that his conduct is stupid and his talk irrational;[3] that he was previously, or subsequently became, insane;[4] that he has been examined and found of imbecile mind and weak memory;[5]

[3] *Coleman* v. *Com.* 25 Gratt. 865, 18 Am. Rep. 711; *Worthington* v. *Mercer,* 96 Ala. 310, 17 L.R.A. 407, 11 So. 72.

[4] Wharton & S. Med. Jur. 5th ed. §§ 288 et seq.; *Reg.* v. *Hill,* 5 Cox, C. C. 259, 2 Den. C. C. 254, Temple & M. 512, 20 L. J. Mag. Cas. N. S. 220, 15 Jur. 470, 5 Eng. L. & Eq. 547; *Fennell* v. *Tait,* 1 Cromp. M. & R. 584, 5 Tyrw. 218; *Spittle* v. *Walton,* L. R. 11 Eq. 420, 40 L. J. Ch. N. S. 368, 24 L. T. N. S. 18, 19 Week, Rep. 405; *Com.* v. *Reynolds,* cited in 10 Allen, 59; *Coleman* v. *Com.* 25 Gratt. 865, 18 Am. Rep. 711; *Campbell* v. *State,* 23 Ala. 44; *District of Columbia* v. *Armes,* 107 U. S. 519, 27 L. ed. 618, 2 Sup. Ct. Rep. 840; *Evans* v. *Hettich,* 7 Wheat. 453, 5 L. ed. 496; *State* v. *Kelley,* 57 N. H. 549, 3 Am. Crim. Rep. 229. See also *Abbott* v. *Com.* 23 Ky. L. Rep. 226, 62 S. W. 715; *Cannady* v. *Lynch,* 27 Minn. 435, 8 N. W. 164; *Woodhull* v. *Whittle,* 63 Mich. 575, 30 N. W. 368; and note in 37 L.R.A. 423.

[1] *State* v. *Kelley,* 57 N. H. 549, 3 Am. Crim. Rep. 229; post, notes to § 371; *Reg.* v. *Hill,* 2 Den. C. C. 254, 5 Cox, C. C. 259, Temple & M. 582, 20 L. J. Mag. Cas. N. S. 222, 15 Jur. 470; *Reg.* v. *Whitehead,* L. R. 1 C. C. 33, 35 L. J. Mag. Cas. N. S. 186, 14 L. T. N. S. 489, 14 Week. Rep. 677, 10 Cox, C. C. 234; *Spittle* v. *Walton,* L. R. 11 Eq. 420, 40 L. J. Ch. N. S. 368, 24 L. T. N. S. 18, 19 Week. Rep. 405; *Campbell* v. *State,* 23 Ala. 44.

[2] *Alleman* v. *Stepp,* 52 Iowa, 626, 35 Am. Rep. 288, 3 N. W. 636; *Fairchild* v. *Bascomb,* 35 Vt. 398. See *Carpenter* v. *Dame,* 10 Ind. 129.

[3] *Territory* v. *Padilla,* 8 N. M. 510, 46 Pac. 346.

[4] *Holcomb* v. *Holcomb,* 28 Conn. 177; *State* v. *Kelley,* 57 N. H. 549, 3 Am. Crim. Rep. 229; *Hoard* v. *State,* 15 Lea, 318. But see *State* v. *Hayward,* 62 Minn. 474, 65 N. W. 63.

[5] *Rivara* v. *Ghio,* 3 E. D. Smith, 264. See *Livingston* v. *Kiersted,* 10 Johns. 362; *Reg.* v. *Hill,* 2 Den. C.

and that at the time of the events narrated there was evidence of mental disturbance.[6]

§ 370b. Proof of incompetency.—The insanity of a witness at the time of the event concerning which he is called upon to testify is to be proved in the same manner as insanity in any other case.[1] The highest and best evidence in such case is the testimony of persons who, from their own knowledge, will swear to the existence of the surrounding facts and circumstances.[2] It may be shown by examining the witness himself,[3] by other witnesses,[4] or by production of the record that he has been legally adjudged a mental incompetent.[5] Opinions of medical men are entitled to peculiar weight, in such case, where they have had good opportunity to observe the witness;[6] thus, the opinion of the family physician, who is experienced and whose opportunities for observation are good, is admissible.[7]

§ 370c. Proof of incompetency; opinion evidence.—A full treatment of the question of opinion evidence relative to insanity is considered in another work.[1] Medical experts and

C. 254, 5 Cox, C. C. 259, Temple & M. 582, 20 L. J. Mag. Cas. N. S. 222, 15 Jur. 470, 5 Eng. L. & Eq. 547.

[6] Supra, 1, 2, 3, and 4; *Bell* v. *Rinner,* 16 Ohio St. 45.

As to procedure on examination, *Robinson* v. *Dana,* 16 Vt. 474.

[1] *Holcomb* v. *Holcomb,* 28 Conn. 177; *Guthrie* v. *Shaffer,* 7 Okla. 459, 54 Pac. 698.

[2] *Foster* v. *Brooks,* 6 Ga. 287.

[3] *Reg.* v. *Hill,* 5 Eng. L. & Eq. 547, 5 Cox, C. C. 259, 2 Den. C. C. 254, Temple & M. 582, 15 Jur. 470, 20 L. J. Mag. Cas. N. S. 222.

[4] *Livingston* v. *Kiersted,* 10 Johns. 362.

[5] See *Willwerth* v. *Leonard,* 156 Mass. 277, 31 N. E. 299; *Aldrich* v. *Barton,* 153 Cal. 488, 95 Pac. 900.

[6] *Armstrong* v. *Timmons,* 3 Harr. (Del.) 342; *Lord* v. *Beard,* 79 N. C. 5; *Bricker* v. *Lightner,* 40 Pa. 199.

[7] *Pigg* v. *State,* 43 Tex. 108; *People* v. *Worthington,* 105 Cal. 166, 38 Pac. 689; *Yates* v. *State,* 127 Ga. 813, 56 S. E. 1017, 9 A. & E. Ann. Cas. 620.

[1] Wharton & S. Med. Jur. Bowlby's 5th ed. chap. XX. §§ 338 et seq.

experts with relation to mental diseases may give an opinion upon the mental condition of the witness, based upon facts and circumstances within their own observation;[2] upon hypothetical questions, based upon the facts and circumstances in evidence;[3] upon facts detailed by other witnesses.[4] They are admissible because they are scientific deductions from the facts, to enable the jury to decide the questions of fact intelligently,[5] and they are received because the nature of the facts is such that they cannot be correctly understood by the

[2] *Pidcock* v. *Potter,* 68 Pa. 342, 8 Am. Rep. 181; *Boardman* v. *Woodman,* 47 N. H. 120; *Potts* v. *House,* 6 Ga. 324, 50 Am. Dec. 329; *Com.* v. *Rogers,* 7 Met. 500, 41 Am. Dec. 458; *People* v. *Strait,* 148 N. Y. 566, 42 N. E. 1045; *Re Carmichael,* 36 Ala. 514; *State* v. *Felter,* 25 Iowa, 67. See *State* v. *Hayden,* 51 Vt. 296; *People* v. *Kemmler,* 119 N. Y. 580, 24 N. E. 9; *Coyle* v. *Com.* 104 Pa. 117, 4 Am. Crim. Rep. 379; *Com.* v. *Buccieri,* 153 Pa. 535, 26 Atl. 228; *Com.* v. *Johnson,* 188 Mass. 382, 74 N. E. 939. See also *People* v. *Furlong,* 187 N. Y. 198, 79 N. E. 978; *People* v. *Meringola,* 113 App. Div. 488, 99 N. Y. Supp. 357.

[3] *Parrish* v. *State,* 139 Ala. 16, 36 So. 1012; *People* v. *Sutton,* 73 Cal. 243, 15 Pac. 86; *McCarty* v. *Com.* 14 Ky. L. Rep. 285, 20 S. W. 229; *Reed* v. *People,* 1 Park. Crim. Rep. 481; *People* v. *Thurston,* 2 Park. Crim. Rep. 49; *People* v. *Lake,* 12 N. Y. 353; *Webb* v. *State,* 9 Tex. App. 490; *Luning* v. *State,* 1 Chand. (Wis.) 178, 52 Am. Dec. 153. See *M'Naghten's Case,* 10 Clark & F. 200, 8 Scott, N. R. 595, 1 Car. & K. 130; *United States* v. *McGlue,* 1 Curt. 1, Fed. Cas. No. 15,679; *Davis* v. *State,* 35 Ind. 496, 9 Am. Rep. 760; *Jones* v. *People,* 23 Colo. 276, 48 Pac. 275; *Johnson* v. *State,* 10 Tex. App. 571; *Dejarnette* v. *Com.* 75 Va. 867; *State* v. *Hayden,* 51 Vt. 296; *State* v. *Maier,* 36 W. Va. 757, 15 S. E. 991; *People* v. *Griffith,* 146 Cal. 339, 80 Pac. 68; *Com.* v. *Johnson,* 188 Mass. 382, 74 N. E. 939; *Duthey* v. *State,* 131 Wis. 178, 10 L.R.A.(N.S.) 1032, 111 N. W. 222.

[4] *Potts* v. *House,* 6 Ga. 324, 50 Am. Dec. 329; *Choice* v. *State,* 31 Ga. 424; *Heald* v. *Thing,* 45 Me. 392; *State* v. *Meyers,* 99 Mo. 107, 12 S. W. 516; *State* v. *Dunn,* 179 Mo. 95, 77 S. W. 848; *State* v. *Feltes,* 51 Iowa, 495, 1 N. W. 755; *People* v. *Osmond,* 138 N. Y. 80, 33 N. E. 739; *State* v. *Leehman,* 2 S. D. 171, 49 N. W. 3.

[5] *Coyle* v. *Com.* 104 Pa. 117, 4 Am. Crim. Rep. 379; *Lake* v. *People,* 1 Park. Crim. Rep. 495; *Harrison* v. *Rowan,* 3 Wash. C. C. 580, Fed. Cas. Mo. 6, 141.

jury unless the expert gives his opinion as to what such facts do or do not indicate.[6]

While the qualifications of the expert witness differ in different jurisdictions, he should have a general knowledge as a medical man, or a scientific training upon the subject.[7] Those who have had the care of insane persons are generally received as competent,[8] also physicians in general practice,[9] and even trained nurses who are accustomed to attend upon the sick,[10] the extent of the experience and knowledge of the witness going to his credibility, and not to his competency.[11]

The admission of the testimony of nonexpert witnesses, where the issue is sanity or insanity, forms an exception to the general rule of evidence that witnesses can speak only as to facts. The opinion of such nonexpert witness is admissible only in connection with the facts upon which such opinion is based.[12] And he must have such an acquaintance with the

[6] *People* v. *Youngs,* 151 N. Y. 210, 45 N. E. 460.

Expert opinion should never be received where all the facts upon which the expert opinion is founded can, not only be ascertained, but made intelligible to the court or jury. *Clark* v. *Fisher,* 1 Paige, 171, 19 Am. Dec. 402.

[7] *State* v. *Crisp,* 126 Mo. 607, 29 S. W. 699; *Com.* v. *Brayman,* 136 Mass. 438; *People* v. *Kemmler,* 119 N. Y. 580, 24 N. E. 9; *Abbott* v. *Com.* 107 Ky. 624, 55 S. W. 196. See also *Burt* v. *State,* 38 Tex. Crim. Rep. 397, 39 L.R.A. 305, 330, 40 S. W. 1000, 43 S. W. 344, and *Toomes's Estate,* 54 Cal. 509, 35 Am. Rep. 83.

[8] *Com.* v. *Rogers,* 7 Met. 500, 41 Am. Dec. 458; *State* v. *Windsor,* 5 Harr. (Del.) 512; *Braham* v. *State,* 143 Ala. 28, 38 So. 919; *Hamilton* v. *United States,* 26 App. D. C. 382.

[9] *Davis* v. *State,* 35 Ind. 496, 9 Am. Rep. 760; *Territory* v. *Davis,* 2 Ariz. 59, 10 Pac. 359; *Montgomery* v. *Com.* 88 Ky. 509, 11 S. W. 475. But see *Com.* v. *Rich,* 14 Gray, 335, and *Russell* v. *State,* 53 Miss. 367; supra, note 7.

[10] Supra, notes 7 and 9. Also see *Porter* v. *State,* 140 Ala. 87, 37 So. 81; *Re Dolbeer,* 149 Cal. 227, 86 Pac. 695, 9 A. & E. Ann. Cas. 795; *Hamilton* v. *United States,* 26 App. D. C. 382; *Re Miller,* 27 Pa. Co. Ct. 49.

[11] *Montgomery* v. *Com.* 88 Ky. 509, 11 S. W. 475. See *Lowe* v. *State,* 118 Wis. 641, 96 N. W. 417.

[12] *United States* v. *Chisholm,* 153 Fed. 808; *Kilgore* v. *Cross,* 1 McCrary, 144, 1 Fed. 578; *Braham* v. *State,* 143 Ala. 28, 38 So. 919;

Parrish v. *State,* 139 Ala. 16, 36 So. 1012; *Porter* v. *State,* 140 Ala. 87, 37 So. 81; *Byrd* v. *State,* 76 Ark. 286, 88 S. W. 974; *People* v. *Sanford,* 43 Cal. 29; *Re Dolbeer,* 149 Cal. 227, 86 Pac. 695, 9 A. & E. Ann. Cas. 795; *Glover* v. *State,* 129 Ga. 717, 59 S. E. 816; *Choice* v. *State,* 31 Ga. 424; *Jamison* v. *People,* 145 Ill. 357, 34 N. E. 486; *Colee* v. *State,* 75 Ind. 511; *Lawson* v. *State,* 171 Ind. 431, 84 N. E. 974; *State* v. *Hayden,* 131 Iowa, 1, 107 N. W. 929; *State* v. *Winter,* 72 Iowa, 627, 34 N. W. 475; *State* v. *Shelton,* 64 Iowa, 333, 20 N. W. 459; *Re Selleck,* 125 Iowa, 678, 101 N. W. 453; *Wood* v. *State,* 58 Miss. 741; *State* v. *Erb,* 74 Mo. 199; *State* v. *Williamson,* 106 Mo. 162, 17 S. W. 172; *Territory* v. *Hart,* 7 Mont. 489, 17 Pac. 718; *State* v. *Penna,* 35 Mont. 535, 90 Pac. 787; *Bothwell* v. *State,* 71 Neb. 747, 99 N. W. 669; *People* v. *Silverman,* 181 N. Y. 235, 73 N. E. 980; *Clark* v. *State,* 12 Ohio, 483, 40 Am. Dec. 481; *Pannell* v. *Com.* 86 Pa. 260; *State* v. *Leehman,* 2 S. D. 171, 49 N. W. 3; *Atkins* v. *State,* 119 Tenn. 458, 13 L.R.A.(N.S.) 1031, 105 S. W. 353; *Mendiola* v. *State,* 18 Tex. App. 462; *Betts* v. *State,* 48 Tex. Crim. Rep. 522, 89 S. W. 413; *Taylor* v. *State,* 49 Tex. Crim. Rep. 7, 90 S. W. 647; *Wells* v. *State,* 50 Tex. Crim. Rep. 499, 98 S. W. 851; *Fults* v. *State,* 50 Tex. Crim. Rep. 502, 98 S. W. 1057; *Henderson* v. *State,* 49 Tex. Crim. Rep. 511, 93 S. W. 550; *Rogers* v. *State,* 77 Vt. 454, 61 Atl. 489; *State* v. *Maier,* 36 W. Va. 757, 15 S. E. 991; *Yanke* v. *State,* 51 Wis. 464, 8 N. W. 276.

So the opinion of nonexperts is admissible in reference to the capacity of the accused to distinguish between right and wrong. *M'Naghten's Case,* 10 Clark & F. 200, 8 Scott, N. R. 595, 1 Car. & K. 130; *Smith* v. *State,* 55 Ark. 259, 18 S. W. 237; *State* v. *Porter,* 34 Iowa, 131; *Clark* v. *State,* 12 Ohio, 483, 40 Am. Dec. 481. See also *Powell* v. *State,* 25 Ala. 21; *State* v. *Barry,* 11 N. D. 428, 92 N. W. 809; *Reed* v. *State,* 75 Neb. 509, 106 N. W. 649; *Green* v. *State,* 64 Ark. 523, 43 S. W. 973; *Armstrong* v. *State,* 30 Fla. 170, 17 L.R.A. 484, 11 So. 618; *Ryder* v. *State,* 100 Ga. 528, 38 L.R.A. 721, 62 Am. St. Rep. 334, 28 S. E. 246; *Abbott* v. *Com.* 107 Ky. 624, 55 S. W. 196; *Queenan* v. *Territory,* 11 Okla. 261, 61 L.R.A. 324, 71 Pac. 218; *Com.* v. *Gearhardt,* 205 Pa. 387, 54 Atl. 1029; *Burt* v. *State,* 38 Tex. Crim. Rep. 397, 39 L.R.A. 305, 330, 40 S. W. 1000, 43 S. W. 344; *Hempton* v. *State,* 111 Wis. 127, 86 N. W. 596, 12 Am. Crim. Rep. 657; *Adams* v. *State,* 34 Tex. Crim. Rep. 470, 31 S. W. 372; *Bolling* v. *State,* 54 Ark. 588, 16 S. W. 658; *People* v. *Barthleman,* 120 Cal. 7, 52 Pac. 112; *State* v. *Cross,* 72 Conn. 722, 46 Atl. 148, 12 Am. Crim. Rep. 175; *Phelps* v. *Com.* 17 Ky. L. Rep. 706, 32 S. W. 470; *People* v. *Casey,* 124 Mich. 279, 82 N. W. 883; *State* v. *Potts,* 100 N. C. 457, 6 S. E. 657; *Genz* v. *State,* 58 N. J. L. 482, 34 Atl. 816; *Schlencker* v. *State,* 9 Neb. 241, 1 N. W. 857; *Com.* v. *Wireback,* 190 Pa. 138, 70 Am. St. Rep. 625, 42 Atl. 542; *Webb* v. *State,* 5 Tex. App. 596.

person that he is able to form a correct opinion as to his mental state.[13]

Such opinions are admitted because it is impossible to convey by language, to those who are not eyewitnesses of the facts, such an understanding of the facts that they can form a correct judgment,[14] and the witness's own observations must convey the indefinable, almost imperceptible, actions which language cannot describe;[15] but such nonprofessional witness cannot give an opinion based upon hypothetical questions, based upon facts not stated by him.[16]

[13] *Roberts* v. *Trawick,* 13 Ala. 68; *Norris* v. *State,* 16 Ala. 776; *Ford* v. *State,* 71 Ala. 385; *People* v. *Suesser,* 142 Cal. 354, 75 Pac. 1093; *State* v. *Von Kutzleben,* 136 Iowa, 89, 113 N. W. 484; *State* v. *Lyons,* 113 La. 959, 37 So. 890; *Atkins* v. *State,* 119 Tenn. 458, 13 L.R.A.(N.S.) 1031, 105 S. W. 353; *Hood* v. *State,* — Tex. Crim. Rep. —, 101 S. W. 229; *Sims* v. *State,* 50 Tex. Crim. Rep. 563, 99 S. W. 555; *Taylor* v. *State,* 83 Ga. 647, 10 S. E. 442; *Sage* v. *State,* 91 Ind. 141; *State* v. *Prichett,* 106 N. C. 667, 11 S. E. 357; *Ragland* v. *State,* 125 Ala. 12, 27 So. 983; *State* v. *Shuff,* 9 Idaho, 115, 72 Pac. 664, 13 Am. Crim. Rep. 443; *Reed* v. *State,* 62 Miss. 405; *Territory* v. *Roberts,* 9 Mont. 12, 22 Pac. 132; *Polin* v. *State,* 14 Neb. 540, 16 N. W. 898; *Pflueger* v. *State,* 46 Neb. 493, 64 N. W. 1094; *State* v. *Lewis,* 20 Nev. 333, 22 Pac. 241, 8 Am. Crim. Rep. 574; *State* v. *Ketchey,* 70 N. C. 621; *State* v. *Bryant,* 93 Mo. 273, 6 S. W. 102; *Com.* v. *Gerade,* 145 Pa. 289, 27 Am. St. Rep. 689, 22 Atl. 464; *People* v. *McCarthy,* 115 Cal. 255, 46 Pac. 1073; *State* v. *Fiester,* 32 Or. 254, 50 Pac. 561; *State* v. *Crisp,* 126 Mo. 605, 29 S. W. 699; *Holcomb* v. *State,* 41 Tex. 125; *State* v. *Murray,* 11 Or. 413, 5 Pac. 55; *Shaeffer* v. *State,* 61 Ark. 241, 32 S. W. 679; *Shults* v. *State,* 37 Neb. 481, 55 N. W. 1080; *State* v. *Stickley,* 41 Iowa, 232; *Brown* v. *Com.* 14 Bush, 400. See *Berry Will Case,* 93 Md. 560, 49 Atl. 401; *State* v. *Klinger,* 46 Mo. 224; *Queenan* v. *Oklahoma,* 190 U. S. 548, 47 L. ed. 1175, 23 Sup. Ct. Rep. 762; *Lowe* v. *State,* 118 Wis. 641, 96 N. W. 417; *Goodwin* v. *State,* 96 Ind. 550; *Com.* v. *Brown,* 193 Pa. 507, 44 Atl. 497. See also *Com.* v. *Buccieri,* 153 Pa. 535, 26 Atl. 228.

[14] *DeWitt* v. *Barly,* 17 N. Y. 340; *Culver* v. *Haslam,* 7 Barb. 314.

[15] *Powell* v. *State,* 25 Ala. 21; *Clifton* v. *Clifton,* 47 N. J. Eq. 227, 21 Atl. 333; *Parrish* v. *State,* 139 Ala. 16, 36 So. 1012; *Com.* v. *Sturtivant,* 117 Mass. 122, 19 Am. Rep. 401; *Duthey* v. *State,* 131 Wis. 178, 10 L.R.A.(N.S.) 1032, 111 N. W. 222; *Braham* v. *State,* 143 Ala. 28, 38 So. 919; *State* v. *Constantine,* 48 Wash. 218, 93 Pac. 317.

[16] *State* v. *Klinger,* 46 Mo. 225;

The sufficiency of the acquaintance and observation that will entitle the nonexpert witness to testify is addressed to the discretion of the trial court,[17] and such determination is final, where the discretion is not abused.[18]

§ 371. Presumption of sanity; burden of proof to overcome.—A person tendered as a witness is presumed to be sane until the contrary is shown.[1] Hence, if insanity or

Pelamourges v. *Clark,* 9 Iowa, 1; *State* v. *Brinyea,* 5 Ala. 241; *State* v. *Peel,* 23 Mont. 358, 75 Am. St. Rep. 529, 59 Pac. 169; *State* v. *Potts,* 100 N. C. 457, 6 S. E. 657; *Com.* v. *Rich,* 14 Gray, 335; *Caleb* v. *State,* 39 Miss. 722; *Russell* v. *State,* 53 Miss. 368; *Ragland* v. *State,* 125 Ala. 12, 27 So. 983; *Com.* v. *Wireback,* 190 Pa. 138, 70 Am. St. Rep. 625, 42 Atl. 542. See also *Dunham's Appeal,* 27 Conn. 192.

But many cases hold the facts need not be stated by the nonexpert witness, where he shows acquaintance and observation, the jury being left to judge of the weight to be given the evidence. See *Cotrell* v. *Com.* 13 Ky. L. Rep. 305, 17 S. W. 149; *Taylor* v. *United States,* 7 App. D. C. 27; *Goodwin* v. *State,* 96 Ind. 550.

[17] *People* v. *McCarthy,* 115 Cal. 255, 46 Pac. 1073; *People* v. *Barthleman,* 120 Cal. 7, 52 Pac. 112; *People* v. *Hubert,* 119 Cal. 216, 63 Am. St. Rep. 72, 51 Pac. 329; *People* v. *Schmitt,* 106 Cal. 48, 39 Pac. 204; *People* v. *Pico,* 62 Cal. 50; *People* v. *Hill,* 116 Cal. 562, 48 Pac. 711; *Colee* v. *State,* 75 Ind. 513; *Hite* v. *Com.* 14 Ky. L. Rep. 308, 20 S. W. 217; *State* v. *Hansen,* 25 Or. 391, 35 Pac. 976, 36 Pac. 296; *People* v. *Borgetto,* 99 Mich. 336, 58 N. W. 328.

[18] *People* v. *McCarthy,* 115 Cal. 255, 46 Pac. 1073; *People* v. *Schmitt,* 106 Cal. 48, 39 Pac. 204; *People* v. *Lane,* 101 Cal. 513, 36 Pac. 16; *People* v. *Fine,* 77 Cal. 147, 19 Pac. 269; *People* v. *Pico,* 62 Cal. 50; *People* v. *Hill,* 116 Cal. 562, 48 Pac. 711; *State* v. *Hansen,* 25 Or. 391, 35 Pac. 976, 36 Pac. 296; Wharton & S. Med. Jur. 5th ed. § 358.

[1] *State* v. *Brown,* 2 Marv. (Del.) 380, 36 Atl. 458; *Armstrong* v. *Timmons,* 3 Harr. (Del.) 342. Also *State* v. *DeWolf,* 8 Conn. 93, 20 Am. Dec. 90; *M'Naghten's Case,* 10 Clark & F. 200, 8 Scott, N. R. 595, 1 Car. & R. 130.

See *Hotema* v. *United States,* 186 U. S. 413, 46 L. ed. 1225, 22 Sup. Ct. Rep. 895; *United States* v. *McGlue,* 1 Curt. C. C. 1, Fed. Cas. No. 15,679; *Re Dolbeer,* 149 Cal. 227, 86 Pac. 695, 9 A. & E. Ann. Cas. 795; *People* v. *McNulty,* 93 Cal. 427, 26 Pac. 597, 29 Pac. 61; *Barber's Appeal,* 63 Conn. 393, 22 L.R.A. 90, 27 Atl. 973 (instruction as to presumption of sanity); *State* v. *Pratt,* Houst. Crim. Rep. (Del.) 249; *Danforth* v. *State,* 75 Ga. 614, 58 Am.

other mental incompetency be set up as a ground for the exclusion of the witness, the preliminary examination to determine the fact is the peculiar province of the court. If the witness, in the opinion of the court, is wholly incompetent, he is to be excluded;[2] or, at any stage of the trial, should the court become convinced of the incompetency of the witness, it is his duty to stop the examination and direct the jury to disregard the witness's testimony;[3] and this duty arises when a witness attempts to testify as to what happened when he was unconscious, or where he is more or less intoxicated at the trial.[4]

The question of competency in this case, as in all other questions of testimonial qualifications, is a judicial one,[5] and to be determined exclusively by the court; but the question of the credibility of such testimony is entirely for the jury, under proper instructions of the court.[6]

Rep. 480; *People* v. *Waters*, 1 Idaho, 560; *Langdon* v. *People*, 133 Ill. 382, 24 N. E. 874; *Montag* v. *People*, 141 Ill. 75, 30 N. E. 337; *Sanders* v. *State*, 94 Ind. 147; *Kriel* v. *Com.* 5 Bush, 362; *Com.* v. *Rogers*, 7 Met. 500, 41 Am. Dec. 458; *Bonfanti* v. *State*, 2 Minn. 123, Gil. 99; *State* v. *Redemeier*, 71 Mo. 173, 36 Am. Rep. 462; *State* v. *Hartley*, 22 Nev. 342, 28 L.R.A. 33, 40 Pac. 372; *Graves* v. *State*, 45 N. J. L. 347, 46 Am. Rep. 778; *Brotherton* v. *People*, 75 N. Y. 159, 3 Am. Crim. Rep. 218; *Coyle* v. *Com.* 100 Pa. 573, 45 Am. Dec. 397; *Com.* v. *Woodley*, 166 Pa. 463, 31 Atl. 202; *King* v. *State*, 91 Tenn. 617, 20 S. W. 169; *Webb* v. *State*, 5 Tex. App. 596; *Carter* v. *State*, 12 Tex. 500, 62 Am. Dec. 539; *State* v. *Kelley*, 74 Vt. 278, 52 Atl. 434. See *Sanders* v. *State*, 18 Tex. App. 372; *Ritter* v. *Mutual L. Ins. Co.* 69 Fed. 505.

[2] Powell, Ev. 4th ed. 28; *Reg.* v. *Hill*, 5 Cox, C. C. 259, 2 Den. C. C. 254, Temple & M. 512, 20 L. J. Mag. Cas. N. S. 222, 15 Jur. 470; *Holcomb* v. *Holcomb*, 28 Conn. 177; *Livingston* v. *Kiersted*, 10 Johns. 362; *Coleman* v. *Com.* 25 Gratt. 865, 18 Am. Rep. 711; supra, § 357; post, § 374.

[3] *Reg.* v. *Whitehead*, L. R. 1 C. C. 33, 35 L. J. Mag. Cas. N. S. 186, 14 L. T. N. S. 489, 14 Week. Rep. 677. See *People* v. *Cole*, 43 N. Y. 508 (where cross-examination was impossible because of the illness of the witness.)

[4] Wharton & S. Med. Jur. Bowlby's 5th ed. chap. XIX.

[5] Wigmore, Ev. § 497 and references.

[6] *Parsons* v. *State*, 81 Ala. 577, 60 Am. Rep. 193, 2 So. 854, 7 Am. Crim. Rep. 266; *State* v. *Keerl*, 29 Mont. 508, 101 Am. St. Rep. 579,

§ 372. Inquisition of lunacy prima facie proof only.—An inquisition of lunacy is only prima facie evidence on the question of sanity or insanity, and hence only prima facie proof upon the question of competency or incompetency;[1] it is not conclusive proof,[2] and does not exclude, if, upon the hearing, the court finds that the witness understands the nature of an oath and the facts of which he speaks.[3] In the absence of an inquisition, the burden of proof is on the party disputing the sanity of the witness.[4]

§ 373. Capacity to observe a condition of credibility.—We have already noticed that where it appears that a witness was absolutely deficient of the requisite perceptive powers at the time of the event to be testified to, he may be excluded by the court.[1] Instances of this kind, however, are of very rare occurrence. Very frequent, on the other hand, are those in which the credibility of witnesses is attacked on the ground of deficient or perverted perceptive powers.[2] These cases may be grouped as follows:

(1) Defect in discrimination.—Discrimination is the basis of perception, without which perception is useless for any

75 Pac. 362; *State* v. *Howard*, 30 Mont. 518, 77 Pac. 50; *United States* v. *Holmes*, 1 Cliff. 98, Fed. Cas. No. 15,382; *State* v. *Jones*, 126 N. C. 1099, 36 S. E. 38; *People* v. *Pine*, 2 Barb. 566; *State* v. *Jones*, 50 N. H. 369, 9 Am. Rep. 242; *McKenzie* v. *State*, 26 Ark. 334; *Guetig* v. *State*, 63 Ind. 278, 3 Am. Crim. Rep. 233; *State* v. *Geier*, 111 Iowa, 706, 83 N. W. 718; *State* v. *Newman*, 57 Kan. 705, 47 Pac. 881; *State* v. *Pike*, 49 N. H. 399, 6 Am. Rep. 533.

[1] *Hoyt* v. *Adee*, 3 Lans. 173; *Noanes* v. *State*, 143 Ind. 299, 42 N. E. 609.

[2] *Kellogg* v. *Cochran*, 87 Cal. 192, 12 L.R.A. 104, 25 Pac. 677.

See *Eastport* v. *Belfast*, 40 Me. 262; *People* v. *Willard*, 150 Cal. 543, 89 Pac. 124; *State ex rel. Thompson* v. *Snell*, 46 Wash. 327, 9 L.R.A. (N.S.) 1191, 89 Pac. 931; *People* v. *Farrell*, 31 Cal. 576.

[3] *Kendall* v. *May*, 10 Allen, 63; post, § 374.

[4] Post, § 729.

[1] Supra, § 369.

[2] See Ram, Facts, 3d Am. ed. chap. 11.

rational purpose.[3] Unless the eye of a witness discriminates between colors, his testimony as to colors is worthless; and color-blindness in such cases (*e. g.*, where a witness is called upon to testify as to the color of a railway or ship signal) operates to destroy credibility. Color-blindness has been of recent years the object of much investigation, having been productive not only of serious casualties in war, through the mistaking of the color of uniforms and of flags, but of many railroad disasters, through mistake of signals. By eminent specialists in this department (de Fontenay and Holmgren) color-blindness is classified as follows: (1) Total; (2) partial; consisting of, (a) complete blindness of red, green, or violet; (b) incomplete color-blindness; (c) feeble sense of color. Of 9,659 persons examined, of whom 6,945 were above the age of sixteen, 217 were color-blind. Of 4,492 adult males, 165 were color-blind, and so were 3 per cent of 2,737 railroad officials examined.[4] A power also to discriminate perspective is necessary, to enable an observer to decide distances; a power to discriminate between refraction and reality is necessary, to enable him to determine whether what he sees is the object itself, or only its exaggerated reflection. The most dispassionate and the most accurate of observers, we are told, when on one moving vessel, fail in taking a correct view of the absolute course of another vessel. We cannot overcome the instinctive belief that it is our own vessel that is stationary, and that it is the other alone that moves. Hence, admiralty courts have held that the testimony of mere observers on board a vessel is to yield, in cases involving the course and deflection of the vessel, to that of those who hold

[3] See Bains' Study of Character, 258, 259. "Discrimination is the very beginning of our intellectual life." Bain's Mind & Body, 81, adopted in Calderwood, Mind & Brain, 218.

[4] See 3 Wharton & S. Med. Jur. 4th ed. § 948.

her helm in their hands.[5] What is true of the sea is true, though in varying degrees, of the land.[6] We all occupy standpoints which make us, however, honest, more or less incapable of perfectly accurate observation. Until allowance be made for this incapacity, no testimony can be properly weighed. As to sounds, the same distinction may be taken. Whether a witness can give his opinion as to what a sound means is hereafter discussed;[7] but there can be no question that when the issue depends upon the identification of tunes or sounds, a witness's credibility, in this respect, depends on his knowledge and capacity for discrimination. A particular tune, it is alleged, is sung by a mob as a mark of treasonable purpose; and the effect of the evidence on this point depends in part upon how far the witnesses were able to discriminate between tunes. The whistle of a steam engine, when indicating danger, will be full of meaning to a railroad officer, while the same signal would be unnoticed by an Indian who might be loitering in the neighborhood. On the other hand, the railroad officer would be incapable of discriminating between sounds whose meaning the Indian would at once catch. Of course, these remarks are peculiarly applicable to cases where the object testified to by a witness is something of which he is ignorant.[8] A great world exposition may be visited by six specialists, each one thoroughly versed in his own depart-

[5] *McNally* v. *Meyer,* 5 Ben. 239, Fed. Cas. No. 8,909. See Ram on Facts, 3d Am. ed. chap. 2.

[6] For mistake arising from refraction in land, see De Boismont on Hallucinations, 105; 3 Wharton & S. Med. Jur. § 937.

[7] Infra, §§ 459, 460.

[8] Illustrations may be found in rape cases, as noticed in Wharton, Crim. Law, 8th ed. § 565. See *Barrett* v. *Williamson,* 4 McLean 589, Fed. Cas. No. 1,051; *Willett* v. *Fister,* 18 Wall. 91, 21 L. ed. 804; *People* v. *Bodine,* 1 Edm. Sel. Cas. 36; *Julke* v. *Adam,* 1 Redf. 454; *Jacksonville, A. & St. L. R. Co.* v. *Caldwell,* 21 Ill. 75; *Durham* v. *Holeman,* 30 Ga. 619; *Evans* v. *Lipscomb,* 31 Ga. 71; *Hitt* v. *Rush,* 22 Ala. 563; infra, § 377. See also more fully, 3 Wharton & S. Med. Jur. §§ 924 et seq.

ment, and thoroughly ignorant of the departments of his associates. If one of these should be examined as to what he saw, he would be able to give the *differentia* of his own specialty, but the *differentia* of no other.

(2) Lack of interest.—This may come from frivolity, as in the case of the fop mentioned in the "Spectator," who saw nothing in a large public assembly but the dresses of certain persons of fashion; or from absorption in some other topic, as was the case with the great scientists whom Gulliver noticed, who, during their periods of study, had flappers by them to call their attention to any object which it might be their duty to notice. Swift's satire was no doubt pointed to the affectation of absorption he elsewhere commented on in philosophers; but there are many others besides philosophers whose testimony as to what took place in their presence is open to this criticism. "I was so much engaged at the time that I did not observe what was done or said until my attention was called to it." A witness, under such circumstances, is apt to work into what he himself saw or heard, that which was told him at the time by the person arousing his attention; and even when this is not the case, the fact of his absorption in another topic is to be taken into consideration when determining the accuracy of his perception. Persons, also, who are absorbed in any great personal grief, or whose faculties are paralyzed by a sudden shock, lose their power of discrimination as to passing events.[9] We notice this in the paucity of details given in the narratives of persons relating the facts of a crime of which they were the surprised and terrified witnesses. Want of circumstantiality infects other narratives with discredit,[10] but does not so affect these.

[9] See illustrations in Carpenter's Ment. Phys. arts. 359 et seq.; 3 Wharton & St. Med. Jur. §§ 926 et seq.

[10] Infra, § 379.

(3) Partisanship and prejudice.—Witnesses to a riot in which partisanship runs high are apt to be inflamed by sympathy with their friends, and hatred to their foes. We find this illustrated in the trials of the Philadelphia rioters in 1844.[11]

(4) Expectancy.—That which is ardently and confidently expected is sometimes believed to be seen by a person of a vivid and overstrained imagination. Mr. Dendy gives us a case in which a crowd of persons had collected in the neighborhood of Northumberland House, and two or three gentlemen, for the purpose of experimenting on this very faculty made the confident assertion that they saw the stone lions on the doorway wag their tails, exclaiming: "They are doing it again. Look!" and several of the bystanders thought they saw the tails moving. Some of the phenomena in table-turning may be thus explained; and a good many of the discrepancies in cases of identity.[12] Symptoms of disease, also, when ex-

[11] See Wharton on Homicide, Appx. Compare *Chicago, B. & Q. R. Co.* v. *Triplett,* 38 Ill. 482; *Lanham* v. *State,* 7 Tex. App. 126.

[12] After the disappearance of Dr. Parkman, when public curiosity was greatly strained on the question whether he had been seen after the day on which it was alleged that he had been murdered, several entirely honest witnesses were convinced that they had seen him in some of his old haunts at the time when, there is now no question, he was dead. Numerous have been the persons who, since the disappearance of Charlie Ross, have honestly declared that they recognized the lost child in places so remote from each other, and at times so close, that it is clear that some of them, at least, were mistaken. The same remarkable aberration of the perceptive powers was illustrated in the trials consequent on the Lord George Gordon riots, and the Philadelphia riots in 1844, already noticed. In each of these cases the collisions were brought about by intense religious animosity. There was a conviction among certain classes of Protestants, and especially among those from the north of Ireland, that the Roman Catholics were about to rise to murder the foes of their church, and that certain well-known and conspicuous Roman Catholics were to be foremost in the work of blood. There was a conviction among certain classes of the Roman Catholics that certain prom-

pected, are often believed to exist. A person, for instance, imagines he has swallowed a pin, and then believes that he

inent Protestant leaders were engaged in preparing for a slaughter of Roman Catholics, and the destruction of Roman Catholic churches. When the leading rioters were tried, it is remarkable how ubiquitous these champions, on both sides, are sworn to have been, and yet at the same time what vanishing properties they appear to have possessed. In the Philadelphia cases, for instance, when the Protestant rioters were on trial, witnesses from the opposite ranks were found in abundance to testify to the activity of certain leading Protestant agitators in the fray; which participation was negatived by witnesses for the defense. The same condition of things was exhibited when the Roman Catholic rioters were on trial; and it was noticed that one prominent and very obnoxious Roman Catholic alderman was sworn to have been conspicuous in so many distinct operations of mischief that this very multiplicity of inconsistent employments gave strong corroboration to the testimony of his friends that during the whole of the riots he kept quietly at his home. The same observation may be made as to the English prosecutions of the Roman Catholics under the auspices of Titus Oates. That Oates knowingly perjured himself there is no question. But there were other witnesses for the prosecution whom we cannot so readily dispose of, as they were persons whose honesty of purpose, whatever we may say of their susceptibility to excitement, was unquestioned and unquestionable. The only solution is that here proposed,—weak capacity for the perception of identity, acted on by powerful distorting prejudices. The mental eye, never very accurate, is overstrained. It is feared or hoped or even believed, that a particular person will be in a particular place. Somebody else is converted into that particular person.

Are such transmutations or idealizations of appearances dependent upon public excitement, as in the cases just mentioned? It would be fortunate for public justice if they were, since in this way our distrust would be limited to cases which involve public excitement. But so far from this being the case, we find that the same deranging and transmutive influence is exercised, on many minds, by any intense personal longing. There are few imposters, striving to seize upon some vacant chair in a desolate household, that have not had at least some sort of temporary recognition of this class. We have before us a French trial of which the basis was the disappearance of a young girl from a peasant's home. Two years afterwards, a girl much resembling the lost child made her appearance in the neighborhood, and was greeted by some of the neighbors as the lost child, reappeared. The newcomer, not orig-

feels lacerations in the bowels, such as that which a swallowed pin might be supposed to produce. Symptoms may thus be detailed which are unreal, and yet which may be honestly believed in.[13]

(5) Deception.—The discrimination of the most observant may be baffled by disguises assumed in order to promote or impair identification.[14]

§ 374. Incapacity to narrate may affect competency.—A witness may have been capable of perceiving, yet be incapable of narration. He may have no powers of speech, and have no means of expressing himself by signs. He may have become insane since the occurrences he is called upon to relate. If, however, such incapacity is temporary, the

inally an imposter, but under the influence of one of those not infrequent psychical conditions in which self-deceit and epidemic delusion mingle, assumed the part thus assigned to her, and appeared in the bereaved home. The strangest part of the procedure was that she was welcomed by the family as really the person she claimed to be; and it was not until months had passed, and a series of counter recognitions sprang up from the family to which she really belonged, that the delusion was dispelled. Lady Tichborne's recognition of the claimant as her lost son is a more familiar illustration of the same phenomenon. (1 Crim. L. Mag. 3, 4.) She was passionately convinced that he would certainly reappear; and his reappearance in the person of the claimant she believed. The same criticism applies to Lady Vane's declarations in the *Vane Case,* before Malins, V. C., December, 1876. Another illustration to the same effect is given by Dr. Wigan (Duality of the Mind, 56): "I was in Paris at a soiree given by M. Bellatt, some days after the execution of the Prince of Moskawa. The usher, hearing the name of M. Marechal, *aîné* (the elder), announced M. le Marechal Ney. An electric shudder ran through the assembly, and, for my own part, I own that the resemblance to the prince was for the moment as perfect to my eyes as the reality." Compare *Morgan's Case,* infra, § 804.

[13] See supra, § 271.

[14] See De Boismont, op. cit. 105.

See, as to lack of interest, *Jeter* v. *Haviland,* 24 Ga. 252; *Haun* v. *Rio Grande Western R. Co.* 22 Utah, 346, 62 Pac. 908; *Birmingham Electric R. Co.* v. *Clay,* 108 Ala. 233, 19 So. 309.

court will in proper cases direct an adjournment, so that it may be overcome.[1] But the application must be made before the jury is sworn.[2] And his case must be one which promises a speedy restoration.[3]

§ 375. Deaf mutes; competency as witnesses.—Deaf mutes were formerly regarded as idiots, and therefore incompetent to testify, but to-day this presumption has disappeared,[1] and the modern doctrine is that if they have sufficient understanding to comprehend the facts as to which they speak, and appreciate the sanctity of an oath, they can give evidence by signs, or through an interpreter, or in writing.[2] He can express himself in writing, if, through this means, he can be more clearly understood,[3] or through a sworn interpreter by whom his signs can be interpreted,[4] a resort to either method is proper;[5] he is not confined to the sign language common to the deaf mutes, but, if his own arbitrary signs can be inter-

[1] *Rex* v. *White,* 1 Leach, C. L. 430, note, a; supra, §§ 368, 369, 371.

[2] *Rex* v. *Wade,* 1 Moody, C. C. 86; *Kinloch's Case,* 18 How. St. Tr. 402.

[3] Supra, § 368.

[1] 1 Hale, P. C. 34; *Rex* v. *Ruston,* 1 Leach, C. L. 408; *Morrison* v. *Lennard,* 3 Car. & P. 127; 4 Bl. Com. p. 303; Greenl. Ev. § 366.

[2] *People* v. *McGee,* 1 Denio, 21; *Kuhlman* v. *Brown,* 4 Rich. L. 479; *Skaggs* v. *State,* 108 Ind. 57, 8 N. E. 695; *Cowley* v. *People,* 83 N. Y. 478, 38 Am. Rep. 464; *State* v. *DeWolf,* 8 Conn. 98, 20 Am. Dec. 95; *Snyder* v. *Nations,* 5 Blackf. 295; *Com.* v. *Hill,* 14 Mass. 207; *State* v. *Howard,* 118 Mo. 127, 144, 24 S. W. 41; *Roberson,* v. *State,* — Tex. Crim. Rep. —, 49 S. W. 398; *State* v. *Weldon,* 39 S. C. 318, 24 L.R.A. 128, 17 S. E. 688; *Territory* v. *Duran,* 3 N. M. 189, 3 Pac. 53; *State* v. *Smith,* 203 Mo. 695, 102 S. W. 526. See also *Kirk* v. *State,* 35 Tex. Crim. Rep. 224, 32 S. W. 1045; *Ritchey* v. *People,* 23 Colo. 314, 47 Pac. 272, 384; *Quinn* v. *Halbert,* 55 Vt. 224, and note in 24 L.R.A. 126.

[3] *State* v. *DeWolf,* 8 Conn. 93, 20 Am. Dec. 90; *Morrison* v. *Lennard,* 3 Car. & P. 127.

[4] Supra, note 3; *Com.* v. *Hill,* 14 Mass. 207; *Snyder* v. *Nations,* 5 Blackf. 295.

[5] *State* v. *Howard,* 118 Mo. 127, 24 S. W. 41; *State* v. *Weldon,* 39 S. C. 318, 24 L.R.A. 126, 17 S. E. 688. See *Dobbins* v. *Little Rock R. & Electric Co.* 79 Ark. 85, 95 S. W. 794, 9 A. & E. Ann. Cas. 84.

preted, he can testify through those signs,[6] and in one case testimony was admitted where no sign at all was understood.[7] It is to be observed, however, that the testimony must be so intelligently communicated that the adverse party has the opportunity to cross-examine the witness.[8] As such infirmity is sometimes accompanied with mental incapacity, it is proper to examine as to the question of capacity as well as infirmity, but ordinarily the only question is possibility of communication;[9] but where mental incompetency also appears, the principles applicable to insanity will govern.

Such testimony, though made through interpretation, is not hearsay,[10] nor is it excluded by the fact that the witness can write.[11] Admissions made by a deaf mute on slips of paper in conversation with others cannot be proved orally, where the writings are missing, and not accounted for.[12]

With the disappearance of the presumption that prevailed against the deaf-mute witness, arose the rule that the party alleging the incompetency must produce evidence. While the

[6] *Skaggs* v. *State,* 108 Ind. 53, 8 N. E. 695.

[7] *Quinn* v. *Halbert,* 55 Vt. 224.

[8] *Territory* v. *Duran,* 3 N. M. 189, 3 Pac. 53. But see *Quinn* v. *Halbert,* 55 Vt. 224 (deaf and dumb plaintiff admitted to testify in his own behalf, though he could not be examined with facility). *State* v. *McNinch,* 12 S. C. 95; *Millikan* v. *Booth,* 4 Okla. 713, 46 Pac. 489.

[9] Wigmore, Ev. § 498.

[10] Supra, § 224; *Ritchey* v. *People,* 23 Colo. 314, 47 Pac. 272, 384.

[11] *State* v. *DeWolf,* 8 Conn. 93, 20 Am. Dec. 90; *State* v. *Howard,* 118 Mo. 127, 144, 24 S. W. 41; *Morrison* v. *Lennard,* 3 Car. & P. 127.

[12] *State* v. *DeWolf,* 8 Conn. 93, 20 Am. Dec. 90.

It is well known that in communicating with deaf mutes, where both parties are not conversant with the sign language, writing is resorted to, and these slips immediately destroyed, and while it has been held in *State* v. *DeWolf,* 8 Conn. 93, 20 Am. Dec. 80, that admissions written on slips of paper could not be proved orally when the slips used were missing and unaccounted for, yet Mr. Underhill, in his 2d edition of Criminal Evidence, states what ought to be the rule in such cases, as follows: "If the writing is one that is customarily destroyed as soon as used, it would not seem logical or fair to require its production, if its contents could be proved orally." Underhill, Crim. Ev. 2d ed. § 45, note 59.

question of competency is for the court, and, to that extent, the court decides a question of fact, yet in a conflict of evidence as to the question of intelligence, the testimony should go to the jury, and they should decide upon the fact.[13] Expert testimony need not be resorted to upon the question of intelligence, for a witness may testify to any facts from which the condition of the witness can be inferred; or it may be shown by any person acquainted with him who can testify as to his intelligence and his knowledge of the sign language;[14] and he qualifies as a witness where he is consciously sworn, though he may not have actually heard the oath administered to him along with the other witnesses.[15]

§ 376. Bias to be taken into account in estimating accuracy of witness.—Pecuniary interest in a case is by no means the only influence by which bias on the part of a witness is produced. Relationship, party sympathy, personal affection, influence the perceptive powers, at least, as effectively as does pecuniary interest; and it is easy to conceive of cases in which the guilt of perjury may, in certain very rude or very corrupt conditions of society, appear to be not so great as the guilt of disclosing a confidence.[1] Mendacity, also, may be inbred in a race accustomed to long subjection, and to the habits of prevarication and deceit which such subjection produces. Hence the standard of truthfulness is much lower in a race accustomed to such subjection than in a race accustomed to dominancy. Professor Lorimer, of Edinburgh, eminent

[13] *State* v. *Rohn*, 140 Iowa, 640, 119 N. W. 88.

[14] *State* v. *Weldon*, 39 S. C. 318, 24 L.R.A. 126, 17 S. E. 688.

[15] *Texas & P. R. Co.* v. *Reid*, — Tex. Civ. App. —, 74 S. W. 99.

[1] According to the received code of honor, when a lady's reputation is concerned, a gentleman is bound to act like the loyal servant who (in 1716), when twitted with having sworn falsely to save Stirling of Keir's life, said he would rather trust his soul with God than his master's life with the Whigs." London Quarterly Rev. Jan. 1878. Art. on Lord Melbourne.

both as a jurist and a philanthropist, when treating of the relative responsibility of races, thus writes: "My friends who hold colonial judgeships tell me that if they were to send to prison all witnesses who tell lies in their courts, there would very soon be no free negroes at all, and the beneficent object of emancipation would be defeated." [2] Where, to view the question generally, all restrictions on admissibility are removed, and proof of interest goes only to credibility, influences of all kinds are objects of consideration in determining how far credibility exists. Credibility, therefore, so far as it depends upon the capacity for accurate narration, is relieved from the obstructions produced by the old rules, and is determinable by the ordinary laws of free logical criticism. In criminal trials, though the abolition of exclusions on ground of interest makes little change, a very great change has been produced by the statutes now generally adopted, enabling defendants to be examined in their own behalf. But aside from this conspicuous case of rehabilitation in the face of the most powerful bias, there are no cases in which party sympathy, personal freindship, family affection, operate, as a rule, so effectively as they do where life and liberty are at stake. In such cases, while (unless in the relationship of marriage, to be hereafter discussed) there is no exclusion on account of bias, no matter how strong, bias is always of importance in determining credibility.[3] Nor is this exclusively on the ground that bias prompts perjury. So it may sometimes do; but cases of this class are rare, while cases in which bias lead to unconscious perversion of facts are frequent."Though we are accustomed to speak of memory as if it consisted in an exact reproduction of past states of consciousness, yet experience is constantly showing us that this reproduction is very often in-

[2] Lorimer's Law of Nations, i. 445.

[3] *United States* v. *Borger,* 19 Blatchf. 249, 7 Fed. 193; *Hinds* v. *State,* 11 Tex. App. 238.

exact, through the modification which the 'trace' has undergone in the interval. Sometimes the trace has been partially obliterated; and what remains may serve to give a very erroneous (because imperfect) view of the occurrence. And where it is one in which our own feelings are interested, we are extremely apt to lose sight of what goes against them, so that the representation given by memory is altogether one-sided." [4] For these reasons, interest and party or social sympathy may be always shown in order to discredit a witness,[5] and the same

[4] Carpenter, Ment. Phys. arts. 365 et seq. Dr. Carpenter adds several curious illustrations.

[5] Infra, §§ 476, 477, 488.

The temptation of police officers to prove a case that they institute is thus noticed by Serjeant Ballantine in his Experiences of a Barrister's Life: "It is manifest that in all investigations in criminal matters, the police must form a very material element, and the correctness of the result must greatly depend upon their truth and accuracy. It is therefore most important that those who preside upon such inquiries should understand the characteristics of the body, and know something of their organizations. I fear that without such knowledge very serious mischances, and perhaps fatal ones, are likely to arise. I have had constant opportunities of forming a judgment, and my remarks are not founded upon any prejudice against a necessary, and in many respects trustworthy, body of men; but from the conclusions that my experience has forced upon me, I am obliged to say that the evidence given by the police ought to be viewed with a considerable amount of caution. Wherever men are associated in a common object, as in their case, an *esprit de corps* naturally arises, and this not unfrequently colors the testimony of individual members. Their duties are extremely trying, and calculated frequently to cause anger and irritation,—feelings which almost invariably induce those possessed by them to exaggerate, if not to invent. The classes against whom they appear are usually without the position that commands consideration, and consequently statements made to their prejudice meet with the more ready belief. The feeling of sanctity that probably once attached to an oath becomes deadened in the minds of those who are taking it everyday, and an easy manner and composed demeanor are acquired by persons constantly in the witness box. There exists a very bad habit in the force of communicating their opinions at the outset of an inquiry, thus pledging themselves to views which it is damaging to their sagacity to retract."

observation may be made as to near relationship.[6] But immorality cannot be introduced to affect credibility, unless it be involved in a reputation for untruth.[7]

§ 377. And so of want of familiarity with topic.—We have already noticed that the credibility of a witness depends (1), on his capacity to observe; and (2), on his capacity to narrate. It should be noticed, in the latter connection, that capacity to narrate may depend in a measure on a special acquaintance with the thing narrated. A physician who has once visited a patient can speak as to this visit, but cannot speak as to idiosyncrasies he had no time to study.[1] Farmers will be entitled to credit in agricultural matters, as to which other persons are of no authority;[2] and so, *mutatis mutandis*, as to architects.[3] Familiarity with the thing testified to, therefore, though not essential to competency, is of much importance in determining credibility, for a witness is entitled to little credit when he speaks of that which he does not comprehend.[4] In questions of identity this caution is to be peculiarly observed.[5]

[6] Infra, § 448; *Re Gangwere*, 14 Pa. 417, 53 Am. Dec. 554; *Tardif* v. *Baudoin*, 9 La. Ann. 127.

[7] Infra, § 487; *State* v. *Randolph*, 24 Conn. 363; *Smithwick* v. *Evans*, 24 Ga. 461.

As to pecuniary interest affecting credibility, see *Grimm* v. *United States*, 156 U. S. 604, 39 L. ed. 550, 15 Sup. Ct. Rep. 470; *United States* v. *Moore*, 19 Fed. 39; *People* v. *Bensen*, 52 Cal. 380; *State* v. *Stickney*, 53 Kan. 308, 42 Am. St. Rep. 284, 36 Pac. 714; *Guy* v. *State*, 96 Md. 692, 54 Atl. 879; *State* v. *Nestavall*, 72 Minn. 415, 75 N. W. 725; *People* v. *Noelke*, 94 N. Y. 137, 46 Am. Rep. 128; *People* v. *Harper*, 145 Mich. 402, 108 N. W. 689.

[1] See *Barrett* v. *Williamson*, 4 McLean, 589, Fed. Cas. No. 1,051; *Durham* v. *Holeman*, 30 Ga. 619; *Hitt* v. *Rush*, 22 Ala. 563.

[2] *Jacksonville, A. & St. L. R. Co.* v. *Caldwell*, 21 Ill. 75.

[3] *Tucker* v. *Williams*, 2 Hilt. 562. See infra, § 408.

[4] See fully on this point §§ 19, 160.

[5] Infra, § 802; Wharton, Ev. § 409.

As to power of observation and accuracy and examination as to these capacities, see *Sharp* v. *Hoffman*, 79 Cal. 404, 21 Pac. 846; *Peo-*

§ 378. So of capacity to remember.—But capacity for observation and narration are not the only constituents of credibility. There must also be a capacity to recollect, or, as it is called by high authority,[1] to "reproduce." As conditions of the trustworthiness of such "recollection" or "reproduction," may be mentioned the following:

(1) Consciousness of identity.—The witness must be sure that he is the person that saw or heard the thing he narrates. It may happen that by hearing a thing very often we may believe we saw or heard it ourselves. The rule excluding hearsay is based on this condition. A witness, to entitle his statement to reception, must be sure that what he states he himself observed.[2]

(2) Consciousness of succession as to time.—It must not be, "I see this now;" but "I saw it at some prior time." We must therefore add to the consciousness of identity, the con-

ple v. *Smith,* 134 Cal. 453, 66 Pac. 669; *State* v. *Savage,* 36 Or. 191, 60 Pac. 610, 61 Pac. 1128; *Eureka Hill Min. Co.* v. *Bullion Beck & Champion Min. Co.* 32 Utah, 236, 125 Am. St. Rep. 835, 90 Pac. 157.

[1] Carpenter, op. cit. art. 340.

[2] As to untrustworthiness from want of this condition, see Carpenter, op. cit. art. 353.

"It is said that there are men who, by often telling a mendacious story as true, come at last to believe it to be true. When this happens, the fact is that a case of the memory of ideas comes to be mistaken for a case of the memory of sensations. How did the man know at first that it was a fictitious story; and how did he afterwards lose that knowledge? He knew, at first, by certain associations; he lost his knowledge by losing those associations, and acquiring others in their stead. When he first told the story, the circumstances related called up to him the idea of himself fabricating the story. This was the memory of the fabrication. In repeating the story as real, the idea of himself fabricating the story is hurried over rapidly; the idea of himself as actor in the story is dwelt upon with great emphasis. In continued repetitions, the first circumstances being attended to as little as possible, the association of it grows weaker and weaker; the other circumstances engrossing the attention, the association of it grows stronger and stronger, till the weaker is at last wholly overpowered by the stronger, and ceases to have any effect." 1 Mill, Human Mind, 333.

sciousness of that identity existing substantively at the time specified. Upon the time thus fixed for the act depend in a large measure its juridical bearings.[3] When was it, for instance, that a witness states that a document claimed to be forged was executed? When was it that he saw a person at a particular place? It may be that, to make out a false case of alibi, the facts belonging to one point of time are transferred to another at which it is proposed to fix the alibi.[4] But unless, by some such process, facts are transferred in a body from one date to another, there will be a want of that circumstantiality which is so important an element in credibility. And when a body of facts is thus transferred to a false date, this very circumstantiality enables the falsehood to be the more readily detected. But no fact can be stated without some date assigned to it, even though the date be merely negative, *i. e.*, if the thing is not happening now, it happened before the present moment. And credibility is apt to diminish in proportion to the failure of precision as to date.

(3) Location in space.—This is also an essential condition of reproduction by memory. "In the original act of observation I must have been in some place, and the object observed must have sustained some relation to attending or accompanying objects. Neither myself nor the object can ordinarily be recalled without some of these accompaniments involving relations to space." [5]

(4) Derangement of the associative powers.—On these powers, as has been seen, no reproduction by memory depends.[6]

[3] Porter, Hum. Int. § 273.

[4] A case of this is reported in 1 Crim. Law. Mag. 8, 17 Alb. L. J. 40.

[5] Porter, Hum. Int. § 273.

[6] See New Quar. Mag. April, 1880, p. 310. As an illustration of the way in which recollections may be mistaken for impressions,—in other words, of the way in which what we have heard may be mistaken for what we have ourselves experienced,—may be mentioned Disraeli's speech in 1852, in which he introduced as original into a panegyric of the Duke of Wellington what was substantially an extract from a eulogium delivered

To recall an isolated fact, if this were possible, would be to recall something which, as it had no relation to past life, can have no relation to present conduct. The fact must have attached to it not only time and place, but collateral circumstances; and in proportion to the accumulation about it of supporting facts does its credibility increase. But the powers of association are subject to various derangements, among which the following may be specified: (a) Inert association, arising sometimes from congenital defects, sometimes from the enfeebling effects of time,[7] sometimes from the habit of

many years before by Thiers, on Marshal St. Cyr. Cobden, in a letter of November 12, 1852 (2 Cobden's Life, 122), speaks of this "escapade" as helping to demoralize the protectionists, and it seemed at the time a discreditable piracy. Disraeli gave no explanation, but Mr. Morley, in a note, supplies the following: "It," the passage in question, "had already appeared in an article in the Morning Chronicle, in 1848; but the writer, a brilliant man well known in society, came forward to say that it was Mr. Disraeli who had called his attention to the passage from Thiers. The 'escapade,'" says Mr. Morley, than whom there is no one better qualified to speak on this point, "was singular, and it was certainly unfortunate, but men of letters, who know the tricks that memory is capable of playing, will hardly think it is incapable of explanation." Coleridge's alleged plagiarisms from Schelling may be explained on the ground that he made the translation, put it away among his papers, and then when it turned up afterwards supposed it was his own. And as both he and Disraeli were fully capable of producing the passages in question, such a supposition is not strange in either case.

[7] "The impairment of the memory in old age commonly shows itself in regard to new impressions; those of the early period of life not only remaining in full distinctness, but even, it would seem, increasing in vividness, from the fact that the Ego is not distracted from attending to them by the continual influx of impressions produced by passing events." Carpenter's Ment. Physiology, art. 351. Illustrations will be found in Porter on the Human Intellect, § 299. Dr. Carpenter attributes this phenomenon to the peculiar plasticity of the brain in childhood. President Porter notices other influences tending to the same result. "The news, the markets, the politics, the literature, the society, that occupied his attention so exclusively (in earlier days), are now less attended to, because they are less cared for. In place of an intent and absorbed devotedness to the present, there is a more frequent review of the past.

Old scenes are described, old books are read, old companions are talked to, old stories are repeated. The best energies of the mind are given to these objects, while the mind scarcely heeds, or with enfeebled interest, the scenes, the persons, and events that are present. For this reason, recent objects are so readily forgotten, and the singular contrast is furnished of the memory peculiar to the aged,—most tenacious of objects and events that occurred longest ago, and readily forgetful, if forgetful at all, of those that were most recent." Porter, Human Intellect, § 299.

Two theories, it will be thus observed, are proposed to account for the retentiveness of memory. The first (the physical) assumes a substance on which impressions are inscribed. The second (the psychical) assumes the noncorporeal existence of these impressions.

Sir W. Hamilton, after noticing the hypothesis that memory is an impression on the substance of the brain, says (Lecture xxx. Metap.): "It may be satisfactory to know that this faculty does not stand in need of such crude modes of explanation. . . If the unity and self-activities of the mind be not denied it is manifest that the mental activities which have been once determined must persist, and these corporeal explanations are superfluous." "The problem," he says in a prior passage, "most difficult of solution, is not how a mental activity endures, but how it ever vanishes." To same effect is McCosh on Emotions, p. 69.

As to the power of association, see further, infra, § 454a. Compare Laycock on Defects of Memory, Edin. Med. Jour. April, 1874; Laycock on the Laws of Memory, Jour. Ment. Science, July, 1875.

President Porter cites the following from Coleridge (The Friend, sec. ii. Essay iv.): "No finer opportunity is furnished for observing this variety in the order and method which characterize the memory of different persons, than in listening to the testimony of different witnesses in a court of justice concerning the same transaction. One witness tells a long and rambling story, which follows the order of his own observations in time, and recites the most trifling accompaniments of place and circumstances. Another recounts those only which are material to the object for which he gives testimony."

A great master of legal logic thus speaks: "There are things which pass every day, which make no impression on the mind of one man, but which do make an impression on the mind of another. Men dine at the same mess or table; something occurs in the course of the conversation; one man remembers it, the other does not think of it any more, and the next morning it is forgotten. One man recollects some event in his past life, more or less important, or more or less trivial, which some else present at the same time, if you were to ask him about it, would have no knowledge or recollection of at all. Of all the unfathomable mysteries which the human mind presents, there is none in my view so astonishing as the faculty of memory,

adjusting the mind for only temporary purposes to an immediate object.[8] (b) Imaginative association, as where certain

especially in the matter to which I am now adverting; that is how some things comparatively trivial remain indelibly impressed on the recollection, while others far more important fade away into the darkness of eternal night, and are totally and entirely forgotten. It would not be fair, therefore, to say, 'Here are half a dozen people who were present with you on a certain occasion, and they all recollect a certain fact. If you do not remember it, you cannot be the man.' Still less just would it be if each of those individuals were allowed to pick out some peculiar circumstance which has remained impressed on his individual memory, and then, because the man did not recollect all that the six persons recollected, it should be said, 'Oh, you cannot be the man.' I quite agree we must not deal with a man in that way; it would be unfair and unjust to do so; but there are things which it is next to impossible anyone should forget, and in respect of those things we are entitled to require that a man should exhibit some knowledge, when you know that they happened to a person whom he represents himself to be. Yet even here we must be on our guard; for even things of importance, things that you would have expected to remain impressed on a man's memory, often pass away and are forgotten; but if you find that a multitude of circumstances such as you cannot reasonably believe that a man could have forgotten are unknown, a very difficult case presents itself." Cockburn, C. J., charge in the *Tichborne Case*. See article in London Quarterly Review for January, 1877.

[8] In illustration of the subsequent torpor produced by the concentration of the associative powers for a temporary purpose on a special case, Dr. Carpenter tells us that "a distinguished equity judge has recently favored" him (Dr. C.) with the following experience: "It has frequently occurred to him that further proceedings having been taken in a cause which he had heard some years previously, and had dismissed altogether from his mind, he has found himself in the first instance to have totally forgotten the whole of the former proceedings, not being able to recollect that the cause had been previously before him. But in the course of the argument some word, phrase, or incident has furnished a suggestion that has served at once to bring the whole case vividly into his recollection, as if a curtain had been drawn away, and a complete picture presented to his view. The entireness of his previous forgetfulness was probably due to the habit, common to barristers, of 'getting up' their cases only to forget them as soon as possible." Carpenter, op. cit. art. 343.

"It is now very generally accepted by psychologists as (to say at least) a probable doctrine, that any

objects associated with a particular place are assumed to be at such place at a particular visit.[9] (c) Insane association, as

idea which has once passed through the mind may be thus (by memory) reproduced, at however long an interval, through the instrumentality of suggestive action; the recurrence of any other state of consciousness with which that idea was originally linked by association being adequate to awaken it from its dormant or latent condition, and to bring it within the sphere of consciousness." Carpenter's Ment. Physiology, art. 340.

[9] Realistic details, it should be remembered, may not only be left out, but may be added, in entire unconsciousness of the falsity of the effect produced. That which we are in the habit of associating with an event when real, we invest that event with permanently, and conceive of it as surrounding the event even when unreal. Some years ago two banks were on opposite wings of a particular building in Philadelphia, with entrances very much alike. A gentleman who kept an account with Bank A, and who was accustomed to leave checks without his bank book with the receiving teller, took with him on a particular day a check, intending to hand it in at Bank A. By mistake he went into Bank B, and the check was taken by the teller at Bank B, he supposing that the intention of the depositor was to open an account in the latter bank. Some weeks afterwards, when the depositor took his book to Bank A to be settled, he was surprised to find that he was not credited with the particular check he thought he had left there. "Why, I recollect the conversation I had with you at the time," he said to the teller. The recollection was honest, for he had been in the habit, when he went into the bank, of having a conversation with the teller about some interests they had in common. Recollecting, as he supposed, the fact of the deposit, he associated with it its ordinary incidents. So convinced was he of the deposit that he felt that he could no longer put confidence in the bank, to the negligence of whose officers he imputed the loss. Many months afterwards, however, on visiting Bank B, the teller of that bank said to him, "You do not want to follow up the deposit you made here some time since?" The truth then flashed across him. He had made the deposit in Bank B instead of in Bank A, but believing it to have been in Bank A, and conceiving such to be the case, he associated with the supposed fact the usual incidents of such a fact, and accumulated about it circumstantial details which were natural and exact, but erroneous only in their application to the particular time. See article in Popular Science Monthly for May, 1879, p. 78, and in London Spectator for Dec. 16, 1882.

"Sometimes, indeed, we come so completely to realize such forgotten experiences by repeated picturing

where the unreal, without reason, and even without actual precedent, is associated with the real.

Whatever may be the explanation of defect of memory in a witness, such defect is a legitimate ground of argument to a jury, and must be weighed by them in making up their opinion as to the credibility of a witness. A witness, as we have seen, cannot be excluded on this ground, unless the loss of memory be total.[10] The ordinary way of bringing out such defect before the jury is by cross-examination. But there can be now no question that evidence going to show any impairment of memory is admissible, provided such testimony is direct, and not secondhand.[11] But habits (*e. g.*, use of nar-

them to ourselves, that the ideas of them attain a force and vividness which equal or even exceed that which the actual memory of them would afford. In like manner, when the imagination has been exercised in a sustained and determinate manner, as in the composition of a work of fiction, its ideal creations may be reproduced with the force of actual experiences; and the sense of personal identity may be projected backward (so to speak) into the characters which the author has evolved out of the depths of his own consciousness." Carpenter, op. cit. art. 364.

The tenacity of association may be illustrated by the way in which persons subject to seasickness are sometimes affected with nausea at the sight of a ship tossing on the waves.

"Dr. Plot, in his history of Staffordshire, tells us of an idiot that, chancing to live within the sound of a clock, and always amusing himself with counting the hour of the day whenever the clock struck, the clock being spoiled by some accident, the idiot continued to strike and count the hour without the help of it, in the same manner as he had done when it was entire. Though I dare not vouch for the truth of the story, it is very certain that custom has a mechanical effect upon the body, at the same time that it has a very extraordinary influence upon the mind." Addison, Spectator, No. 447.

An article on the topic in the text will be found in the London New Quart. Mag. April, 1880, p. 310; and see article on Delusions of Memory in North American Review for May, 1882.

[10] See Wharton, Ev. § 410; *Lewis* v. *Eagle Ins. Co.* 10 Gray, 508; *Kuntzman* v. *Weaver,* 20 Pa. 422, 59 Am. Dec. 740.

[11] Supra, §§ 370, 371; *Fairchild* v. *Bascomb,* 35 Vt. 398; *Com.* v. *Cooper,* 5 Allen, 495, 81 Am. Dec. 762, cited supra, § 362; *Brindle* v *M'Ilvaine,* 10 Serg & R. 285, where

cotics) likely to impair memory cannot be put in evidence. Such proof, aside from other objections, is secondary. Actual decay or derangement may be proved; not habits likely to have such an effect.[12]

§ 379. Want of circumstantiality a ground for discredit.—Fabricators deal usually with generalities, avoiding circumstantial references which may be likely to bring their statements into collision with other evidence; and hence it is properly held that a studied avoidance of details by witnesses throws suspicion on their statements.[1] This, however, depends upon the object to be recalled. Events of remote date we cannot expect a witness to remember in detail; and some portion, at least, of such circumstances we must be prepared to find lost in haze. If involving matters of deep interest to the witness, they may be remembered in their effects, but not ordinarily in their particulars. A minute specification of details as to very distant events in which the witness had

it was argued by Gibson, J., that proof of prior paralysis was admissible; *State* v. *Ketchey*, 70 N. C. 621; *Isler* v. *Dewey*, 75 N. C. 466; *Fleming* v. *State*, 5 Humph. 564.

[12] *McDowell* v. *Preston*, 26 Ga. 528. See *Goodwyn* v. *Goodwyn*, 20 Ga. 600; *Alleman* v. *Stepp*, 52 Iowa, 626, 35 Am. Rep. 288, 3 N. W. 636.

As to testing memory, see *Boulden* v. *State*, 102 Ala. 78, 15 So. 341; *People* v. *Goodwin*, 132 Cal. 368, 64 Pac. 561; *Coburn* v. *State*, 151 Ala. 100, 44 So. 58, 15 A. & E. Ann. Cas. 249; *Williams* v. *State*, 144 Ala. 14, 40 So. 405; *State* v. *Stukes*, 73 S. C. 386, 53 S. E. 643; *Sexton* v. *State*, 48 Tex. Crim. Rep. 497, 88 S. W. 348; *Rutherford* v. *State*, 49 Tex. Crim. Rep. 21, 90 S. W. 172; *State* v. *Duffy*, 57 Conn. 525, 18 Atl. 791; *Parmelee* v. *People*, 8 Hun, 623.

[1] See supra, § 107; *Speicot's Case*, 5 Coke, 58; *Presbytery of Auchterarder* v. *Kinnoull*, 6 Clark & F. 698; *Walker* v. *Blassingame*, 17 Ala. 810; *Cornet* v. *Bertelsmann*, 61 Mo. 118. "*Dolosus versatur in generalibus*,—a person intending to deceive deals in general terms,—which has been adopted from the civil law, and is frequently cited and applied in our courts." Broom's Legal Max. 389. But compare comments supra, § 373. As to attacking truthfulness, see infra, § 486. And see articles on the Levy Case in London Spectator for December 16th, 1882.

no personal interest does not enhance the credit;[2] its absence as to such events does not detract from credit.[3] But to matters which the witness, under ordinary circumstances, would remember, the test fairly applies.

§ 380. Falsum in uno does not absolutely discredit.—In criminal, as well as in civil trials, appeal is frequently made to the maxim, *Falsum in uno, falsum in omnibus,* and the criticism is proper in cases in which the special falsity is of a nature to imply falsity as to the whole case;[1] or when the contradictions are so numerous as to show imbecility of memory.[2] Beyond this, however, we cannot go.[3] There are instances, in connection even with an examination in chief, in which a witness may swear falsely in a particular line, and yet with such truthfulness as to the rest of the case that it would work injustice to throw out his entire testimony. A witness's personal assumptions may be false, while his narrative of external objects may be true.[4] He may state some points connected with his own history falsely; he may even swear falsely as to his own relation to the case, yet in other respects he may be accurate. To cross-examinations these observations are pe-

[2] *Willett* v. *Fister,* 18 Wall. 91, 21 L. ed. 804; *Parker* v. *Chambers,* 24 Ga. 518; *Chandler* v. *Hough,* 7 La. Ann. 441.

[2] *Fulton* v. *Maccracken,* 18 Md. 538, 81 Am. Dec. 620; *State* v. *Cowan,* 29 N. C. (7 Ired. L.) 239; *Black* v. *Black,* 38 Ala. 111; infra, § 381–461.

[1] *Hargraves* v. *Miller,* 16 Ohio, 338; *Stoffer* v. *State,* 15 Ohio St. 47, 86 Am. Dec. 470; *Richardson* v. *Roberts,* 23 Ga. 215; *Smith* v. *State,* 23 Ga. 297; *Ivey* v. *State,* 23 Ga. 576; *State* v. *Mix,* 15 Mo. 153; *Paulette* v. *Brown,* 40 Mo. 52; *Brown* v. *Hannibal & St. J. R. Co.* 66 Mo. 588; *Troxdale* v. *State,* 9 Humph. 411; *People* v. *Soto,* 59 Cal. 367. Mr. Webster, in his speech on the impeachment of Judge Prescott, pressed this inference to its extremest limit. See 5 Webster's Works, 540.

[2] *Evans* v. *Lipscomb,* 31 Ga. 71.

[3] See *State* v. *Brown,* 76 N. C. 222; *Pierce* v. *State,* 53 Ga. 365. As to the care to be used in applying this maxim to the testimony of a defendant in his own behalf, see *Moett* v. *People,* 85 N. Y. 373.

[4] Wharton, Ev. § 412.

culiarly applicable. A witness whom it may be attempted to disgrace may swear falsely as to some sore point which may be touched, yet truly as to the rest of the case. On account of such falsity it would be a perversion of justice to reject the rest of the evidence. It may be proper to punish the witness for his perjury; it would not be proper to punish the party innocently calling the witness, by refusing to believe what was true in the witness's testimony. Nor would it be right to tell a jury, who are sworn to determine a case according to the evidence, that they are to reject that which is probably true in the testimony of a witness, because that testimony contains something that is probably false. *Falsa demonstratio non nocet* is a maxim of universal application, so far as it means that we may reject as surplusage a false description that is not vital to the object of controversy.[5] Hence it is that the maxim, *Falsum in uno, falsum in omnibus,* does not hold good except in cases where the party calling the witness is cognizant of the falsehood, or where the falsehood goes to the core of the witness's testimony.[6] The maxim is wholly without force in cases where the misstatement is inadvertent, or attributable to the ordinary fluctuations of memory.[7] Nor, when we undertake to test credibility by this standard, should we fail to remember that even the most conscientious wit-

[5] Broom's Legal Maxims, 629; and see, for other points, Wharton on Evidence, § 945.

[6] See, generally, authorities cited in Wharton, Ev. § 412. And see *Turner* v. *Com.* 86 Pa. 54, 27 Am. Rep. 683; *Pennsylvania Co.* v. *Conlan,* 101 Ill. 93; *State* v. *Brantley,* 63 N. C. 518; *State* v. *Brown,* 76 N. C. 222; *Finley* v. *Hunt,* 56 Miss. 221; *People* v. *Strong,* 30 Cal. 151; *People* v. *Hicks,* 53 Cal. 354; *People* v. *Sprague,* 53 Cal. 491; *Dell* v. *Oppenheimer,* 9 Neb. 454, 4 N. W. 51. See, as to mistakes of sight, 3 Wharton & S. Med. Jur. 4th ed. 1884, §§ 925 et seq.

[7] *Brennan* v. *People,* 15 Ill. 511; *State* v. *Peace,* 46 N. C. (1 Jones, L.) 251; *State* v. *Elkins,* 63 Mo. 159; *Yoes* v. *State,* 9 Ark. 42; and other cases cited in Wharton, Ev. § 412. See supra, § 378; *Jackson ex dem. Neilson* v. *M'Vey,* 18 Johns 330; *McDonel* v. *State,* 90 Ind. 327.

nesses, as has just been stated,[8] may not only forget, but unconsciously misstate details.[9]

§ 381. Literal coincidence of oral statements a ground for suspicion.—"Substantial unity with circumstantial variety" is an incident of reliable testimony;[1] and the circumstantial variety increases in proportion to the comprehensiveness with which details were noticed by the witnesses exam-

[8] Supra, § 378.

[9] Pope's correspondence gives several instances of bad acts falsely avowed, of good acts falsely disavowed, and of plots and counterplots in which truth and falsehood are undistinguishable, but of which the leading object was mischief. When he praised a bishop in one of his letters, Johnson says: "He meant to hurt somebody, but whom I do not know." And Mr. Leslie Stephen, writing of the same letters, says: "It is painful to track the strange deceptions of a man of genius as a detective unravels the misdeeds of an accomplished swindler." Yet falsifications such as these do not compel us to reject as untrue all other statements made in Pope's letters.

This maxim applies only where the statement is as to a material issue, wilfully and intentionally made. *People* v. *Plyler,* 121 Cal. 160, 53 Pac. 553; *People* v. *Sprague,* 53 Cal. 491; *Minich* v. *People,* 8 Colo. 440, 9 Pac. 4, 5 Am. Crim. Rep. 20; *Pierce* v. *State,* 53 Ga. 365; *Swan* v. *People,* 98 Ill. 610; *State* v. *Henderson,* 72 Minn. 74, 74 N. W. 1014; *People* v. *Moett,* 58 How. Pr. 467; *State* v. *Sexton,* 10 S. D. 127, 72 N. W. 84; *State* v. *Thompson,* 21 W. Va. 741; *The Santissima Trinidad,* 7 Wheat. 283, 5 L. ed. 454; *Mack* v. *State,* 48 Wis. 271, 4 N. W. 449; *Prater* v. *State,* 107 Ala. 26, 18 So. 238; *People* v. *Arlington,* 131 Cal. 231, 63 Pac. 347; *Jones* v. *People,* 2 Colo. 351; *Gantling* v. *State,* 40 Fla. 237, 23 So. 857; *Plummer* v. *State,* 111 Ga. 839, 36 S. E. 233; *Waters* v. *People,* 172 Ill. 367, 50 N. E. 148; *Peoples* v. *State* — Miss. —, 33 So. 289; *State* v. *Miller,* 159 Mo. 113, 60 S. W. 67; *Faulkner* v. *Territory,* 6 N. M. 464, 30 Pac. 905; *People* v. *Chapleau,* 121 N. Y. 266, 24 N. E. 469; *State* v. *Freidrich,* 4 Wash. 204, 29 Pac. 1055, 30 Pac. 328, 31 Pac. 332; *Schultz* v. *Territory,* 5 Ariz. 239, 52 Pac. 352, 11 Am. Crim. Rep. 44; *Wilkinson* v. *People,* 226 Ill. 135, 80 N. E. 699; *Pumorlo* v. *Merrill,* 125 Wis. 102, 103 N. W. 464; *Hamilton* v. *State,* 147 Ala. 110, 41 So. 940; *Addis* v. *Rushmore,* 74 N. J. L. 649, 65 Atl. 1036; *People* v. *Dinser,* 49 Misc. 82, 98 N. Y. Supp. 314. But see *Alexander* v. *Blackman,* 26 App. D. C. 541; *Prior* v. *Territory,* 11 Ariz. 169, 89 Pac. 412.

[1] Paley, Ev. pt. 3, c. i. Brougham's Speeches, i. 245.

ined, and the copiousness with which these details are narrated. As to substance, harmony is one of the conditions of truth; as to form, wherever there are truth and liberty, there is variety.

§ 382. Affirmative testimony is stronger than negative.—Testimony, even by a series of witnesses, that they did not see a thing happen which may have happened in the ordinary course of events, at a moment when no one of these witnesses was present, cannot outweigh the testimony of a single reliable witness that he saw the event happen at a time when no one of the others was present.[1] The testimony of a series of witnesses, for instance, that they never saw a party drunk, does not outweigh the testimony of others to the fact of his drunkenness on particular occasions, unless those speaking to the negative cover the same point of time as those speaking to the affirmative.[2] The weight to be attached to negative witnesses depends upon the exhaustiveness of their observations.[3] Put an intelligent and credible witness in a small chamber open throughout to his scrutiny, and his testimony that in that chamber, at a given time, an event did not occur which could not have occurred without his observation, is entitled to the same weight with that of a witness who, equally intelligent and credible, should swear to the occurrence of the event at the same time.[4] A negative

[1] *Stitt* v. *Huidekoper*, 17 Wall. 384, 21 L. ed. 644; *Coughlin* v. *People*, 18 Ill. 266, 68 Am. Dec. 541; *State* v. *Gates*, 20 Mo. 400; *Ralph* v. *Chicago & N. W. R. Co.* 32 Wis. 177, 14 Am. Rep. 725; *Johnson* v. *State*, 14 Ga. 55; *Todd* v. *Hardie*, 5 Ala. 698; *Pool* v. *Devers*, 30 Ala. 672; *Hepburn* v. *Citizens Bank*, 2 La. Ann. 1007, 46 Am. Dec. 564; *Auld* v. *Walton*, 12 La. Ann. 129; *Coles* v. *Perry*, 7 Tex. 109.

[2] *Murphy* v. *People*, 90 Ill. 59.

[3] *Com.* v. *Cooley*, 6 Gray, 350. That a negative may be proved, see supra, § 321; *Burchfield* v. *State*, 82 Ind. 580.

[4] See cases cited in Wharton, Ev. § 415; *McConnell* v. *State*, 67 Ga. 633. Hence it is admissible to show

witness, also, whose attention is concentrated on a particular point, may outweigh an affirmative witness whose attention has not been so concentrated.[5] On the other hand, as the space covered by a negative witness becomes undetermined, his testimony loses in weight.[6] Yet this objection goes to weight, not to admissibility.[7]

§ 383. When credit of witnesses is equal, preponderance to be given to number.—Two witnesses, all other things being equal, are less likely to be mistaken than one,[1] and from this the conclusion is sometimes drawn that the weight of testimony as to a contested fact is to be determined by the number of the witnesses testifying. But witnesses can-

that all guns in a particular neighborhood had been examined to see whether any one of them carried a ball of the same gauge as one by which a wound had been inflicted. *Dean* v. *Com.* 32 Gratt. 912. And see, as to proving a negative by exclusion, *Roberts* v. *State,* 61 Ala. 401.

It has been ruled that the statement of a witness who was very wakeful, and who slept in the room with the defendant, and who saw him go to bed that night and rise the next morning, that the defendant could not have left the room that night, is inadmissible, as matter of opinion. *Bennett* v. *State,* 52 Ala. 371, 1 Am. Crim. Rep. 188. The proper ground of exclusion in such a case, however, would be irrelevancy (*Chambers* v. *Hill,* 34 Mich. 523), though ordinarily the objection would go to weight, and not to admissibility.

[5] *Reeves* v. *Poindexter,* 53 N. C. (8 Jones, L.) 308.

[6] *Abel* v. *Fitch,* 20 Conn. 90; *Thomas* v. *Degraffenreid,* 17 Ala. 602. See *Matthews* v. *Poythress,* 4 Ga. 287.

[7] *State* v. *Phair,* 48 Vt. 366.

While positive testimony is always to be preferred to negative, still a greater weight is to be attached to the position and opportunity of the witness for observation, or the direction of his attention to the fact, than to the affirmative or negative form of his testimony. See *Ralph* v. *Chicago & N. W. R. Co.* 32 Wis. 177, 14 Am. Rep. 725; *Humphries* v. *State,* 100 Ga. 260, 28 S. E. 25; *Kimbrough* v. *State,* 101 Ga. 583, 29 S. E. 39; *Stitt* v. *Huidekoper,* 17 Wall. 384, 21 L. ed. 644. But see *Haun* v. *Rio Grande Western R. Co.* 22 Utah, 346, 62 Pac. 908; *Cowart* v. *State,* 120 Ga. 510, 48 S. E. 198; *Warrick* v. *State,* 125 Ga. 133, 53 S. E. 1027. See *Atlantic Coast Line R. Co.* v. *O'Neill,* 127 Ga. 685, 56 S. E. 986.

[1] See *Dowdell* v. *Neal,* 10 Ga. 148.

not be treated as units, to be devested of their own distinctive claims to credit. It may well happen that one intelligent and honest witness may outweigh several who are ignorant or unreliable.[2] Nor should it be forgotten that one witness corroborated by facts or documents may outweigh a multitude whose testimony may have been the result of imperfect observation, or may have been influenced by prejudice.[3]

§ 384. Credibility is for jury.—Credibility is therefore a matter of induction, to be determined by the jury, under such instructions as to the reason of the case, as may be given by the court;[1] and the presumptions usually invoked in this relation are presumptions of fact, based on free logic, and are not presumptions of technical law.[2] It need scarcely be added that the importance of applying psychological tests resting on the motives which may lead a witness to deceive, or the character which deprives him of trustworthiness, is enhanced by the statutory removal of disqualification from interest, from infamy, and from atheism.

[2] Cockburn, C. J., in the *Tichborne Case; McLees* v. Felt, 11 Ind. 218; *Glenn* v. *Farmers Bank,* 70 N. C. 191; *Boylston* v. *Bain,* 90 Ill. 283. See *Sanborn* v. *Babcock,* 33 Wis. 400.

[3] See supra, § 10; *McCrum* v. Corby, 15 Kan. 112; *Parrish* v. *State,* 45 Tex. 51.

[1] See *Kintner* v. *State,* 45 Ind. 175; *Jones* v. *State,* 48 Ga. 163; *Minor* v. *State,* 63 Ga. 318; *Grimes* v. *State,* 63 Ala. 166; *Ford* v. *State,* 71 Ala. 385; *People* v. *Lee,* 2 Utah, 441; *Lunsford* v. *State,* 9 Tex. App. 217; *Wilbanks* v. *State,* 10 Tex. App. 642; *Pickens* v. *State,* 13 Tex. App. 353; *State* v. *Miller,* 53 Iowa, 209, 4 N. W. 1083; *Mack* v. *State,* 48 Wis. 271, 4 N. W. 449. In Missouri comments on the weight of the evidence are forbidden by statute. *State* v. *Bell,* 70 Mo. 633.

As to credibility of witness as to character in criminal case, see note in 14 L.R.A.(N.S.) 739.

As to caution by court to jury as to credibility of accused as witness in his own behalf, see note in 19 L.R.A.(N.S.) 802.

[2] Wharton, Ev. §§ 124, 417. Among these presumptions may be noticed those drawn from the witness's manner. Infra, § 751.

§ 384a. Intoxicated witnesses may be excluded.—When the court is satisfied that a witness is so drunk as to be unable to testify, he may be excluded, or his examination postponed until he is sober;[1] though to exclude a witness, it is not sufficient that he has been found to be a habitual drunkard under the statute.[2] To impeach credibility, drunkenness at the time of the event testified to may be proved.[3] Evidence of the use of opium cannot be introduced to impair credit, unless it be shown that the witness was under the influence of opium when examined, or that his powers of observation or recollection were affected by the habit.[4]

[1] *Hartford* v. *Palmer,* 16 Jones, 143; *Gould* v. *Crawford,* 2 Pa. St. 89; *State* v. *Underwood,* 28 N. C (6 Ired. L.) 96. That the jury are to pass on the question, see *State* v. *McNinch,* 12 S. E. 89.

[2] *Gebhart* v. *Shindle,* 15 Serg. & R. 235. Compare authorities cited supra, § 378.

[3] *Duffy* v. *Com.* 6 W. N. C. 311; supra, § 369.

[4] Supra, § 378; *McDowell* v. *Preston,* 26 Ga. 528. As to insane witnesses, see supra, § 370; infra, § 399.

The jury are the sole judges of the credibility of the witness. *United States* v. *Murphy,* 16 Pet. 203, 10 L. ed. 938; *United States* v. *Post,* 128 Fed. 950; *Hamilton* v. *State,* 62 Ark. 543, 36 S. W. 1054, *Wilkerson* v. *State,* 140 Ala. 165, 37 So. 265; *Brown* v. *State,* 142 Ala. 287, 38 So. 268; *Hamilton* v. *State,* 147 Ala. 110, 41 So. 940; *People* v. *Eckart,* 16 Cal. 111; *People* v. *Gibson,* 53 Cal. 601; *People* v. *Waysman,* 1 Cal. App. 246, 81 Pac. 1087; *Davidson* v. *People,* 4 Colo. 145; *Fincher* v. *People,* 26 Colo. 169, 56 Pac. 902; *Lynch* v. *People,* 33 Colo. 128, 79 Pac. 1015; *Boles* v. *People,* 37 Colo. 41, 86 Pac. 1030; *State* v. *Stewart,* 6 Penn. (Del.) 435, 67 Atl. 786; *Hampton* v. *State,* 50 Fla. 55, 39 So. 421; *Peadon* v. *State,* 46 Fla. 124, 35 So. 204; *Glover* v. *State,* 22 Fla. 493; *Sindy* v. *State,* 120 Ga. 202, 47 S. E. 554; *Robinson* v. *State,* 128 Ga. 254, 57 S. E. 315; *Quigg* v. *People,* 211 Ill. 17, 71 N. E. 886; *Waters* v. *People,* 172 Ill. 367, 50 N. E. 148; *State* v. *Barber,* 2 Kan. App. 679, 43 Pac. 800; *Barnard* v. *Com.* 10 Ky. L. Rep. 143, 8 S. W. 444; *People* v. *Com.* 87 Ky. 487, 9 S. W. 509, 810; *State* v. *Breckenridge,* 33 La. Ann. 310; *State* v. *Bazile,* 50 La. Ann. 21, 23 So. 8; *Com.* v. *Barry,* 9 Allen, 276; *State* v. *Fogg,* 206 Mo. 696, 105 S. W. 618; *State* v. *Wigger,* 196 Mo. 90, 93 S. W. 390; *State* v. *Lortz,* 186 Mo. 122, 84 S. W. 906; *State* v. *Lucas,* 124 Or. 168, 33 Pac. 538; *Com.* v. *Mika,* 171 Pa. 273, 33 Atl. 65; *Com.* v. *Winkelman,* 12 Pa. Super. Ct. 497. See *Smith* v. *State,* 137 Ala.

§ 385. Counsel in case may be witnesses.—So far as concerns the question of technical competency, a lawyer concerned in a case cannot be excluded from the witness box on account of his professional connection with the case; though it has been held that he may in the discretion of the court be precluded from recklessly and unnecessarily uniting the functions of counsel and witness.[1] The mere fact that the case has been opened by an attorney who had previously cross-examined witnesses on the other side does not make him incompetent as a witness for his client.[2] Where, however, counsel thus become witnesses, it may be a proper exercise of the discretion of the court to prohibit them from subsequently addressing the jury on the case thus made up; and the testifying of the counsel should be confined to extreme cases where there is no other proof.[3]

22, 34 So. 396, 13 Am. Crim. Rep. 410; *Walters* v. *Syracuse Rapid Transit R. Co.* 178 N. Y. 50, 70 N. E. 98; *State* v. *Anderson*, 24 S. C. 109; *Doss* v. *State*, 21 Tex. App. 505, 57 Am. Rep. 618, 2 S. W. 814; *Franklin* v. *State*, Tex. Crim. Rep. 28 S. W. 472; *State* v. *Thompson*, 21 W. Va. 741; *Heldt* v. *State*, 20 Neb. 492, 47 Am. Rep. 835, 30 N. W. 626; *United States* v. *Hall*. 10 L.R.A. 324, 44 Fed. 864; *People* v. *Hite*, 8 Utah, 461, 33 Pac. 254; *Atzroth* v. *State*, 10 Fla. 207; *Com.* v. *Loewe*, 162 Mass. 518, 39 N. E. 192; *Durant* v. *People*, 13 Mich. 351; *Chezen* v. *State*, 56 Neb. 496, 76 N. W. 1056; *State* v. *Castello*, 62 Iowa, 404, 17 N. W. 605; *Finch* v. *State*, 81 Ala. 41, 1 So. 565; *People* v. *Kahler*, 93 Mich. 625, 53 N. W. 826; *State* v. *Gleim*, 17 Mont. 17, 31 L.R.A. 294, 52 Am. St. Rep. 655, 41 Pac. 998, 10 Am. Crim. Rep. 46; *Eldridge* v. *State*, 27 Fla. 162, 9 So. 448; *State* v. *White*, 10 Wash. 611, 39 Pac. 160, 41 Pac. 442; *State* v. *King*, 88 Minn. 175, 92 N. W. 965; *Com.* v. *Howe*, 9 Gray, 110; *State* v. *Feltes*, 51 Iowa, 495, 1 N. W. 755; *State* v. *Grear*, 28 Minn. 426, 41 Am. Rep. 296, 10 N. W. 472; *People* v. *Webster*, 139 N. Y. 73, 34 N. E. 730.

[1] *State* v. *Cook*, 23 La. Ann. 347. See *Tilton* v. *Beecher*, 2 Abbott's Rep. of Trial of Henry Ward Beecher, 48, for an illustration of a case in which such testimony was admitted.

[2] *Follansbee* v. *Walker*, 72 Pa. 228, 13 Am. Rep. 671.

[3] See *Cobbett* v. *Hudson*, 1 El. & Bl. 11, 22 L. J. Q. B. N. S. 11, 17 Jur. 488, 1 Week. Rep. 54; *Ross* v. *Demoss*, 45 Ill. 447; *Madden* v. *Farmer*, 7 La. Ann. 580; *Boissy* v *Lacou*, 10 La. Ann. 29. As to the

Privilege in professional communications is hereafter considered.[4]

V. Number of Witnesses Necessary.

§ 385a. Quantum of proof.—The common law differs from the civil law and from all of the ancient laws of which we have any reliable history, as to the quantum of proof. Without regard to the number of witnesses, the general requirement of the law is that the sufficiency of proof is for the court or the jury as triers of fact, and if they are satisfied, the proof is sufficient although made through only one witness.[1] It follows from this that where a fact has been proved by one witness, it is not error to exclude merely cumulative evidence of the same fact.[2]

§ 386. In treason two witnesses are required.—In high treason, at common law, two witnesses are required, both before the grand jury and at the trial; both of the witnesses to be to the same overt act. In England, the original statute of Edward,[1] although requiring both witnesses to be to the same overt act, was held to mean that there might be one witness to one overt act and another witness to another overt act of the

Georgia statute excluding attorneys from testifying for their clients, see *Churchill* v. *Corker*, 25 Ga. 479; *Hines* v. *State*, 26 Ga. 614; *Sharman* v. *Morton*, 31 Ga. 54.

[4] Infra, § 496.

[1] *McLain* v. *Com.* 99 Pa. 86; *State* v. *McGlothlen*, 56 Iowa, 544, 9 N. W. 893. See Thayer's Cases on Ev. p. 1067; 3 Bl. Com. 370; *Lipsey* v. *People*, 227 Ill. 364, 81 N. E. 348; *Com.* v. *Stebbins*, 8 Gray, 492; *Com.* v. *Pioso*, 18 Lanc. L. Rev. 185; *State* v. *Kane*, 1 M'Cord, L. 482.

[2] *People* v. *Westlake*, 62 Cal. 303; *People* v. *Reed*, 48 Cal. 553.

[1] 1 Ed. VI. chap. 12, § 22; 5 and 6 Ed. VI. chap. 11, § 12; *Lilburne's Trial*, 4 How. St. Tr. 1269; *Regicide's Case*, J. Kelyng, 9; *Stafford's Trial*, 7 How. St. Tr. 1293, also 1527; *Colledge's Trial*, 8 How. St. Tr. 549; *Parkyn's Trial*, 13 How. St. Tr. 131; *Vaughan's Trial*, 13 How. St. Tr. 485; 7 Wm. III. chap. 3, § 2; *Reg.* v. *McCafferty*, 10 Cox, C. C. 603, Ir. Rep. 1 C. L. 365, 15 Week. Rep. 1022.

same species of treason,[2] and, in one case[3] it has been intimated that the same construction might apply in this country. But, as Mr. Wigmore so succinctly observes: "The opportunity of detecting the falsity of the testimony, by sequestering the two witnesses and exposing their variance in details, is wholly destroyed by permitting them to speak to different acts."[4] The rule as adopted in this country, by all the constitutional provisions, both state and Federal, properly requires that two witnesses shall testify to the same overt act.[5] This also is now the rule in England.[6] But the rule as to two witnesses has not been held to apply to preliminary hearing,[7] and it seems that one witness with corroborating circumstances will justify the finding of an indictment,[8] and two witnesses are not necessary to any fact other than the overt act.[9] If the

[2] *Rex* v. *Jellias,* 1 East, P. C. 130.

[3] *Burr's Trial,* Fed. Cas. Nos. 14,693 and 14,694a; *United States* v. *Hanway,* 2 Wall. Jr. 139, Fed. Cas. No. 15,299. See contra, *United States* v. *Fries,* 3 Dall. 515, Wharton, St. Tr. 480, Fed. Cas. No. 5,126.

[4] Wigmore, Ev. § 2038.

[5] See Federal and state Constitutions.

Owing to the spirit of the times prevailing after the close of the War of the Revolution, cases of treason were prosecuted with great animosity. The nation was not then so completely seated in power but that many fancied acts were construed as treasonable, and to secure the quantum of proof through the mouth of two witnesses against legislative change, the Constitution in terms requires two witnesses to the same overt act.

In Scott's edition of Madison's Journal of the Federal Convention, vol. II. pages 564–566, it is stated: "It was then moved to insert after the words 'two witnesses' the additional words, 'to the same overt act', and Dr. Franklin wished this amendment to take place. Prosecutions for treason were generally virulent, and perjury too easily made use of against the innocent."

[6] Russell, Crimes, 7th Eng. ed. p. 2294, and note a.

[7] *United States* v. *Greiner,* 4 Phila. 396, Fed. Cas. No. 15,262. See also charge to Grand Jury, 2 Wall. Jr. 134, Fed. Cas. No. 18,276.

[8] *Burr's Trial,* Fed. Cas. Nos. 14,693, 14, 694a; *United States* v. *Hanway,* 2 Wall. Jr. 139, Fed. Cas. No. 15,299.

[9] Frost, C. L. 242; 1 East, P. C. 130.

jury does not give credit to both witnesses, then the defendant must be acquitted.[10]

The confession contemplated by the Constitutions is pleading guilty in open court,[11] for any other confession, whether made to persons in authority or not, is merely evidence in the case, and must be proved, like other facts, by two witnesses, and it will have its weight with the jury according to circumstances, like any other extrajudicial confession;[12] but this of itself is not sufficient to sustain a conviction.[13]

Evidence may be given of other acts where connected with that on which the indictment is founded, even though occurring elsewhere than in the place averred,[14] and declarations accompanying the act charged may be shown to prove the intent.[15] But evidence of acts constituting in themselves a substantive offense cannot be given unless they directly tend to prove the charge averred,[16] and the rule against the admission of evidence of collateral offenses applies in treason as well, and excludes evidence of another act which constitutes an independent crime for which the defendant is indicted.[17]

§ 387. Perjury; corroboration necessary.—Perjury is the taking of an oath known to be false, by one who is lawfully required to swear to the truth in any judicial proceed-

[10] *R.* v. *Palmer*, 3 State, Tr. 56; *Palmer's Trial*, 7 How. St. Tr. 1067.

[11] Russell, Crimes, 7th Eng. ed. 2294b. See *Respublica* v. *M'Carty*, 2 Dall. 86, 1 L. ed. 300; *United States* v. *Fries*, 3 Dall. 515, Wharton, St. Tr. 482, 586, 594, Fed. Cas. No. 5,126.

[12] 2 Russell, Crimes, p. 2294b.

[13] *United States* v. *Fries*, 3 Dall. 515, 1 L. ed. 701, Fed. Cas. Nos. 5,126, 15,170.

[14] *United States* v. *Fries*, 3 Dall. 515, 1 L. ed. 701, Fed. Cas. Nos. 5,126, 15,170; *Burr's Trial*, Fed. Cas. No. 14,693. And see Fed. Cas. No. 14,694a.

[15] *Burr's Trial*, Fed. Cas. No. 14,694; *United States* v. *Lee*, 2 Cranch, C. C. 104, Fed. Cas. No. 15,584.

[16] *Burr's Trial*, Fed. Cas. No. 14,693.

[17] *United States* v. *Mitchell*, 2 Dall. 357, 1 L. ed. 414, Fed. Cas. No. 15,789.

ing, and then giving testimony falsely in a matter material to the point in issue;[1] there must be proof of a wilful intention to swear falsely;[2] it must be shown beyond a reasonable doubt that the accused knew its falsity, and that he wilfully, corruptly, and deliberately swore it to be true.[3] Its materiality must be established,[4] and this is shown not by its effect, but

[1] *Com.* v. *Smith,* 11 Allen, 243. See *Gardner* v. *State,* 80 Ark. 264, 97 S. W. 48.

[2] 1 Hawk, P. C. 329; *McLaren* v. *State,* 4 Ga. App. 643, 62 S. E. 138; *United States* v. *Richards,* 149 Fed. 443; *People* v. *Martin,* 175 N. Y. 315, 96 Am. St. Rep. 628, 67 N. E. 589, 15 Am. Crim. Rep. 591; *State* v. *Faulkner,* 175 Mo. 546, 75 S. W. 116; *State* v. *Luper,* — Or. —, 95 Pac. 811; *Goodwin* v. *State,* 118 Ga. 770, 45 S. E. 620.

[3] *People* v. *German,* 110 Mich. 244, 68 N. W. 150; *Nurnberger* v. *United States,* 84 C. C. A. 377, 156 Fed. 721; *United States* v. *Kenney,* 90 Fed. 257; *People* v. *Ross,* 103 Cal. 425, 37 Pac. 379; *Davidson* v. *State,* 22 Tex. App. 372, 3 S. W. 662; *People* v. *Stone,* 32 Hun, 41; *McClerkin* v. *State,* 20 Fla. 879; *Williams* v. *Com.* 91 Pa. 493; *State* v. *Brown,* 110 La. 591, 34 So. 698, 15 Am. Crim. Rep. 286; *People* v. *VanTassel,* 26 App. Div. 445, 50 N. Y. Supp. 53; *Tidwell* v. *State,* 40 Tex. Crim. Rep. 38, 47 S. W. 466, 48 S. W. 184; *Goodwin* v. *State,* 118 Ga. 770, 45 S. E. 620; *State* v. *Loos,* 145 Iowa, 170, 123 N. W. 962.

[4] *Rich* v. *United States,* 1 Okla. 354, 33 Pac. 804; *Com.* v. *Pollard,* 12 Met. 225; *Com.* v. *Parker,* 2 Cush. 212; *Nelson* v. *State,* 32 Ark. 192; *People* v. *Ah Sing,* 95 Cal. 657, 30 Pac. 797; *People* v. *Ostrander,* 110 Mich. 60, 67 N. W. 1079; *State* v. *Aikens,* 32 Iowa, 403; *State* v. *Kennerly,* 10 Rich. L. 152; *Wood* v. *People,* 59 N. Y. 117; *State* v. *Byrd,* 28 S. C. 18, 13 Am. St. Rep. 660, 4 S. E. 793; *State* v. *Faulkner,* 175 Mo. 546, 75 S. W. 116; *Askew* v. *State,* 3 Ga. App. 79, 59 S. E. 311; *People* v. *Collins,* 6 Cal. App. 492, 92 Pac. 513; *State* v. *Hoel,* 77 Kan. 334, 94 Pac. 267; *State* v. *Gordon,* 196 Mo. 185, 95 S. W. 420; *People* v. *Davis,* 122 App. Div. 569, 107 N. Y. Supp. 426; *McVicker* v. *State,* 52 Tex. Crim. Rep. 508, 107 S. W. 834; *State* v. *Dineen,* 203 Mo. 628, 102 S. W. 480; *State* v. *Brown,* 111 La. 170, 35 So. 501; *Bledsoe* v. *State,* 64 Ark. 474, 42 S. W. 899; *State* v. *Moran,* 216 Mo. 550, 115 S. W. 1126; *State* v. *Cline,* 146 N. C. 640, 61 S. E. 522; *People ex rel. Hegeman* v. *Corrigan,* 195 N. Y. 1, 87 N. E. 792; *People* v. *Chadwick,* 4 Cal. App. 63, 87 Pac. 384, 389; *Brown* v. *State,* 47 Fla. 16, 36 So. 705; *Wilkinson* v. *People,* 226 Ill. 135, 80 N. E. 699; *Leak* v. *State,* 61 Ark. 599, 33 S. W. 1067; *Masterson* v. *State,* 144 Ind. 240, 43 N. E. 138; *State* v. *Swafford,* 98 Iowa, 362, 67 N. W. 284; *People* v. *Macard,* 109 Mich. 623, 67 N. W. 968.

by the effect it could have had, had the testimony been true in fact.[5]

At common law the evidence of one witness is not sufficient to warrant a conviction for perjury, unless it is corroborated in some material particular. But for this rule, in such a case there would be only one oath against another;[6] the rule is founded on substantial justice,[7] and the court should so instruct the jury.[8]

The rule is now settled that whenever the falsity of the defendant's statement can be proved beyond a reasonable doubt, it is sufficient to sustain a conviction.[9] Hence the testimony of a witness to falsity is sufficiently sustained by a written admission of the defendant.[10] But the corroboration must

[5] *State* v. *Hoel,* 77 Kan. 334, 94 Pac. 267.

[6] Russell, Crimes, 7th Eng. ed. p. 2294.

[7] *Reg.* v. *Yates,* Car. & M. 139, 5 Jur. 636.

[8] *Crandison* v. *State,* 29 Tex. App. 186, 15 S. W. 174; *Wilson* v. *State,* 27 Tex. App. 47, 11 Am. St. Rep. 180, 10 S. W. 749 (all Texas criminal cases in accord).

[9] *Reg.* v. *Boulter,* 2 Den. C. C. 396, 5 Cox. C. C. 543, 3 Car. & K. 236, 21 L. J. Mag. Cas. N. S. 57, 16 Jur. 135; *Reg.* v. *Roberts,* 2 Car. & K. 607; *Reg.* v. *Gardiner,* 8 Car. & P. 737; *Champney's Case,* 2 Lewin, C. C. 258; *Reg.* v. *Braithwaite,* 8 Cox, C. C. 254, 1 Fost. & F. 639; *Reg.* v. *Hook,* 8 Cox, C. C. 5, Dears. & B. C. C. 606, 27 L. J. Mag. Cas. N. S. 222, 4 Jur. N. S. 1026, 6 Week. Rep. 518; *United States* v. *Wood,* 14 Pet. 440, 10 L. ed. 532; *Woodbeck* v. *Keller,* 6 Cow. 118; *Williams* v. *Com.* 91 Pa. 493; *Crusen* v. *State,* 10 Ohio St. 258; *Hendricks* v. *State,* 26 Ind. 493; *State* v. *Raymond,* 20 Iowa, 582; *State* v. *Hayward,* 1 Nott & M'C. 547; *State* v. *Molier,* 12 N. C. (1 Dev. L.) 263; Wharton, Crim. Law, 10th ed. 1319; *Gabrielsky* v. *State,* 13 Tex. App. 439.

[10] *Rex* v. *Mayhew,* 6 Car. & P. 315; *Reg.* v. *Hook,* 8 Cox, C. C. 5, Dears. & B. C. C. 606, 27 L. J. Mag. Cas. N. S. 222, 4 Jur. N. S. 1026, 6 Week. Rep. 518; *United States* v. *Wood,* 14 Pet. 430, 10 L. ed. 527; *State* v. *Molier,* 12 N. C. (1 Dev. L.) 263; *State* v. *Swafford,* 98 Iowa, 362, 67 N. W. 284. But see *State* v. *Buckley,* 18 Or. 228, 22 Pac. 838. See *United States* v. *Brown,* 6 Utah, 115, 21 Pac. 461 (dictum); *United States* v. *De Amador,* 6 N. M. 173, 27 Pac. 488; *Brooks* v. *State,* 29 Tex. App. 582, 16 S. W. 542; *State* v. *Hunter,* 181 Mo. 316, 80 S. W. 955; *Schmidt* v. *United States,* 66 C. C. A. 389, 133 Fed. 257.

go beyond slight and indifferent particulars.[11] The corroboration must go to some one particular false statement. It is not sufficient to prove by one inadequate line of testimony that one statement made by the defendant is false, and then by another inadequate line of testimony that another statement made by him is false.[12] There must be full corroboration for each assignment.[13]

As to the nature of the corroboration, no rule can be laid down,[14] but the corroboration is required for the fact as a whole, and not for every constituent element of it.[15] The rule that the evidence of an accomplice must be corroborated applies to perjury. Where corroboration is required, it cannot be furnished by the testimony of an accomplice, and whether the witness is or is not an accomplice is a fact for the jury to determine.[16]

The rule is universal, in terms, that the testimony of one

[11] *Reg.* v. *Yates,* Car. & M. 139, 5 Jur. 636; *Simmons* v. *Simmons,* 11 Jur. 830; *Reg.* v. *Boulter,* 2 Den. C. C. 396, 5 Cox, C. C. 543, 3 Car. & K. 236, 21 L. J. Mag. Cas. N. S. 57, 16 Jur. 135; *Dodge* v. *State,* 24 N. J. L. 455; *People* v. *Davis,* 61 Cal. 536.

[12] *Reg.* v. *Virrier,* 12 Ad. & El. 317, 4 Perry & D. 161, 9 L. J. Mag. Cas. N. S. 120; *Reg.* v. *Parker,* Car. & M. 639; Wharton, Crim. Law, 10th ed. §§ 1317 et seq.

[13] *Lea* v. *State,* 64 Miss. 278, 1 So. 235; *Williams* v. *Com.* 91 Pa. 493; *Reg.* v. *Parker,* Car. & M. 639; *Reg.* v. *Hare,* 13 Cox, C. C. 174. See *Barton* v. *Com.* 17 Ky. L. Rep. 580, 32 S. W. 171, 396; *Com.* v. *Davis,* 92 Ky. 460, 18 S. W. 10; *Wells* v. *Com.* 9 Ky. L. Rep. 658, 6 S. W. 150.

But the evidence corroborating the single witness must be strong and positive. See *Gandy* v. *State,* 27 Neb. 707, 43 N. W. 747, 44 N. W. 108; *Hernandez* v. *State,* 18 Tex. App. 134, 51 Am. Rep. 295; *People* v. *Smith,* 3 Cal. App. 68, 84 Pac. 452.

[14] Wigmore, Ev. § 2042 (2).

[15] *Reg.* v. *Roberts,* 2 Car. & K. 607, 614; *State* v. *Courtright,* 66 Ohio St. 35, 63 N. E. 590, 15 Am. Crim. Rep. 584; *United States* v. *Hall,* 10 L.R.A. 324, 44 Fed. 864; *People* v. *Rodley,* 131 Cal. 240, 63 Pac. 351; *State* v. *Wood,* 17 Iowa, 18; *State* v. *Jean,* 42 La. Ann. 946, 8 So. 480; *Com.* v. *Pollard,* 12 Met. 225; *Holt* v. *State,* 48 Tex. Crim. Rep. 559, 89 S. W. 838; *State* v. *Rutledge,* 37 Wash. 523, 79 Pac. 1123.

[16] *People* v. *Gilhooley,* 187 N. Y. 551, 80 N. E 1116.

witness corroborated is sufficient to sustain a conviction.[17] The general rule as to corroboration ought not to be defined further than that the corroboration of the witness must be clear, positive, and strong, so that, in connection with the evidence of the witness who testifies directly, it will convince the jury beyond a reasonable doubt.[18] The jury ought always to be instructed not to convict unless the testimony of the principal witness is so corroborated that they believe it to be true beyond a reasonable doubt.

§ 388. Corroboration in offenses against chastity.—At common law, in the trial of all offenses against the chastity of women, the testimony of the injured party was sufficient to sustain a conviction, neither a second witness nor corroboration being required[1] and in the absence of a statute the jury

[17] See Penal Codes of various states. *Mackin* v. *People*, 115 Ill. 312, 56 Am. Rep. 167, 3 N. E. 222, 6 Am. Crim. Rep. 556; *State* v. *Blize*, 111 Mo. 464, 20 S. W. 210; *Territory* v. *Williams*, 9 N. M. 400, 54 Pac. 232; *Meeks* v. *State*, 32 Tex. Crim. Rep. 420, 24 S. W. 98.

[18] *Com.* v. *Butland*, 119 Mass. 317; *State* v. *Miller*, 44 Mo. App. 159; *State* v. *Gibbs*, 10 Mont. 213, 10 L.R.A. 749, 25 Pac. 289; *Waters* v. *State*, 30 Tex. App. 284, 17 S. W. 411; *Heflin* v. *State*, 88 Ga. 151, 30 Am. St. Rep. 147, 14 S. E. 112; *United States* v. *Hall*, 10 L.R.A. 324, 44 Fed. 864; *Harris* v. *People*, 64 N. Y. 148, 2 Am. Crim. Rep. 416; *People* v. *Hayes*, 70 Hun, 111, 24 N. Y. Supp. 194; *State* v. *Pratt*, 21 S. D. 305, 112 N. W. 152; *Grady* v. *State*, 49 Tex. Crim. Rep. 3, 90 S. W. 38; *Stamper* v. *Com.* 30 Ky. L. Rep. 992, 100 S. W. 286; *State* v. *Hunter*, 181 Mo. 316, 80 S. W. 955; *Nance* v. *State*, 126 Ga. 95, 54 S. E. 932; *Howell* v. *Com.* 31 Ky. L. Rep. 983, 104 S. W. 685; *Parham* v. *State*, 3 Ga. App. 468, 60 S. E. 123; *Bell* v. *State*, 5 Ga. App. 701, 63 S. E. 860.

[1] *Boddie* v. *State*, 52 Ala. 395; *Barnett* v. *State*, 83 Ala. 40, 3 So. 612; *Curby* v. *Territory*, 4 Ariz. 371, 42 Pac. 953; *People* v. *Fleming*, 94 Cal. 308, 29 Pac. 647; *Doyle* v. *State*, 39 Fla. 155, 63 Am. St. Rep. 159, 22 So. 272; *State* v. *Connelly*, 57 Minn. 482, 59 N. W. 479; *Monroe* v. *State*, 71 Miss. 196, 13 So. 884; *State* v. *Dusenberry*, 112 Mo. 277, 20 S. W. 461; *State* v. *Marcks*, 140 Mo. 656, 41 S. W. 973, 43 S. W. 1095; *Gonzales* v. *State*, 32 Tex. Crim. Rep. 611, 25 S. W. 781; *Wilcox* v. *State*, 102 Wis. 650, 78 N. W. 763; *State* v. *Seiler*, 106 Wis. 346, 82 N. W. 167; *Lanphere* v. *State*,

may determine the issues in favor of the complainant upon her testimony alone.[2]

In England, in bastardy proceedings, it seems necessary, to sustain an order of affiliation, that the evidence of the mother should be corroborated in some material particular by other testimony.[3] In prosecutions for seduction, however, by statute corroboration is usually required.[4] In seduction, where corroboration is required in general terms as "by other evidence," it is sufficient if the injured party is corroborated as to some material fact, so that the jury is satisfied of her

114 Wis. 193, 89 N. W. 128; *Tway* v. *State,* 7 Wyo. 74, 50 Pac. 188; *Ferguson* v. *Moore,* 98 Tenn. 342, 39 S. W. 341; *State* v. *Nichols,* 29 Minn. 357, 13 N. W. 153; *Olson* v. *Peterson,* 33 Neb. 358, 50 N. W. 155; *Robb* v. *Hewitt,* 39 Neb. 217, 58 N. W. 88; *State* v. *Meares,* 60 S. C. 527, 39 S. E. 245; *People* v. *Wade,* 118 Cal. 672, 50 Pac. 841; *Washington* v. *State,* 124 Ga. 423, 52 S. E. 910.

The prosecutrix is not looked upon as an accomplice. *Keller* v. *State,* 102 Ga. 506, 31 S. E. 92. But see *Polk* v. *State,* 40 Ark. 482, 48 Am. Rep. 17 (construing statute).

Corroboration does not apply to seduction. See *People* v. *Wade,* 118 Cal. 672, 50 Pac. 841.

[2] *State* v. *Meares,* 60 S. C. 527, 39 S. E. 245; *State* v. *McGlothlen,* 56 Iowa, 544, 9 N. W. 893; *State* v. *Nichols,* 29 Minn. 357, 13 N. W. 153; *Noonan* v. *Brogan,* 3 Allen, 481; *Robb* v. *Hewitt,* 39 Neb. 217, 58 N. W. 88; *State ex rel. Zehntner* v. *Tipton,* 15 Mont. 74, 38 Pac. 222; *People ex rel. Kenfield* v. *Lyon,* 83 Hun, 303, 31 N. Y. Supp. 942; Compare *McClellan* v. *State,* 66 Wis. 335, 28 N. W. 347; *Olson* v. *Peterson,* 33 Neb. 358, 50 N. W. 155; *Miller* v. *State,* 110 Ala. 69, 20 So. 392; *Evans* v. *State,* 165 Ind. 369, 2 L.R.A.(N.S.) 619, 74 N. E. 244, 6 A. & E. Ann. Cas. 813 same case on denial of rehearing, 165 Ind. 372, 2 L.R.A.(N.S.) 621, 75 N. E. 651, 6 A. & E. Ann. Cas. 814; *Matteson* v. *People,* 122 Ill. App. 66; *Gatzemeyer* v. *Peterson,* 68 Neb. 832, 94 N. W. 974.

[3] In England, corroboration is necessary. Russell, Crimes, 7th Eng. ed. pp. 940, 943, 956, 2293, and 2294; *Harvey* v. *Anning,* 87 L. T. N. S. 687, 67 J. P. 73; *Reg.* v. *Roberts,* 2 Car. & K. 614; *Hodges* v. *Bennett,* 5 Hurlst. & N. 625, 29 L. J. Mag. Cas. N. S. 224, 2 L. T. N. S. 190, 8 Week. Rep. 463; *Reg.* v. *Read,* 9 Ad. & El. 619, 8 L. J. Mag. Cas. N. S. 19, 1 Perry & D. 413, 2 W. W. & H. 94.

[4] See Federal and state statutes relating to rape, bastardy, and seduction, as to the corroboration required.

credibility;[5] but as such prosecutions are almost entirely statute controlled, the particular statute should be looked to as to the quantum of proof. Some statutes require corroboration only as to the promise of marriage,[6] other statutes to every material fact including the promise to marry,[7] and still other statutes that corroboration extends to facts tending to connect the defendant with the offense.[8]

§ 389. Witnesses in divorce proceedings.—Divorce proceedings, formerly being under the exclusive control of the ecclesiastical courts administering the canon law, requiring two witnesses in order to establish any material fact, have impressed that general rule in many jurisdictions in the United States, and while it has not been adopted, there has been a

[5] See Elliott, Ev. § 3152; *People* v. *Wade*, 118 Cal. 672, 50 Pac. 841; *Wilson* v. *State*, 73 Ala. 527; *Boyce* v. *People*, 55 N. Y. 644; *People* v. *Orr*, 92 Hun, 199, 36 N. Y. Supp. 398.

[6] Wharton, Crim. Law, 10th ed. § 1308; *Com.* v. *Walton*, 2 Brewst. (Pa.) 487; *State* v. *Painter*, 50 Iowa, 317; *State* v. *Curran*, 51 Iowa, 112, 49 N. W. 1006, 3 Am. Crim. Rep. 405; *State* v. *Reeves*, 97 Mo. 668, 10 Am. St. Rep. 349, 10 S. W. 841, 8 Am. Crim. Rep. 698; *Spenrath* v. *State*, — Tex. Crim. Rep. —, 48 S. W. 192.

[7] *Burnett* v. *State*, 76 Ark. 295, 113 Am. St. Rep. 94, 88 S. W. 956; *Hart* v. *State*, 117 Ala. 183, 23 So. 43; *La Rosae* v. *State*, 132 Ind. 219, 31 N. E. 798; *State* v. *Bauerkemper*, 95 Iowa, 562, 64 N. W. 609; *State* v. *Timmens*, 4 Minn. 325, Gil. 241; *Andre* v. *State*, 5 Iowa, 389, 68 Am. Dec. 708; *State* v. *Painter*, 50 Iowa, 317; *Zabriskie* v. *State*, 43 N. J. L. 640, 39 Am. Rep. 610; *Woolley* v. *State*, 50 Tex. Crim. Rep. 214, 96 S. W. 27; *Cunningham* v. *State*, 73 Ala. 51. See *Wilson* v. *State*, 73 Ala. 527, 534; *Cagle* v. *State*, 87 Ala. 93, 6 So. 300; *State* v. *Brassfield*, 81 Mo. 151, 51 Am. Rep. 234; *State* v. *Patterson*, 88 Mo. 88, 57 Am. Rep. 374; *Harvey* v. *Territory*, 11 Okl. 156, 65 Pac. 837.

[8] *State* v. *Fountain*, 110 Iowa, 15, 81 N. W. 162; *State* v. *Hill*, 91 Mo. 423, 4 S. W. 121; *State* v. *Eisenhour*, 132 Mo. 140, 33 S. W. 785; *State* v. *Ayers*, 8 S. D. 517, 67 N. W. 611; *Bailey* v. *State*, 36 Tex. Crim. Rep. 540, 38 S. W. 185; *State* v. *Waterman*, 75 Kan. 253, 88 Pac. 1074; *Lasater* v. *State*, 77 Ark. 468, 94 S. W. 59; *Cooper* v. *State*, 86 Ark. 30, 109 S. W. 1023.

general tendency to require corroboration in divorce proceedings.

Hence, the uncorroborated testimony of one party has been held insufficient to establish a charge of adultery,[1] and that a divorce will not be granted upon the uncorroborated testimony of the complainant as to the ground of divorce.[2] But, unless statute controlled, there is no inflexible rule of law which precludes the granting of a divorce upon the uncorroborated testimony of the complaining party,[3] and where the issues are tried to a jury, where the credibility of the witness can be judged by his conduct and appearance, the verdict is sufficiently supported if it is based on the testimony of the complaining party alone, as, for instance, in Pennsylvania.[4]

With the natural suspicion with which courts look upon confessions, the canon law,—that credit is not to be given to the confessions of the parties either in or out of court,[5]—

[1] *Thayer* v. *Thayer*, 101 Mass. 111, 100 Am. Dec. 110; *Tate* v. *Tate*, 26 N. J. Eq. 55; *Black* v. *Black*, 26 N. J. Eq. 431; *Bronson* v. *Bronson*, 8 Phila. 261; *Hays* v. *Hays*, 19 Wis. 183; *Fugate* v. *Pierce*, 49 Mo. 446; *Merritt* v. *State*, 10 Tex. Crim. Rep. 402.

[2] *Scarborough* v. *Scarborough*, 54 Ark. 20, 14 S. W. 1098; *Chappell* v. *Chappell*, 83 Ark. 533, 104 S. W. 203; *Hayes* v. *Hayes*, 144 Cal. 625, 78 Pac. 19; *Avery* v. *Avery*, 148 Cal. 239, 82 Pac. 967; *Jenkins* v. *Jenkins*, 86 Ill. 340; *Potter* v. *Potter*, 75 Iowa, 211, 39 N. W. 270; *Clark* v. *Clark*, 86 Minn. 249, 90 N. W. 390; *Paden* v. *Paden*, 28 Neb. 275, 44 N. W. 228; *Kimball* v. *Kimball*, 13 N. H. 222; *Grover* v. *Grover*, 63 N. J. Eq. 771, 50 Atl. 1051; *Hutchinson* v. *Hutchinson*, 53 Misc. 438, 104 N. Y. Supp. 1074; *Fawcett* v. *Fawcett*, 29 Misc. 673, 61 N. Y. Supp. 108.

[3] *Sylvis* v. *Sylvis*, 11 Colo. 319, 17 Pac. 912.

It is well remarked in the above case as to the quantum of proof, that "each case must depend upon the facts shown, whether by one or more than one witness. When the evidence is sufficient to convince the mind of the truthfulness of the allegations upon which the divorce is asked, such evidence is all that the law requires." *Sylvis* v. *Sylvis*, 11 Colo. 319, 326, 17 Pac. 912; *Robbins* v. *Robbins*, 100 Mass. 150, 97 Am. Dec. 91; *Maget* v. *Maget*, 85 Mo. App. 6.

[4] *Flattery* v. *Flattery*, 88 Pa. 27; *Krug* v. *Krug*, 22 Pa. Super. Ct. 572.

[5] *Harrison* v. *Harrison*, 4 Moore, P. C. C. 101, 6 Jur. 899; *Owen* v. *Owen*, 4 Hagg. Eccl. Rep. 261.

and the like rule of the civil law,[6] has been generally adopted by statute or decision in the United States, and a divorce will not be granted upon the uncorroborated admissions or confessions of the parties to the action.[7] Some states even exclude the confessions,[8] but the general rule is to admit them, and give them credibility where sufficiently corroborated.[9]

In the absence of a statute prescribing otherwise, and where the testimony is not merely an uncorroborated confession, the settled rule is that a divorce will be granted upon the complainant's own testimony, and a second witness or corroborating circumstances are not required.[10] As has been well said, the rule as to a second witness or corroboration is a rule of practice, not an inflexible rule, and "there is no law to prevent the finding of a fact upon the testimony of a party whose credibility and good faith are satisfactorily established." [11]

[6] Pothier's Marriage Contract, vol. II. Nos. 517, 518; *Harman* v. *McLeland*, 16 La. 26.

[7] *King* v. *King*, 28 Ala. 315; *Hayes* v. *Hayes*, 144 Cal. 625, 78 Pac. 19; *May* v. *May*, 71 Kan. 317, 80 Pac. 567; *Michalowicz* v. *Michalowicz*, 25 App. D. C. 484, and cases cited.

[8] *Woolfolk* v. *Woolfolk*, 53 Ga. 661; *Mathews* v. *Mathews*, 41 Tex. 331; *Hansley* v. *Hansley*, 32 N. C. (10 Ired. L.) 507.

[9] *Rie* v. *Rie*, 34 Ark. 37; *Baker* v. *Baker*, 13 Cal. 88; *McMullin* v. *McMullin*, 140 Cal. 112, 73 Pac. 808; *Evans* v. *Evans*, 41 Cal. 103; *Kean* v. *Kean*, 7 D. C. 4; *Michalowicz* v. *Michalowicz*, 25 App. D. C. 484; *Woolfolk* v. *Woolfolk*, 53 Ga. 661; *McCulloch* v. *McCulloch*, 8 Blackf. 60; *Mack* v. *Handy*, 39 La. Ann. 491, 2 So. 181; *May* v. *May*, 71 Kan. 317, 80 Pac. 567; *Baxter* v. *Baxter*, 1 Mass. 346. But see *Billings* v. *Billings*, 11 Pick. 461; *Rosecrance* v. *Rosecrance*, 127 Mich. 322, 86 N. W. 800; *True* v. *True*, 6 Minn. 458, Gil. 315; *Armstrong* v. *Armstrong*, 32 Miss. 279; *Twyman* v. *Twyman*, 27 Mo. 383; *White* v. *White*, 45 N. H. 121; *Kloman* v. *Kloman*, 62 N. J. Eq. 153, 49 Atl. 810; *Garcin* v. *Garcin*, 62 N. J. Eq. 189, 50 Atl. 71; *Phillips* v. *Phillips*, 24 Misc. 334, 52 N. Y. Supp. 489; *Hansley* v. *Hansley*, 32 N. C. (10 Ired. L.) 506; *Mathews* v. *Mathews*, 41 Tex. 331; *Richardson* v. *Richardson*, 50 Vt. 119.

[10] Wigmore, Ev. § 2046.

[11] *Robbins* v. *Robbins*, 100 Mass. 150, 97 Am. Dec. 91.

VI. Husband and Wife.

§ 390. Husband and wife witnesses neither for nor against each other.—Where the relation of husband and wife makes either incompetent as a witness for or against the other, it is necessary, to work such incompetency, that a valid marriage should be proved. Prima facie every person is competent to testify in all issues; if he is to be excluded by the policy of the law, the burden is on the party objecting to show the reason for such exclusion.[1] Intimate sexual relations do not constitute such reason, even though disguised by a pretended but invalid marriage.[2] And where a man and a woman lived, as they supposed, as husband and wife, but separated in consequence of the woman's discovery that a former husband, believed to be dead, was still alive, it was held that the woman was a competent witness against the man with whom she thus lived as a second husband, even as to the facts she learned from him during their cohabitation.[3] For when a former existing marriage is conceded, no subsequent marriage, no matter how solemn, can operate to devest the parties to such subsequent invalid marriage, of their privilege as witnesses for or against each other.[4] Modern statutes,

[1] *Dove* v. *State*, 3 Heisk. 348.

In Texas, under a statute permitting husband and wife to testify against each other in criminal prosecutions for offenses committed against each other, either may testify on the indictment of the other for adultery. *Roland* v. *State*, 9 Tex. App. 277, 35 Am. Rep. 743.

[2] *Batthews* v. *Galindo*, 4 Bing. 610, 3 Car. & P. 238, 1 Moore & P. 565, 6 L. J. C. P. 138; *Campbell* v. *Twemlow*, 1 Price, 81; *Divoll* v. *Leadbetter*, 4 Pick. 220; *Dennis* v. *Crittenden*, 42 N. Y. 542; *People* v. *McCraney*, 6 Park. Crim. Rep. 49; *State* v. *Taylor*, 61 N. C. (Phill. L.) 508; *Hill* v. *State*, 41 Ga. 484; *State* v. *Brown*, 28 La. Ann. 279; *Flanagin* v. *State*, 25 Ark. 92; *Rickerstriker* v. *State*, 31 Ark. 207; *Mann* v. *State*, 44 Tex. 642.

[3] *Wells* v. *Fletcher*, 5 Car. & P. 12; *People* v. *McCrancy*, 6 Park. Crim. Rep. 49. But see *People* v. *Marble*, 38 Mich. 117.

[4] *Rex* v. *Serjeant*, Ryan & M. 354; *Reg.* v. *Jones*, Car. & M. 614; *Reg.* v. *Madden*, 14 U. C. Q. B. 588; *State* v. *Patterson*, 24 N. C. (2

however, now make husband and wife in many cases competent witnesses in favor of each other, and Congress has made specific provisions as to the competency of witnesses in criminal cases, by permitting a defendant in any criminal case to testify on the trial at his own request, and by making the lawful husband or wife of the accused a competent witness in any prosecution for bigamy, polygamy, or unlaw-

Ired. L.) 346, 38 Am. Dec. 699; *Finney* v. *State,* 3 Head, 544; *State* v. *Johnson,* 12 Minn. 476, Gil. 378, 93 Am. Dec. 241.

It is said that Lord Kenyon once rejected a woman called as a witness for a putative husband, to whom she was never married, but who acknowledged her as his wife. Anonymous, cited by Richards, B., in 1 Price, 83. But in that case the criminal had throughout the trial admitted that the witness was his wife, and was thus, in a manner, estopped from denying the marriage when her competency was questioned; and in the subsequent cases of *Batthews* v. *Galindo,* 4 Bing. 610, 612, 613, 3 Car. & P. 238, 1 Moore & P. 565, 6 L. J. C. P. 138, where Lord Kenyon's ruling was discussed, Park and Burrough, JJ., declared that his decision was founded on this admission, and the whole court determined that a kept mistress was a competent witness for her protector, though she passed by his name and appeared to the world as his wife. The same view was afterwards taken even as to confidential communications between persons untruly believing themselves husband and wife; though in the latter case the parties had separated before trial, on hearing that a former husband of the woman was still alive. *Wells* v. *Fletcher,* 5 Car. & P. 12; *Wells* v. *Fisher,* 1 Moody & R. 99 and note.

It seems also from this last case and from several others (*Peat's Case,* 2 Lewin, C. C. 288; *Wakefield's Case,* 2 Lewin, C. C. 279; 1 Russell, Crimes, 218, note "t") that a supposed husband or wife may be examined on the *voir dire* to facts showing the invalidity of the marriage; and it is apprehended that no valid reason can be given for not admitting their evidence thus far, though the fact that the marriage ceremony has been actually performed may have been previously proved by independent testimony. *Rex* v. *Bramley,* 6 T. R. 330.

Rex v. *Bathwick,* 2 Barn. & Ad. 646, where Lord Tenterden observed "that it might well be doubted whether the competency of a witness can depend upon the marshalling of the evidence, or the particular stage of the cause at which the witness may be called." Taylor, Ev. § 1231, infra, § 397.

Where one of two prisoners had married his deceased wife's sister, it was held in England, when such marriages were there held void,

ful cohabitation.[5] This provision, however, in such states, does not affect the rule excluding them as witnesses for the state in the absence of statute, and if one is called for the other in any criminal trial, the witness cannot be made to testify against the accused by being required to disclose collateral matters under the guise of cross-examination. While the wife can testify for, she is not permitted in this way to testify against, her husband.[6]

§ 390a. Competency of husband and wife as witnesses, continued.—Marriage, however, being proved, neither husband or wife is competent at common law to testify in a suit for or against the other.[1] This exclusion is based not

that she was a competent witness against him on the trial. *Reg.* v. *Young,* 5 Cox, C. C. 296.

[5] Act of March, 16th, 1878, chap. 37, 20 Stat. at L. 30, U. S. Comp. Stat. 1901, p. 660; Act of March, 3d 1887, chap. 397, 24 Stat. at L. 635, U. S. Comp. Stat. 1901, p. 3635; *Logan* v. *United States,* 144 U. S. 263, 36 L. ed. 429, 12 Sup. Ct. Rep. 617.

Recent statutes in many of the states concerning "white slavery" and various other forms of prostitution have been enacted, providing "that in all such prosecutions a husband or wife shall be a competent witness against the other, and the wife may be compelled to testify on behalf of the people in any prosecution under this act, wherein her husband shall be a party defendant." Colo. Sess. Laws, 1909, chap. 19o.

[6] A wife can be a witness for her husband, but not against him; and when she is a witness for him, the state can legitimately cross-examine her as to the facts sworn to by her on her direct examination. But on cross-examination, if the state is permitted, over defendant's objection, to prove other independent facts not elicited on the examination in chief, it thereby makes her a state's witness against her husband, which cannot be done. And if the matters so elicited on cross-examination are of a material character, it will constitute reversible error. *Jones* v. *State,* 38 Tex. Crim. Rep. 112, 70 Am. St. Rep. 719, 40 S. W. 807, 41 S. W. 638; *Clark* v. *People,* 178 Ill. 37, 52 N. E. 857; *State* v. *Gordon,* 46 N. J. L. 432, 4 Am. Crim. Rep. 3; 1 Greenl. Ev. § 339.

For notes as to competency of husband or wife as witness against the other in criminal proceedings, see 2 L.R.A.(N.S.) 862, and 22 L.R.A.(N.S.) 240.

[1] *Rex* v. *Smith,* 1 Moody, C. C. 289; *Reg.* v. *Payne,* 12 Cox, C. C. 118, 41 L. J. Mag. Cas. N. S. 65,

solely on the ground of interest, but partly on the identity of their legal rights and interests and partly on principles of public policy, which lie at the base of civil society. Thus, a

L. R. 1 C. C. 349, 26 L. T. N. S. 41, 20 Week. Rep. 390; *State* v. *Welch*, 26 Me. 30, 45 Am. Dec. 94; *Kelley* v. *Proctor*, 41 N. H. 151; *Manchester* v. *Manchester*, 24 Vt. 649; *Seargent* v. *Seward*, 31 Vt. 509; *Com.* v. *Marsh*, 10 Pick. 57; *Lucas* v. *State*, 23 Conn. 18; *Wilke* v. *People*, 53 N. Y. 525; *People* v. *Moore*, 65 How. Pr. 177; *Gibson* v. *Com.* 87 Pa. 253; *Steen* v. *State*, 20 Ohio St. 333; *Taulman* v. *State*, 37 Ind. 353; *William* v. *State*, 33 Ga. Supp. 85; *Williams* v. *State*, 44 Ala. 24; *Byrd* v. *State*, 57 Miss. 243, 34 Am. Rep. 440; *State* v. *Berlin*, 42 Mo. 572; *Turnbull* v. *Com.* 79 Ky. 495; *Overton* v. *State*, 43 Tex. 616; *State* v. *Vaughan*, 136 Mo. App. 645, 118 S. W. 1186; *Canole* v. *Allen*, 222 Pa. 156, 70 Atl. 1053; *Com.* v. *Cleary*, 152 Mass. 491, 25 N. E. 834; *Lowery* v. *People*, 172 Ill. 466, 64 Am. St. Rep. 50, 50 N. E. 165, 11 Am. Crim. Rep. 169; *Territory* v. *Paul*, 2 Mont. 314, 2 Am. Crim. Rep. 332; *Porter* v. *United States*, 7 Ind. Terr. 616, 104 S. W. 855; *Rickerstricker* v. *State*, 31 Ark. 208, 3 Am. Crim. Rep. 351; *Pullen* v. *People*, 1 Dougl. (Mich.) 48; *State* v. *Luper*, — Or. —, 95 Pac. 811.

Holding the rule making privileged communications between husband and wife not applicable in criminal cases. *Hardin* v. *State*, 51 Tex. Crim. Rep. 559, 103 S. W. 401; *Spencer* v. *State*, 52 Tex. Crim. Rep. 289, 106 S. W. 386; *State* v. *Brittain*, 117 N. C. 783, 23 S. E. 433; *Jordon* v. *State*, 142 Ind. 422, 41 N. E. 817, 10 Am. Crim. Rep. 31; *United States* v. *Wade*, 2 Cranch, C. C. 680, Fed. Cas. No. 16,629; *Collier* v. *State*, 20 Ark. 36; *Woodward* v. *State*, 84 Ark. 119, 104 S. W. 1109; *Head Bros.* v. *Thompson*, 77 Iowa, 263, 42 N. W. 188; *Stewart* v. *State*, 52 Tex. Crim. Rep. 273, 106 S. W. 685; *Murphy* v. *Com.* 23 Gratt. 960; *Emmons* v. *Barton*, 109 Cal. 662, 42 Pac. 303; *Reg.* v. *Brittleton*, L. R. 12 Q. B. Div. 266, 53 L. J. Mag. Cas. N. S. 83, 50 L. T. N. S. 276, 32 Week. Rep. 463, 15 Cox, C. C. 431, 48 J. P. 295, 4 Am. Crim. Rep. 605; *Morissey* v. *People*, 11 Mich. 327.

The following authorities hold that the wife of one jointly indicted is a competent witness for those indicted with her husband, if they are tried separately; *Thompson* v. *Com.* 1 Met. (Ky.) 13; *Cornelius* v. *Com.* 3 Met. (Ky.) 481; *State* v. *Burnside*, 37 Mo. 343; *Com.* v. *Manson*, 2 Ashm. (Pa.) 31; *Workman* v. *State*, 4 Sneed, 425. See also *Com.* v. *Ham*, 9 Am. Crim. Rep. 1, and note, 156 Mass. 485, 31 N. E. 639; *State* v. *Woodrow*, 2 L.R.A (N.S.) 862, and note, 58 W. Va. 527, 112 Am. St. Rep. 1001, 52 S. E. 545, 6 A. & E. Ann. Cas. 180; *State* v. *Orth*, 22 L.R.A.(N.S.) 240, and note, 79 Ohio St. 130, 86 N. E. 476.

Where made competent by statute. *Evans* v. *State*, 165 Ind. 369, 2 L.R.A.(N.S.) 619, 74 N. E. 244,

husband is incompetent in a prosecution against his wife for her adultery, and so *mutatis mutandi* is the wife against the husband;[2] but if the paramour be prosecuted singly, it has been held that the restriction does not continue in force.[3] This is not the law, however, for on a trial of the paramour for adultery, the injured husband or wife, as the case may be, is by the better opinion not a competent witness for the prosecution.[4]

§ 391. So for or against each other's codefendant.—Wherever a defendant is incompetent to testify for or against a codefendant, then the husband or wife of such defendant is to the same extent incompetent. The incompetency of one is in effect the disability of the other.[1] Thus, in a trial for

75 N. E. 651, 6 A. & E. Ann. Cas. 813.

[2] *State* v. *Welch,* 26 Me. 30, 45 Am. Dec. 94; *Com.* v. *Sparks,* 7 Allen, 534; *Thomas* v. *State,* 14 Tex. App. 70. But see *State* v. *Bennett,* 31 Iowa, 24; *Lord* v. *State,* 17 Neb. 526, 23 N. W. 507, 6 Am. Crim. Rep. 17.

In the latter case the wife's testimony was admitted against the husband on a charge of adultery, under a statute permitting husband or wife to testify in a criminal proceeding for a crime committed by one against the other.

[3] *State* v. *Marvin,* 35 N. H. 22; *Com.* v. *Reid,* 8 Phila. 385; *Morrill* v. *State,* 5 Tex. App. 447.

[4] *Com.* v. *Gordon,* 2 Brewst. (Pa.) 569; *State* v. *Welch,* 26 Me. 30, 45 Am. Dec. 94; *State* v. *Gardner,* 1 Root, 485; *Cotton* v. *State,* 62 Ala. 12. See also *Pett-Morgan* v. *Kennedy,* 62 Minn. 348, 30 L.R.A. 529, 54 Am. St. Rep. 647, 64 N. W. 912.

Dying declarations of wife against husband. *Worthington* v. *State,* 92 Md. 222, 56 L.R.A. 360, 84 Am. St. Rep. 506, 48 Atl. 355.

Effect of marrying to prevent testimony. *Moore* v. *State,* 67 L.R.A. 499, and note, 45 Tex. Crim. Rep. 234, 108 Am. St. Rep. 952, 75 S. W. 497, 2 A. & E. Ann. Cas. 878, on main subject.

Wife as witness before grand jury. *Com.* v. *Hayden,* 163 Mass. 453, 28 L.R.A. 322, 47 Am. St. Rep. 468, 40 N. E. 846, 9 Am. Crim. Rep. 408; Wigmore, Ev. §§ 600–620, 2227–2245, 2332-2341.

[1] Infra, 445; *Rex* v. *Smith,* 1 Moody, C. C. 289; *Rex* v. *Hood,* 1 Moody, C. C. 281; *Reg.* v. *Payne,* 12 Cox, C. C. 118, 41 L. J. Mag. Cas. N. S. 65, L. R. 1 C. C. 349, 26 L. T. N. S. 41, 20 Week. Rep. 390; *Reg.* v. *Thompson,* L. R. 1 C. C. 377, 41 L. J. Mag. Cas. N. S. 112, 26 L. T. N. S. 667, 20 Week. Rep. 728, 12 Cox, C. C. 202; *United*

conspiracy, the wife of one of the defendants should not be allowed to testify against one of the others as to any act done

States v. *Hanway,* 2 Wall. Jr. 139, Fed. Cas. No. 15,299; *Com.* v. *Robinson,* 1 Gray, 555; *Com.* v. *Reid,* 8 Phila. 385; *State* v. *Smith,* 24 N. C. (2 Ired. L.) 402; *State* v. *McGrew,* 13 Rich. L. 316; *State* v. *Workman,* 15 S. C. 540; *Johnson* v. *State,* 47 Ala. 9; *Mask* v. *State,* 32 Miss. 405; *Casey* v. *State,* 37 Ark. 67; *Daffin* v. *State,* 11 Tex. App. 76; *Elmore* v. *State,* 140 Ala. 184, 37 So. 156; *Lide* v. *State,* 133 Ala. 43, 31 So. 953; *State* v. *Sargood,* 77 Vt. 80, 58 Atl. 971; *Lucas* v. *State,* 23 Conn. 18; *Graff* v. *People,* 208 Ill. 312, 70 N. E. 299; *People* v. *Langtree,* 64 Cal. 256, 30 Pac. 813; *Raynes* v. *Bennett,* 114 Mass. 424; *State* v. *Pain,* 48 La. Ann. 311, 19 So. 138; *State* v. *Lortz,* 186 Mo. 122, 84 S. W. 906 (competent for accused); *Com.* v. *Barker,* 185 Mass. 324, 70 N. E. 203; *Turpin* v. *State,* 55 Md. 462; *Murray* v. *State,* 48 Tex. Crim. Rep. 141, 122 Am. St. Rep. 737, 86 S. W. 1024 (by statute); *Frazier* v. *State,* 48 Tex. Crim. Rep. 142, 122 Am. St. Rep. 738, 86 S. W. 754, 13 A. & E. Ann. Cas. 497; *Wilke* v. *People,* 53 N. Y. 525; *Dill* v. *People,* 19 Colo. 469, 41 Am. St. Rep. 254, 36 Pac. 229; *Cotton* v. *State,* 62 Ala. 12; *Steen* v. *State,* 20 Ohio St. 333; *Com.* v. *Sapp,* 90 Ky. 580, 29 Am. St. Rep. 405, 14 S. W. 834; *State* v. *Sloan,* 55 Iowa, 219, 7 N. W. 516; *Gibson* v. *Com.* 87 Pa. 253; *State* v. *Hughes,* 58 Iowa, 165, 11 N. W. 706; *Lord* v. *State,* 17 Neb. 526, 23 N. W. 507, 6 Am. Crim. Rep. 17; *State* v. *Dodson,* 16 S. C. 453; *Bassett* v. *United States,* 137 U. S. 496, 34 L. ed. 762, 11 Sup. Ct. Rep. 165; *Miner* v. *People,* 58 Ill. 59; *Owen* v. *State,* 89 Tenn. 698, 16 S. W. 114; *Mitchinson* v. *Cross,* 58 Ill. 366; *Sagar* v. *Eckert,* 3 Ill. App. 412; *Kraimer* v. *State,* 117 Wis. 350, 93 N. W. 1097.

"Independent of the statute, it is a well-established rule of evidence that facts obtained in confidence from one by the other because of the marital relation shall not be made public through testimony in a court of law. The happiness of the marriage state requires that there shall be unlimited confidence between husband and wife, and their confidence the law secures by providing that nothing shall be extracted from the bosom of one in whom the confidence was reposed by the other. Such confidence is inviolable forever, even after the marital relation ceases by divorce or death." Whitehead, Ev. p. 33; *Supreme Lodge, M. W.* v. *Jones,* 113 Ill. App. 241.

In a prosecution for rape, where the state sought to prove pregnancy of the woman, who had become defendant's wife, and a physician had just testified thereto, it was held error to call the wife to the court room, ostensibly to allow the physician to identify her as the woman he had examined, since the jury could observe her condition, and she was thus compelled to testify against her husband. *State* v. *Winnett,* 48 Wash. 93, 92 Pac. 904.

by him in furtherance of the common design, if there be any evidence given connecting the husband with the defendants in the general conspiracy.[2] And on an indictment against sev-

Rule does not extend to conversations between them when heard by others. *Toole* v. *Toole,* 112 N. C. 152, 34 Am. St. Rep. 479, 16 S. E. 912.

And where a letter of one falls into the hands of a third person, it is said that "the sacred shield of privilege" is removed. *State* v. *Buffington,* 20 Kan. 599, 27 Am. Rep. 193; *State* v. *Hoyt,* 47 Conn. 518, 36 Am. Rep. 89.

But the latter doctrine is viewed with suspicion, and eminent authority holds that "no infidelity of the receiver can make it an instrument of evidence." 2 Nelson, Marr. & Div. p. 748.

A woman testified for the state that she was present at the time of the homicide. She was married, but had not lived with her husband for several years. Her husband was called as a witness by the defendant, to prove her bad reputation for truth and veracity. Held error to refuse it. *Ware* v. *State,* 35 N. J. L. 553; Hughes, Crim. Law & Proc. 784; *Owen* v. *State,* 78 Ala. 425, 56 Am. Rep. 40, 6 Am. Crim. Rep. 208.

A police officer asked the prisoner to consider when he had bought the stolen property, to which the prisoner replied "that his wife would make out a list of it." She did so, handed it to the officer the next day in her husband's presence, saying: "This is a list of what we bought and what we gave for them." Held competent. *Reg.* v. *Mallory,* L. R. 13 Q. B. Div. 33, 53 L. J. Mag. Cas. N. S. 134, 50 L. T. N. S. 429, 32 Week. Rep. 721, 15 Cox, C. C. 456, 48 J. P. 487, 4 Am. Crim. Rep. 586.

Upon a trial for larceny, declarations of the wife made in his presence, to the effect that stolen property found in the house belonged to him, are admissible against the accused. *State* v. *Record,* 151 N. C. 695, 25 L.R.A.(N.S.) 561, 65 S. E. 1010, 19 A. & E. Ann. Cas. 527.

Where, upon trial for murder, the state was permitted to ask the defendant on cross-examination, "If your mother or your wife say or testify that you did not come back home from the time that you left that morning until about 4 o'clock, is that correct?" and, on objection by the defense, it withdrew said question, and requested the court to instruct the jury not to consider the matter for any purpose, which was done; and there was no admission by the state that defendant's wife had not testified, and no request from the defendant to instruct the jury that the wife had not so testified, at a former trial, and there was nothing to show to what she did testify to at said former trial,—there was no error. *Welch* v. *State,* 57 Tex. Crim. Rep. 112, 122 S. W. 880.

[2] *Rex* v. *Serjeant,* Ryan & M. 352, and cases cited infra, § 392.

eral defendants for a conspiracy to charge the wife of one of them with adultery, such wife is not a competent witness for the prosecution.[3] But where a codefendant is admissible, his wife is also admissible.[4]

§ 392. Rule inapplicable to separate suits where acquittal of one does not operate on the other.—But where the grounds of defense are separate and distinct and in no way dependent on each other, as is observed by Mr. Greenleaf, "no reason is perceived why the wife of one defendant should not be admitted as a witness for another," [1] and where the acquittal of one defendant does not necessarily involve the acquittal of the other, the wife of one defendant, where the trials are separate, may be a witness for the other,[2] though all the authorities are agreed that neither husband or wife can be a witness for a party joined and tried jointly with the other.[3] Thus, where H. D., S. L., and T. were jointly indicted for murder, and a separate trial awarded T., and upon the trial of T. he offered to prove an alibi by the wives of H. and S., it was held that they were competent witnesses. The

[3] *State* v. *Burlingham*, 15 Me. 104. See *Johnson* v. *State*, 47 Ala. 9.

[4] *Blackburn* v. *Com.* 12 Bush, 181. See *Ray* v. *Com.* 12 Bush, 397. See also *Grabowski* v. *State*, 126 Wis. 447, 105 N. W. 805; *Donnelly* v. *State*, 78 Ala. 453; *State* v. *Richardson*, 194 Mo. 326, 92 S. W. 649; *Birge* v. *State*, 78 Ala. 435; *Knight* v. *State*, 114 Ga. 48, 88 Am. St. Rep. 17, 39 S. E. 928; *Schultz* v. *State*, 32 Ohio St. 276; *Gibson* v. *Com.* 87 Pa. 253; *State* v. *Willis*, 119 Mo. 485, 24 S. W. 1008.

[1] 1 Greenl. Ev. § 335.

[2] *United States* v. *Addatte*, 6 Blatchf. 76, Fed. Cas. No. 14,422; *Com.* v. *Easland*, 1 Mass. 15; *Com* v. *Manson*, 2 Ashm. (Pa.) 33; *Com.* v. *Reid*, 8 Phila. 385; *Com.* v. *David*, 8 Phila. 611; *State* v. *Mooney*, 64 N. C. 54; *Powell* v. *State*, 58 Ala. 362; *State* v. *Anthony*, 1 M'Cord, L. 286; *Cornelius* v. *Com.* 3 Met. (Ky.) 481. Though see *Pullen* v. *People*, 1 Dougl. (Mich.) 48; *Workman* v. *State*, 4 Sneed, 428; *State* v. *Burnside*, 37 Mo. 343; *People* v. *Bill*, 10 Johns. 95; *People* v. *Colbern*, 1 Wheeler, C. C. 479.

[3] 1 Bishop, Crim. Proc. § 1019; 1 Archbold, Crim. Pr. & Pl. 497; *Schoeffler* v. *State*, 3 Wis. 823; Moore, Crim. Law, p. 62; *Com.* v. *Manson*, 2 Ashm. (Pa.) 31; *State* v. *Burnside*, 37 Mo. 343.

court, after reviewing the authorities upon the question, said: "The mere fact that the husband is a party to the record does not of itself exclude the wife as a witness on behalf of the other parties, but the rule of exclusion is only to be applied to cases in which the interest of the husband is to be affected by the testimony of the wife.[4] Where, also, a married defendant has pleaded guilty,[5] or is entirely removed from the record, whether by a verdict pronounced in his favor or by a previous conviction, his wife may testify either for or against any other persons who may be parties to the record,[6] and the mere hope that, by testifying against a prisoner, a wife may procure the pardon of her husband who has been previously convicted of another crime will not affect her competency, though it may shake her credit.[7] But where the offense is such that the acquittal of one defendant is the acquittal of the other (*e. g.*, adultery, as well as riot and conspiracy), then the husband or wife of one of the parties is under any circumstances incompetent.[8] Nor can either after divorce be

[4] *Thompson* v. *Com.* 1 Met. (Ky.) 13; *Cornelius* v. *Com.* 3 Met. (Ky.) 481; *Workman* v. *State,* 4 Sneed, 425; *Territory* v. *Paul,* 2 Mont. 314, 2 Am. Crim. Rep. 332.

The following authorities hold that the wife of a respondent is not a competent witness for the correspondent, even though they have separate trials. *United States* v. *Wade,* 2 Cranch, C. C. 680, Fed. Cas. No. 16,629; *Collier* v. *State,* 20 Ark. 36.

Wife of codefendant now competent by statute. *Morissey* v. *People.* 11 Mich. 327.

[5] *Reg.* v. *Thompson,* 3 Fost. & F. 824.

[6] *Hawkesworth* v. *Showler,* 12 Mees. & W. 49; *Reg.* v. *Williams,* 8 Car. & P. 284.

[7] *Rex* v. *Rudd,* 1 Leach, C. L. 127, Cowp. pt. 1, p. 331.

[8] *Com.* v. *Gordon,* 2 Brewst. (Pa.) 569; *Mask* v. *State,* 32 Miss. 405. See also Wharton, Crim. Pl. & Pr. § 873.

In 2 Kent's Com. p. 179, the principle is stated thus: "The husband and wife cannot be witnesses for or against each other in a civil suit. This is well-settled principle of law and equity, and it is founded as well on the interest of the parties being the same as on public policy. The foundations of society would be shaken according to the strong language of some of the cases by permitting it. Nor can either of them be permitted to give any testimony, either in a civil or criminal case, which goes to criminate the

permitted to testify against the other, without consent, to any transaction prior to the divorce.[9]

§ 393. Exception in case of violence.—The wife of a prosecutor is not precluded by this rule from giving evidence either for the prosecution or for the defendant.[1] Where, however, violence has been committed on the person of the wife by the husband, she is competent to prove such violence.[2]

other; and this rule is so inviolable that no consent will authorize the breach of it. See as well Buller, N. P. p. 286; *Wilson* v. *Hill,* 13 N. J. Eq. 143; 2 Starkie, Ev. 399; Roscoe, Crim. Ev. 114; *Mitchinson* v. *Cross,* 58 Ill. 366.

The act of Congress that in civil actions in the courts of the United States, there shall be no exclusion of any witness because he is a party to or interested in the issue tried, does not remove the objection to a wife's incompetency to testify for or against the husband. *Lucas* v. *Brooks,* 18 Wall. 436, 21 L. ed. 779. See also *People* v. *Carpenter,* 9 Barb. 580; *Reeves* v. *Herr,* 59 Ill. 79; *Miner* v. *People,* 58 Ill. 59; *Creed* v. *People,* 81 Ill. 565; *Stein* v. *Bowman,* 13 Pet. 209, 10 L. ed. 129; 1 Greenl. Ev. § 334; Roscoe, Crim. Ev. 5th ed. 147; Roscoe, Crim. Ev. 125; *People ex rel. Ordronaux* v. *Chegaray,* 18 Wend. 637; *State* v. *Hussey,* 44 N. C. (Busbee, L.) 123; 2 Russell, Crimes, 606; *Overton* v. *State,* 43 Tex. 616; *State* v. *Welch,* 26 Me. 30, 45 Am. Dec. 94; *Lowery* v. *People,* 11 Am. Crim Rep. 169 and note, 172 Ill. 466, 64 Am. St. Rep. 50, 50 N. E. 165; *Hopkins* v. *Grimshaw,* 165 U. S. 342, 41 L. ed. 739, 17 Sup. Ct. Rep. 401; 1 Bl. Com. 443; *State* v. *Burlingham,* 15 Me. 104; *Com.* v. *Ham,* 9 Am. Crim. Rep. 1, and case note, 156 Mass. 485, 31 N. E. 639; *Miles* v. *United States,* 103 U. S. 304, 26 L. ed. 481.

[9] *Cook* v. *Grange,* 18 Ohio, 526; *Rea* v. *Tucker,* 51 Ill. 110, 99 Am. Dec. 539; Moore, Crim. Law, 62.

The statutes of most of the states on this question are similar, and use the following language in substance: "A husband shall not be examined for or against his wife without her consent, nor a wife for or against her husband without his consent; nor shall either, during the marriage or afterward, be, without the consent of the other, examined as to any communication made by one to the other during the marriage; but this exception does not apply to a civil action or proceeding by one against the other, nor to a criminal action or proceeding for a crime committed by one against the other." 2 Mills's Anno. Stat. (Colo.) § 4824.

[1] *Rex* v. *Houlton,* 1 Jebb, C. C. 24; Taylor, Ev. 1230.

[2] *Audley's Case,* 3 How. St. Tr. 402; *R.* v. *Wasson,* 1 Craw. & D.

Hence on the trial of a man for the murder of his wife, her dying declarations are evidence against him.[3] And in all cases of personal injuries committed by the husband or wife against each other, the injured party is an admissible witness against the other.[4] Thus, the husband may be a witness against the wife when she is prosecuted for assaulting him.[5] The wife may be a witness against the husband on a prosecution against him for attempting to poison her,[6] and for being concerned in attempting a miscarriage on her. On this rule, however, the supreme court of North Carolina has grafted the qualification that the assault must amount to an attempted felony, or cause lasting injury or great bodily harm.[7] And it is plain that in cases not involving personal injuries, the wife cannot at common law be called as a witness against her husband.[8]

C. C. 197; *Rex* v. *Serjeant,* Ryan & M. 352; *United States* v. *Smallwood,* 5 Cranch, C. C. 35, Fed. Cas. No. 16,316; *Com.* v. *Murphy,* 4 Allen, 491; *People* v. *Fitzpatrick,* 5 Park. Crim. Rep. 26.

[3] *Rex* v. *Woodcock,* 1 Leach, C. L. 500; *John's Case,* 1 East, P. C. 357; *Soule's Case,* 5 Me. 407; *State* v. *Boyd,* 2 Hill, L. 288, 27 Am. Rep. 376; *People* v. *Green,* 1 Denio, 614; *Moore* v. *State,* 12 Ala. 764, 46 Am. Dec. 276; 2 Starkie, Ev. 458; 1 Phillipps, Ev. 75, note 1; supra, § 289.

[4] *Jagger's Case,* 1 East, P. C. 455; *Reg.* v. *Pearce,* 9 Car. & P. 667; *People* v. *Mercein,* 8 Paige, 47; *State* v. *Davis,* 3 Brev. 3, 5 Am. Dec. 529; *Hampton* v. *State,* 45 Ala. 82.

[5] *Whipp* v. *State,* 34 Ohio St. 87, 32 Am. Rep. 359.

[6] *Jagger's Case,* 1 East, P. C. 455; *R.* v. *Wasson,* 1 Craw. & D. C. C. 197.

[7] *State* v. *Rhodes,* 61 N. C. (Phill. L.) 453; *State* v. *Oliver,* 70 N. C. 60; *State* v. *Davidson,* 77 N. C. 522. Contra, *United States* v. *Smallwood,* 5 Cranch, C. C. 35, Fed. Cas. No. 16,316.

[8] *People* v. *Carpenter,* 8 Barb. 580; *Com. ex rel. Boyd* v. *The Jailer,* 1 Grant, Cas. 218; *Steen* v. *State,* 20 Ohio St. 333; *State* v. *Berlin,* 42 Mo. 572.

The wife held to be competent witness against the husband for adultery, under the statute permitting husband or wife to testify in a criminal proceeding for a crime committed by one against the other. *Lord* v. *State,* 17 Neb. 526, 23 N. W. 507, 6 Am. Crim. Rep. 17; *State* v. *Bennett,* 31 Iowa, 24; *State* v. *Sloan,* 55 Iowa, 219, 7 N. W. 516;

§ 394. So in abduction and rape.—If a woman be taken away by force and married, she may be a witness against her husband, indicted on Stat. 9 George IV. chap. 31, § 19, against the stealing of women, for a contract obtained by force has no obligation in law.[1] So upon an indictment on

Morrill v. *State,* 5 Tex. App. 447; *Roland* v. *State,* 9 Tex. App. 277, 35 Am. Rep. 743.

And in a prosecution for arson against the wife, the husband, as the party injured, being a part of the property burned, may testify against his wife as to communications between them. *Jordan* v. *State,* 142 Ind. 422, 41 N. E. 817, 10 Am. Crim. Rep. 31.

Meaning of word "injured" as employed. 11 Am. & Eng. Enc. Law, p. 1, note 1; *People* v. *Howard,* 17 Cal. 64; *Doolittle* v. *State,* 93 Ind. 272.

Congress has made specific provisions as to the competency of witnesses in criminal cases, by permitting a defendant in any criminal case to testify on the trial at his own request, and by making the lawful husband or wife of the accused in any prosecution for bigamy, polygamy, or unlawful cohabitation, a competent witness. *Logan* v. *United States,* 144 U. S. 263, 36 L. ed. 429, 12 Sup. Ct. Rep. 617; Act of March 16th, 1878, chap. 37, 20 Stat. at L. 30, U. S. Comp. Stat. 1901, p. 660; Act of March 3d, 1887, chap. 397, 24 Stat. at L. 635, U. S. Comp. Stat. 1901, p. 3635.

On principles of public policy, all communications between husband and wife which do not on their face appear to be public, or intended to be so, are shielded from public scrutiny as evidence, and neither can testify as to such communications when the interests of the other are involved; and in criminal cases the subsequent dissolution of the marriage relation by decree of divorce does not remove the incompetency. *Owen* v. *State,* 78 Ala. 425, 56 Am. Rep. 40, 6 Am. Crim. Rep. 206; *State* v. *Jolly,* 20 N. C. 108 (3 Dev. & B. L.) 110, 32 Am. Dec. 656.

When, however, the conduct or transaction is in no sense traceable to the relation of husband and wife and the confidence it inspires, but in its nature is as likely to have occurred before the public as in private, there are authorities which hold that, after the mariage is dissolved, the parties or survivor, as the case may be, are competent in civil cases to testify for and against each other. *Beveridge* v. *Minter,* 1 Car. & P. 364; *Edgell* v. *Bennett,* 7 Vt. 534; *Wottrich* v. *Freeman,* 71 N. Y. 601; *Coffin* v. *Jones,* 13 Pick. 441; *Brown* v. *Wood,* 121 Mass. 137 (on statute); *Westerman* v. *Westerman,* 25 Ohio St. 500 (on statute).

[1] *Rex* v. *Reading,* Cast. Hardw. 79; Buller, N. P. 286; Wharton, Crim. Law, 8th ed. § 587.

In a case before Mr. Baron Hullock, where the defendants were

the same act, § 22 , for marrying a second wife the first being alive, though the first cannot be a witness,[2] yet the second may, after proof of the first marriage, the second marriage being void.[3] In Lord Audley's Case his wife was allowed to be a witness to prove that he assisted in a rape upon her.[4] The common-law inhibition against a wife's testifying against her husband applies only to a valid marriage, and does not disqualify a woman who is abducted and married by force. She is a wife *de facto* only, and not *de jure,* and is a competent witness against the man.[5] She is also a competent witness in his behalf.[6]

§ 394a. When admissible against, admissible for.—In all cases where the testimony of husband or wife is admissible against each other, it is admissible for each other.[1] Thus,

charged in one count with a conspiracy to carry away a young lady under the age of sixteen from the custody appointed by her father, and to cause her to marry one of the defendants, and in another count with conspiring to take her away by force, being an heiress, and to marry her to one of the defendants, the learned judge was of opinion that, even assuming the witness to be at the time of the trial the lawful wife of one of the defendants, she was yet a competent witness for the prosecution, on the ground of necessity, although there was no evidence to support that part of the indictment which charged force; and also on the ground that the latter defendant by his own criminal act could not exclude such evidence against himself. *Wakefield's Case,* 2 Lewin, C. C. 1,279; 2 Russell, Crimes, 605; 2 Starkie, Ev. 402, note; Roscoe, Crim. Ev. 2d ed. 126.

[2] *Williams* v. *State,* 44 Ala. 24.

[3] *Griggs Case,* T. Raym. 1; Buller, N. P. 287; 2 Hawk, P. C. chap. 46, § 72; *Rex* v. *Serjeant,* Ryan & M. 354; infra, 397.

[4] *Fisher's Trial,* 1 How. St. Tr. 393, and see 1 Hale, P. C. 301, 1 Phillipps, Ev. 84.

[5] *State* v. *Gordon,* 46 N. J. L. 432, 4 Am. Crim. Rep. 1; 2 Starkie, Ev. 711; 1 Greenl. Ev. § 343; 1 Enc. Ev. p. 45, and note 62.

[6] 3 Russel, Crimes, 7th Eng. & 1st. Can. ed. p. 2281; Gilbert, Ev. 120; 1 Hale, P. C. 302-661; Buller, N. P. 286; Taylor, Ev. 10th ed. § 1470; *Reg.* v. *Pearce,* 9 Car. & P. 667; *Rex* v. *Azire,* 1 Strange, 633; Buller, N. P. 298.

[1] *Rex* v. *Serjeant,* Ryan & M. 352; *People* v. *Fitzpatrick,* 5 Park. Crim. Rep. 26.

on an indictment of a husband for an assault and battery on his wife, she is a competent witness for him to disprove the charge.[2] But where the wife is prima facie incompetent by reason of such relation, it is error to read in the hearing of the jury the record of the court in divorce proceedings, to establish the competency of the wife as a witness, it being a question solely for the court to determine.[3]

§ 395. Wife may be a witness to establish the marriage collaterally.—While, to test competency, either the man or the woman may be examined on the *voir dire* as to marriage,[1] to establish the marriage, proof *aliunde* must be adduced. The reasoning is this: if the marriage is valid, the witness is incompetent; admitting that which he is offered to prove, then he is incompetent as a witness in the case. This conclusion, however, does not apply to settlement cases or to collateral inquiries.[2] Thus, it has been held in Pennsylvania that a woman is a competent witness to prove the contract of marriage in a proceeding by the guardians of the poor to compel the alleged husband to contribute to her support.[3] To invalidate a second marriage collaterally, by prov-

[2] *Com.* v. *Murphy,* 4 Allen, 491; *State* v. *Neill,* 6 Ala. 685, and cases cited supra.

[3] *State* v. *Hennett,* 54 Vt. 83, 4 Am. Crim. Rep. 38.

[1] *Seeley* v. *Engell,* 13 N. Y. 542.

[2] *Peat's Case,* 2 Lewin, C. C. 288; *Rex* v. *Bramley,* 6 T. R. 330; *Rex* v. *Bathwick,* 2 Barn. & Ad. 646; *Reg.* v. *Bienvenu,* 15 Lower Can. Jur. 141; *Scherpf* v. *Szadeczky,* 4 E. D. Smith, 110; *Redgrave* v. *Redgrave,* 38 Md. 93; *Williams* v. *State,* 44 Ala. 24.

In New York, however, under the statute permitting a wife to testify in matters affecting her husband, she may testify in her own behalf in a suit of divorce brought by her to prove a marriage. *Bissell* v. *Bissell,* 55 Barb. 325.

At common law, either husband or wife may be a witness to prove marriage collaterally in all cases in which proof of the marriage would make the witness incompetent. *Willis* v. *Underhill,* 6 How. Pr. 396; *Dwelly* v. *Dwelly,* 46 Me. 377; *Stafford* v. *Stafford,* 41 Tex. 111; *Corson* v. *Corson,* 44 N. H. 587.

[3] *Guardians of Poor* v. *Nathans,* 2 Brewst. (Pa.) 149. See *Christy* v. *Clarke,* 45 Barb. 529.

ing the existence of a first marriage, either party is competent.[4]

§ 396. Husband and wife not compelled collaterally to criminate each other.—The mere fact that the testimony to be given by a wife criminates her husband, or that the testimony of the husband criminates the wife, does not exclude such testimony in prosecutions in which the party so criminated is not a defendant.[1] Yet while such testimony will be admitted, it will not be compelled,[2] though an answer will

[4] *Re Shaak,* 4 Brewst. (Pa.) 305; 8 Enc. Ev. p. 466; *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.

[1] Wharton, Ev. § 432; *Rex* v. *Bathwick,* 2 Barn. & Ad. 639; *Rex* v. *All Saints,* 6 Maule. & S. 194; *Reg.* v. *Halliday,* 8 Cox, C. C. 298, Bell, C. C. 257, 29 L. J. Mag. Cas. N. S. 148, 6 Jur. N. S. 514, 2 L. T. N. S. 254, 8 Week. Rep. 423; *Henman* v. *Dickinson,* 5 Bing. 183, 2 Moore & P. 289, 7 L. J. C. P. 68, 30 Revised Rep. 565; *State* v. *Bridgman,* 49 Vt. 202, 24 Am. Rep. 124; *Com.* v. *Reid,* 8 Phila. 385. For other cases, see infra, § 402.

In *Tilton* v. *Beecher,* Abbott's Rep. of Trial of Henry Ward Beecher, vol. 2, pp. 48 et seq. Mr. Tilton, the plaintiff (the suit being against Mr. Beecher for damages for criminal conversation with the plaintiff's wife), was offered as a witness to prove his wife's adultery. This was objected to by the defendant's counsel, who, after citing a series of common-law authorities, relied on *Chamberlain* v. *People,* 23 N. Y. 88, 80 Am. Dec. 255; *Dann* v. *Kingdom,* 1 Thomp. & C. 492; *Lucas* v. *Brooks,* 18 Wall. 452, 21 L. ed. 783; *Re Rideout,* L. R. 10 Eq. 44. In behalf of the plaintiff it was argued that his competency for this purpose was established by the statute of 1867. To this effect were cited *Marsh* v. *Potter,* 30 Barb. 506; *Wehrkamp* v. *Willet,* 4 Abb. App. Dec. 548; *Chamberlain* v. *People,* 23 N. Y. 85, 80 Am. Dec. 255; *White* v. *Stafford,* 38 Barb. 419; *Card* v. *Card,* 39 N. Y. 317; *Matteson* v. *New York C. R. Co.* 62 Barb. 364, 35 N. Y. 487, 91 Am. Dec. 67; *Petrie* v. *Howe,* 4 Thomp. & C. 85. The court (p. 116) held that the plaintiff was entitled to testify as a witness to the fact proposed, but not as to confidential communications from his wife.

In *Dickerman* v. *Graves,* 6 Cush. 308, 53 Am. Dec. 41, a wife after a divorce from her husband, was held a competent witness for him to prove the fact of adultery in a suit by him against the alleged adulterer. But see infra, § 399.

[2] *Cartwright* v. *Green,* 8 Ves. Jr. 405, 7 Revised Rep. 99; *Rex* v. *All Saints,* 6 Maule & S. 200; *Reg.*

be required as to matters only disgracing, but not criminating.[3]

§ 397. Bigamy; lawful wife cannot prove marriage.— It has been ruled in Canada that in an indictment for bigamy, the first wife is inadmissible for the defense to prove that her marriage is invalid.[1] This, however, is founded on *petitio principii*. The question is whether the first marriage is valid. If so, she is not a witness, but she is a witness if such marriage is invalid. For the court to refuse to admit her, when called by the defense to disprove the marriage, is to prejudice the question in issue.[2] That she cannot be called to sustain the marriage is clear, for she is excluded by the very hypothesis she is called to support.[3] The proper course is to examine her on her *voir dire*. If she claims to be the first wife, on her own showing, her testimony is inadmissible. If she denies that she was married to the defendant, then she

v. *Williams*, 8 Car. & P. 284; *State* v. *Briggs*, 9 R. I. 361, 11 Am. Rep. 270; *Com.* v. *Reid*, 8 Phila. 385. But see fully infra, § 402.

[3] *Rex* v. *Bathwick*, 2 Barn. & Ad. 639; *State* v. *Marvin*, 35 N. H. 22; *Com.* v. *Sparks*, 7 Allen, 534; *Ware* v. *State*, 35 N. J. L. 553; *State* v. *Dudley*, 7 Wis. 664.

The question whether a wife is bound to answer questions criminating her husband is not in a satisfactory state. It was held at common law, in *Rex* v. *Cliviger*, 2 T. R. 268, that a wife could not be compelled to answer questions criminating her husband. In *Rex* v. *All Saints*, 6 Maule & S. 194. Lord Ellenborough held that a wife was competent to answer such questions, and that the answers were not excluded on the ground of public policy; but Bayley, J., was of opinion that a wife who threw herself upon the protection of the court would not be compelled to answer. In equity there is no doubt that a wife cannot be compelled to answer any question which may expose her husband to a charge of felony. *Cartwright* v. *Green*, 8 Ves. Jr. 410; 7 Revised Rep. 99; Powell, Ev. 4th ed. 110.

That husband and wife may be permitted to contradict each other. See infra, § 402.

[1] *Reg.* v. *Madden*, 14 U. C. Q. B. 588; *Reg.* v. *Tubbee*, 1 Ont. Pr. Rep. 103.

[2] *Dumas* v. *State*, 14 Tex. App. 464, 46 Am. Rep. 241.

[3] But see *State* v. *Sloan*, 55 Iowa, 217, 7 N. W. 516.

should be admitted, and the jury directed to disregard her testimony if they believe her to be the defendant's wife.[4] Otherwise material testimony might be excluded on a hypothesis not only artificial, but false. On the other hand, if a man be prosecuted for bigamy, his first wife, the validity of whose marriage is assumed by the prosecution, cannot be called to prove her marriage with the defendant.[5] The first marriage being established, the woman with whom the second marriage was had is a competent witness either for or against the prisoner, for the second marriage is void.[6]

If the proof of the first marriage is doubtful, and the fact is controverted, the alleged second wife cannot be admitted at common law for the prosecution.[7] It has been argued that

[4] *Peat's Case,* 2 Lewin, C. C. 288; *Wakefield's Case,* 2 Lewin, C. C. 279, which cases are noticed supra, § 390.

[5] *Grigg's Case,* T. Raym. 1; 1 Hale, P. C. 693; 1 Russell, Crimes, 218. And see supra, § 390.

[6] Buller, N. P. 287; Roscoe, Crim. Ev. 8th ed. 124; *Rex* v. *Serjeant,* Ryan. & M. 354; *Reg.* v. *Jones,* Car. & M. 614; *State* v. *Patterson,* 24 N. C. (2 Ired. L.) 346, 38 Am. Dec. 699; *Finney* v. *State,* 3 Head, 544; *Johnson* v. *State,* 61 Ga. 305; *State* v. *Johnson,* 12 Minn. 476, Gil. 378, 9 Am. Dec. 241, and cases cited supra.

So, where a woman had married the plaintiff and lived with him as his wife during the time of the transactions to which she was called to speak, but had left him on the return of a former husband, who had been absent from England upwards of thirty years, and was supposed to be dead, Patterson, P., held that there was no objection to her giving evidence for the defendant. *Wells* v. *Fisher,* 1 Moody & R. 99, 5 Car. & P. 12.

[7] 1 Hale, P. C. 693; 1 East, P. C. 469; *Grigg's Case,* T. Ryan, 1. See *Mills* v. *United States,* 103 U. S. 304, 26 L. ed. 481; 2 Archbold, Crim. Pr. & Pl. 1029.

On a trial for bigamy, the state, to prove the first marriage, gave evidence that defendant and the woman lived together, and held themselves out to the world as man and wife, for years; that they had a family of children living with them as their children; that she had signed and acknowledged deeds as his wife; and that after the bigamous marriage she had sued for a divorce, he had answered, and the divorce was granted. Held, all competent. *State* v. *Gonce,* 79 Mo. 600, 4 Am. Crim. Rep. 68.

"As long as the fact of the first marriage is contested, the second wife is incompetent as a witness. *Mills* v. *United States,* 103 U. S. 304, 26 L. ed. 481, and cases cited.

the lawful wife, though incompetent as a witness, may appear in court for the purpose of being identified, although by this process suspicion may attach to her husband; it being said by way of illustration that she may be thus produced to be identified as having passed a note which he is charged with having stolen.[8]

§ 398. Neither can testify as to confidential marital relations.—Aside from the question just stated, confidential communications between husband and wife are so far privileged that the law refuses to permit either to be interrogated as to what occurred in their confidential intercourse during their marital relations,[1] covering therefore admissions by silence as well as admissions by words.[2] The privilege, however, is personal to the parties. A third person who happened to overhear a confidential conversation between husband and wife may be examined as to such conversation.[3] A letter also written confidentially by husband to wife is ad-

[8] Alison, Crim. Law Practice, 463; Taylor, Ev. § 1231.

[1] *Dexter* v. *Booth*, 2 Allen, 559; *Baldwin* v. *Parker*, 99 Mass. 79, 96 Am. Dec. 697; *Raynes* v. *Bennett*, 114 Mass. 424; *Drew* v. *Tarbell*, 117 Mass. 90; *Bradford* v. *Williams*, 2 Md. Ch. 1; *Waddams* v. *Humphrey*, 22 Ill. 661; *Castello* v. *Castello*, 41 Ga. 613; *Wade's Succession*, 21 La. Ann. 343, 99 Am. Dec. 738.

A husband under the Massachusetts statute cannot be admitted to testify as to his private conversations with his wife, so as to charge his wife with liability based on such conversations. *Drew* v. *Tarbell*, 117 Mass. 90.

So under Missouri statute *Moore* v. *Wingate*, 53 Mo. 398; though in other respects either husband or wife may be a witness for the other. *Chesley* v. *Chesley*, 54 Mo. 347.

On a trial for an assault with intent to kill and murder, the witness upon whom the assault was alleged to have been made was asked if he did not tell his wife that the prisoner acted only in his own defense. It was held that the question required him to state a communication supposed to have been made by him to his wife, which, if made, was a confidential communication, and which he was not bound to disclose. *Murphy* v. *Com.* 23 Gratt. 960.

[2] *Goodrum* v. *State*, 60 Ga. 509.

[3] *Com.* v. *Griffin*, 110 Mass. 181.

missible against the husband, when brought into court by a third party.[4]

Nor does the privilege extend to conversations with third parties which the wife overheard,[5] nor does it protect husband or wife from being examined as to their conversation in presence of third parties,[6] though it is otherwise where such third parties are infants, or incapable, from their ignorance or other incapacity, of taking part in the conversation.[7] The privilege also extends only to confidential communications, and does not cover topics incident to general intercourse.[8] The wife is not competent to prove nonaccess of the husband, but she may from necessity, in a case of bastardy, be examined to prove her criminal intercourse with another.[9]

§ 399. Effect of death or divorce on admissibility.— Even death or permanent separation by divorce does not release the parties from the obligation of secrecy thus imposed

[4] *State* v. *Hoyt*, 47 Conn. 518, 36 Am. Rep. 89; *State* v. *Buffington*, 20 Kan. 599, 27 Am. Rep. 193.

[5] *Mercer* v. *Patterson*, 41 Ind. 440.

[6] *State* v. *Center*, 35 Vt. 379; *Keator* v. *Dimmick*, 46 Barb. 158; *Allison* v. *Barrow*, 3 Coldw. 414, 91 Am. Dec. 291. On this point, see *Westerman* v. *Westerman*, 25 Ohio St. 500, cited infra, § 401; *Toole* v. *Toole*, 112 N. C. 152.

[7] *Jacobs* v. *Hesler*, 113 Mass. 160.

[8] *Litchfield* v. *Merritt*, 102 Mass. 524.

As to statutory changes in this respect, see infra, § 401. See *Wilson* v. *Sheppard*, 28 Ala. 623; *Schnabel* v. *Betts*, 23 Fla. 178, 1 So. 692; *Kusch* v. *Kusch*, 143 Ill. 353, 32 N. E. 267; *Seaton* v. *Kendall*, 171 Ill. 410, 49 N. E. 561; *Walker* v. *Steele*, 121 Ind. 436, 22 N. E. 142, 23 N. E. 271; *Layson* v. *Cooper*, 174 Mo. 211, 97 Am. St. Rep. 545, 73 S. W. 472; *Nix* v. *Gilmer*, 5 Okla. 740, 50 Pac. 131; *McDuffie* v. *Greenway*, 24 Tex. 625; *Wells* v. *Tucker*, 57 Vt. 223; *Anderson* v. *Snyder*, 21 W. Va. 632; *Mountoin* v. *Fisher*, 22 Wis. 83.

[9] *Com.* v. *Shepherd*, 6 Binn. 283, 6 Am. Dec. 449; *Com.* v. *Connelly*, 1 Browne (Pa.) 284; *State* v. *Pettaway*, 10 N. C. (3 Hawks) 623. See infra, § 518; *Corson* v. *Corson*, 44 N. H. 587; *Dillon* v. *Dillon*, 32 La. Ann. 643; *Haley* v. *Haley*, 67 Cal. 24, 7 Pac. 3; *Shafto* v. *Shafto*, 28 N. J. Eq. 34.

by marriage.[1] The survivor in such cases is ordinarily precluded from divulging information he has received in marital confidence.[2] The same privilege continues after divorce or death, and neither of the parties can then reveal any information acquired during the marriage.[3] Otherwise as to communications made after divorce.[4]

§ 400. Statutes do not remove common-law disability.— The reason for the exclusion of the testimony of husband and wife, when called, for or against each other, being social policy, and not interest, statutes abolishing incompetency resting on interest do not remove the common-law incompetency of husband and wife for or against the other.[1] This is

[1] See Wharton, Ev. § 429, for cases.

[2] *Monroe* v. *Twisleton,* Peake, N. P. Add. Cas. 219; *Doker* v. *Hasler,* Ryan & M. 198; *Aveson* v. *Kinnaird,* 6 East, 192, 2 Smith, 286, 8 Revised Rep. 455; *Stein* v. *Bowman,* 13 Pet. 209, 10 L. ed. 129; *Ryan* v. *Follansbee,* 47 N. H. 100; *Williams* v. *Baldwin,* 7 Vt. 503; *Griffin* v. *Smith,* 45 Ind 366; *Lingo* v. *State,* 29 Ga. 470.

[3] 2 Nelson, Div. & Sep. 749; *State* v. *Jolly,* 20 N. C. 108 (3 Dev. & B. L.) 110; *Brock* v. *Brock,* 116 Pa. 109, 9 Atl. 486; *Perry* v. *Randall,* 83 Ind. 143; *Chamberlain* v. *People,* 23 N. Y. 85, 80 Am. Dec. 255.

[4] *Long* v. *State,* 86 Ala. 36, 5 So. 443.

On an indictment for fornication and adultery, one who had been the husband of the female defendant, but had been divorced from her on account of her adultery, was held, in North Carolina, incompetent to testify against the defendants as to the adulterous intercourse, or any other fact which occurred while the marriage existed. *State* v. *Jolly,* 20 N. C. 108 (3 Dev. & B. L.) 110.

Otherwise in a civil suit against paramour. *Dickerman* v. *Graves,* 6 Cush. 308, 53 Am. Dec. 41. And after a divorce *a vinculo,* the husband has been held a competent witness to prove the marriage with his divorced wife, on an indictment of another for adultery alleged to have been committed during coverture with such divorced wife. *State* v. *Dudley,* 7 Wis. 664.

[1] *Reg.* v. *Brittleton,* L. R. 12 Q. B. Div. 266, 53 L. J. Mag. Cas. N. S. 83, 50 L. T. N. S. 276, 32 Week. Rep. 463, 15 Cox, C. C. 431, 48 J. P. 295, 4 Am. Crim. Rep. 605; *Lucas* v. *Brooks,* 18 Wall. 436, 21 L. ed. 779; *McKeen* v. *Frost,* 46 Me. 239; *Young* v. *Gilman,* 46 N. H. 484; *Cram* v. *Cram.* 33 Vt. 15; *Lunay* v. *Vantyne,* 40 Vt. 501; *Kelly* v. *Drew,* 12 Allen, 107, 90 Am. Dec. 138; *Drew* v. *Tarbell,* 117 Mass. 90; *Sy-*

eminently the case in respect, as will be seen presently, to the confidential communications to each other of husband and wife.[2]

§ 401. May testify under enabling statutes.—Whether special statutes prescribing that the marital relation shall not be a ground for the exclusion of witnesses apply to criminal prosecutions depends upon the terms of such statutes.[1] But such statutes, when limited to the restoration of competency, do not preclude the parties from taking advantage of the right of withholding privileged communications which occurred during coverture, and not in the presence of third parties;[2] nor do they strip the parties of the right to decline

monds v. *Peck*, 10 How. Pr. 395; *Turpin* v. *State*, 55 Md. 462; *Steen* v. *State*, 20 Ohio St. 333; *Stanley* v. *Stanton*, 36 Ind. 445; *Castello* v. *Castello*, 41 Ga. 613; *Dunlap* v. *Hearn*, 37 Miss. 471. Though see *Lockhart* v. *Luker*, 36 Miss. 68; *Funk* v. *Dillon*, 21 Mo. 294; *Birdsall* v. *Dunn*, 16 Wis. 236; *Hobby* v. *Wisconsin Bank*, 17 Wis. 168; infra, § 437.

[2] See infra, §§ 407, 437.

[1] *Northwestern Union Packet Co.* v. *Clough*, 20 Wall. 528, 22 L. ed. 406; *State* v. *Black*, 63 Me. 210; *Burke* v. *Savage*, 13 Allen, 408; *Merriam* v. *Hartford & N. H. R. Co.* 20 Conn. 354, 52 Am. Dec. 344; *Southwick* v. *Southwick*, 49 N. Y. 510; *Marsh* v. *Potter*, 30 Barb. 506; *People ex rel. Smith* v. *Public Charities Comrs.* 9 Hun, 212; *Bronson* v. *Bronson*, 8 Phila. 261; *Dellinger's Appeal*, 71 Pa. 425; *Robinson* v. *Chadwick*, 22 Ohio St. 527; *Menk* v. *Steinfort*, 39 Wis. 370; *Bennifield* v. *Hypres*, 38 Ind. 498; *McNail* v. *Ziegler*, 68 Ill. 225; *State* v. *Nash*, 10 Iowa, 81; *State* v. *Hazen*, 39 Iowa, 649; *Ruth* v. *Ford*, 9 Kan. 17; *Bradsher* v. *Brooks*, 71 N. C. 322; *Chesley* v. *Chesley*, 54 Mo. 347. As to distinctive rule in Texas, see *Daffin* v. *State*, 11 Tex. App. 76; *Compton* v. *State*, 13 Tex. App. 271, 44 Am. Rep. 703.

[2] *McKeen* v. *Frost*, 46 Me. 239; *Jones* v. *Simpson*, 59 Me. 180; *Young* v. *Gilman*, 46 N. H. 484; *Dexter* v. *Booth*, 2 Allen, 559; *Packard* v. *Reynolds*, 100 Mass. 153; *Drew* v. *Tarbell*, 117 Mass. 90; *People* v. *Reagle*, 60 Barb. 527; *Bevins* v. *Cline*, 21 Ind. 37; *Reeves* v. *Herr*, 59 Ill. 81; *State* v. *Bernard*, 45 Iowa, 234; *Jackson* v. *Jackson*, 40 Ga. 150; *Moore* v. *Wingate*, 53 Mo. 398; *Magness* v. *Walker*, 26 Ark. 470; *Creamer* v. *State*, 34 Tex. 173; *State* v. *McCord*, 8 Kan. 232, 12 Am. Rep. 469.

to answer criminating questions.[3] Privilege, as it exists at common law, can be asserted in all cases in which it is not specifically prohibited by statute.[4]

[3] *Bronson* v. *Bronson,* 8 Phila. 261; *State* v. *McCord,* 8 Kan. 232, 12 Am. Rep. 469.

[4] In New Hampshire, the statutes are thus recapitulated: "In *State* v. *Moulton,* 48 N. H. 485, it was expressly held that the recent statutes making the wife a witness for her husband do not apply in criminal cases. A different rule is now established by the following statute: P. L. 1871, chap. 38, § 2: "In any case where the respondent in any criminal prosecution is allowed to testify by law, the wife of such respondent shall be a competent witness." Sec. 3. This act shall apply to all cases now pending, and shall take effect upon its passage. Approved July 13th, 1871. See also *State* v. *Straw,* 50 N. H. 460.

Under the Illinois statute, husband and wife are not competent witnesses against each other, though in certain cases they may be examined in each other's behalf. *Hawver* v. *Hawver,* 78 Ill. 412; *Trepp* v. *Barker,* 78 Ill. 146; *Primmer* v. *Clabaugh,* 78 Ill. 94.

In New York, under the provisions of the act of 1867 (chap. 887, Laws of 1867), in an action between husband and wife, either is a witness in his or her behalf against the other, save in the cases excepted in the act. The act, it is held, applies to all trials thereafter had in actions pending when it took effect, and under it the husband or wife can testify to conversations and communications (not confidential) had with the other prior to the taking effect of the act. *Southwick* v. *Southwick,* 49 N. Y. 510.

In *Houghton* v. *People,* 23 Alb. L. J. 443, which was an indictment for bigamy, on the trial of which the defendant's wife was admitted against him as a witness, the conviction was set aside. Judge Dykman, speaking of the statute, *viz*: "It is a statute in derogation of the common law, and can be permitted to accomplish nothing beyond what is fairly intended. It is first affirmatively enacted that a husband or wife may be examined as a witness for the other in a criminal prosecution, and further the statute does not affirmatively provide. What follows is a provision that on no criminal trial or examination shall husband or wife be compelled to testify against each other. These are negative words only, and make no innovation or relaxation of the old rule of law. Probably, their true intention and operation will be found in preventing the elicitation of testimony from husband or wife against each other after being called in their behalf. Substantially, the same view of this statute was taken in *People* v. *Briggs,* 60 How. Pr. 17. If it had been the intention of the statute to break down the barrier protecting the husband and wife from the testimony of the other in criminal prosecutions, it would

§ 402. May contradict each other.—The fact that a married person has testified in one way in a trial does not preclude the husband or wife of such person from testifying precisely to the opposite, even though the effect be to discredit the party contradicted.[1] Whether either husband or wife can be permitted in a collateral proceeding to charge the

not have been left to inference or implication, and we are not at liberty to resort to either to find it. In this case, the court proceeded on the theory that the wife was competent, but not compellable, and might testify of her free will, but, as we have seen already, the statute affirms her competency only in favor of her husband, and not against him." The editor of the Albany Law Journal cites as to the same effect, *Byrd* v. *State,* 57 Miss. 243, 34 Am. Rep. 440. Also 22 Alb. L. J. 81.

In Pennsylvania, under the act of April 15, 1869, a wife may be called as a witness by her husband, notwithstanding she may be compelled on cross-examination to give evidence against him; the act provides for the competency of the witness, not for the effect of her testimony. *Ballentine* v *White,* 77 Pa. 20. But the statutes of 1872 and 1877 do not confer competency on the wife as a witness in criminal cases for her husband. *Gibson* v. *Com.* 87 Pa. 253.

In Ohio, under the amendatory act of April 18, 1870 (67 Ohio Laws, 113), husband and wife are competent witnesses for and against each other, except as to communications made by one to the other, and acts done by one in the presence of the other during coverture, and not in the known presence of a third person. The act is held to be applicable to cases pending and causes of action existing at the time of its passage, notwithstanding the provisions of the act of February 19, 1866 (S. & S. 1), declaring the effect of repeals and amendments. It has been further ruled that evidence that a third person was present, and known to be present, at the time of making such communications, or doing such acts, is for the court, and not for the jury, and on error will be presumed to have been given to the court, unless the contrary appears. *Westerman* v. *Westerman,* 25 Ohio St. 500.

[1] Supra, § 396; *Stapleton* v. *Crofts,* 18 Q. B. 368; *Annesley* v. *Anglesea,* 17 How. St. Tr. 1276; *Rex* v. *All Saints,* 6 Maule & S. 194; *Rex* v. *Bathwick,* 2 Barn. & Ad. 639; *Stein* v. *Bowman,* 13 Pet. 209, 10 L. ed. 129; *State* v. *Marvin,* 35 N. H. 22; *Fitch* v. *Hill,* 11 Mass. 286; *Royal Ins. Co.* v. *Noble,* 5 Abb. Pr. (N. S.) 55; *Ware* v. *State,* 35 N. J. L. 553; *Com.* v. *Patterson,* 8 Phila. 609; *State* v. *Dudley,* 7 Wis. 664; *Clubb* v. *State,* 14 Tex. App. 192. See, however, contra, *Roach* v. *State,* 41 Tex. 261; *Keaton* v. *McGwier,* 24 Ga. 217.

other with a criminal offense has been doubted. In England, it was at one time held that no such testimony could be received,[2] and so it has frequently been ruled in this country.[3] But it is more reasonable to admit such testimony in all cases where it cannot be used as an instrument of future prosecution, provided the witness be not compelled to testify.[4]

[2] *Rex* v. *Cliviger,* 2 T. R. 263.

[3] *State* v. *Welch,* 26 Me. 30, 45 Am. Dec. 94; *Com.* v. *Sparks,* 7 Allen, 534; *State* v. *Gardner,* 1 Root, 485; *State* v. *Wilson,* 31 N. J. L. 77; *State* v. *Pettaway,* 10 N. C. (3 Hawks) 623; *People* v. *Horton,* 4 Mich. 67. See *Reg.* v. *Williams,* 8 Car. & P. 289; *Tilton* v. *Beecher,* Abbott's Rep. of Trial of Henry Ward Beecher, vol. 2, p. 48; supra, § 396.

[4] *Reg.* v. *Halliday,* 8 Cox, C. C. 298, Bell, C. C. 257, 29 L. J. Mag. Cas. N. S. 148, 6 Jur. N. S. 514, 2 L. T. N. S. 254, 8 Week. Rep. 423; *State* v. *Briggs,* 9 R. I. 361, 11 Am. Rep. 270; *Petrie* v. *Howe,* 4 Thomp. & C. 85; Phillipps, Ev. 4th Am. ed. 184; *Com.* v. *Reid,* 8 Phila. 385; *State* v. *Dudley,* 7 Wis. 664. See supra, § 396; *State* v. *Woodrow,* 58 W. Va. 527, 2 L.R.A.(N.S.) 862, 111 Am. St. Rep. 1001, 52 S. E. 545, 6 A. & E. Ann. Cas. 180; *Com.* v. *Woelfel,* 121 Ky. 48, 88 S. W. 1061; *Cole* v. *State,* 48 Tex. Crim. Rep. 439, 88 S. W. 341; *Hearne* v. *State,* 50 Tex. Crim. Rep. 431, 97 S. W. 1050; *Joseph* v. *Com.* 30 Ky. L. Rep. 638, 99 S. W. 311; *State* v. *Wilson,* 5 Penn. (Del.) 77, 62 Atl. 227; *Hoch* v. *People,* 219 Ill. 265, 109 Am. St. Rep. 327, 76 N. E. 356; *Purdy* v. *State,* 50 Tex. Crim. Rep. 318, 97 S. W. 480.

If defendant desires to object to witness testifying against him on the ground that she is his wife, he must challenge her competency when sworn, and try the question before the court. Failure to so do deemed a waiver. *State* v. *Falsetta,* 43 Wash. 159, 86 Pac. 168, 10 A. & E. Ann. Cas. 177; *State* v. *Frye,* 45 Wash. 645, 89 Pac. 170.

See *State* v. *Mathews,* 133 Iowa, 398, 109 N. W. 616, where wife divorced before trial held a competent witness against the defendant, notwithstanding Code provision forbidding it.

For a full discussion of this topic under the following heads:

1. Effect of marrying a witness to prevent her from testifying.

2. Competency at common law.

3. Competency under statutory provisions,—see *Moore* v. *State,* 44 Tex. Crim. Rep. 526, 72 S. W. 595, 67 L.R.A. 499, and note, 45 Tex. Crim. Rep. 234, 108 Am. St. Rep. 952, 75 S. W. 497, 2 A. & E. Ann. Cas. 878; *Compton* v. *State,* 13 Tex. App. 271, 44 Am. Rep. 703; *Dumas* v. *State,* 14 Tex. App. 464, 46 Am. Dec. 241; *Overton* v. *State,* 43 Tex. 616; *Sexton* v. *Sexton,* 2 L.R.A. (N. S.) 708, and note, 129 Iowa, 487, 105 N. W. 314; *O'Toole* v. *Ohio German F. Ins. Co.* 159 Mich. 187, 24 L.R.A.(N.S.) 802, 123 N. W. 795;

VII. Distinctive Rules as to Experts.

§ 403. Expert testifies as a specialist.—An expert in a specialty has been frequently defined to be a person experienced in such specialty, and to this definition, in fact, we are led by the derivation of the word. But with this definition

Mead v. *Owen*, 80 Vt. 273, 12 L.R.A. (N.S.) 655, 67 Atl. 722, 13 A. & E. Ann. Cas. 231.

Prohibition against wife of husband testifying against each other does not extend to those unlawfully cohabiting as husband and wife. *Mann* v. *State*, 44 Tex. 642.

Nor can a wife's declarations be proved by her husband for the purpose of impeaching her. *Roach* v. *State*, 41 Tex. 261.

Wife not a competent witness against any codefendant then on trial with her husband. Roscoe, Crim. Ev. 116; *Rex* v. *Smith*, 1 Moody, C. C. 289; *Rex* v. *Hood*, 1 Moody, C. C. 281; *State* v. *Smith*, 24 N. C. (2 Ired. L.) 402; *Com.* v. *Robinson*, 1 Gray, 555; Wharton, Crim. Law, § 767.

Wife's testimony not admissible with the consent of her husband. *Canole* v. *Allen*, 222 Pa. 156, 70 Atl. 1053; 1 Greenl. Ev. § 340; *Com.* v. *Easland*, 1 Mass. 15. Contra, *Pedley* v. *Wellesley*, 3 Car. & P. 558.

A statement made by the wife to another has been held to be inadmissible, as it amounts to permitting her to testify against the husband. *State* v. *Richardson*, 194 Mo. 326, 92 S. W. 649.

Competent as to marriage only. *Williams* v. *State*, 149 Ala. 4, 43 So. 720; *DeLeon* v. *Territory*, 9 Ariz. 161, 80 Pac. 348; *Ford* v. *State*, 124 Ga. 793, 53 S. E. 335; *Hoch* v. *People*, 219 Ill. 265. 109 Am. St. Rep. 327, 76 N. E. 356; *Porter* v. *United States*, 7 Ind. Terr. 616, 104 S. W. 855; *State* v. *Bell*, 212 Mo. 111, 111 S. W. 24; *Spencer* v. *State*, 52 Tex. Crim. Rep. 289, 106 S. W. 386; *Stewart* v. *State*, 52 Tex. Crim. Rep. 273, 106 S. W. 685.

Husband and wife of opposite party incompetent. *Wilbur* v. *Grover*, 140 Mich. 187, 103 N. W. 583.

Wife's testimony admissible in absence of objection by husband. *People* v. *Chadwick*, 4 Cal. App. 63, 87 Pac. 384, 389.

Necessary to prove woman wife of defendant. *State* v. *Frye*, 45 Wash. 645, 89 Pac. 170; *State* v. *Hancock*, 28 Nev. 304, 82 Pac. 95, 6 A. & E. Ann. Cas. 1020; *Hoch* v. *People*, 219 Ill. 279, 109 Am. St. Rep. 327, 76 N. E. 356; *Richardson* v. *State*, 103 Md. 112, 63 Atl. 317; 30 Am. & Eng. Enc. Law, 2d. ed. p. 951.

Exception confined to cases of personal violence. *State* v. *Woodrow*, 58 W. Va. 527, 2 L.R.A. (N.S.) 862, 112 Am. St. Rep. 1001, 52 S. E. 545, 6 A. & E. Ann. Cas. 180; *Williams* v. *State*, 149 Ala. 4, 43 So. 720; 30 Am. & Eng. Enc. Law, 2d. ed. p. 720.

we cannot rest. All experts are more or less experienced in a specialty, but all persons more or less experienced in a specialty are not to be regarded as experts in such specialty so as to be called as such in a court of justice. We must go further therefore, and seek for the distinguishing mark of experts when so called. It has sometimes been said that an expert is a witness who testifies as to conclusions from facts, while an ordinary witness testifies only as to facts. This definition also is not sufficiently exact. No witness called to detail facts reproduces such facts as they really exist.[1] Apart from the psychological question whether what we see is immediately perceived by us, such acts are inferred, not actually witnessed.[2] I hear the report of a gun for instance, I notice that the gun is aimed at a particular bird by a sportsman, and I see the bird fall. I infer that the sportsman killed the bird, though I did not see the shot as it passed through the air and struck the object aimed at. Identity, as has already been seen, is always a matter of inference, and so are all statements involving the application of a predicate to a subject.[3] We must therefore proceed further when we seek to distinguish between the expert and the nonexpert. And the true distinction is this, that the nonexpert testifies to a subject-matter readily mastered by the adjudicating tribunal; the expert to conclusions outside of such range. The nonexpert gives the results of a process of reasoning which can be verified only by specialists.[4]

§ 403a. Competency of experts.—But in order to render the evidence of a witness admissible on the ground that he is skilled in the matter upon which he is called to give

[1] Supra, § 378.
[2] Supra, § 17.
[3] Supra, §§ 7, 18, 19.
[4] Wharton, Ev. § 403; *People* v. *Royal*, 53 Cal. 62.

That an official examiner appointed by statute to make an autopsy does not exclude other experts as witnesses, see *Com.* v. *Dunan*, 128 Mass. 422; infra, § 422.

evidence, it is not necessary that such person should be skilled in such matter by reason of his professional trade. It is sufficient if the court is satisfied that he has in some way or other gained such experience in the matter as to entitle his evidence to credit.[1] The proper function of such witnesses is to instruct the court and jury in matters so removed from the ordinary pursuits of life that accurate knowledge of them can be gained only by study and experience; the object being to enable both court and jury to judge intelligently of the force and application of the several facts introduced in evidence.[2]

§ 403b. Necessary ingredients of expert testimony.— Two things must concur to justify the admission of the testimony of an expert witness. First, the subject under examination must be one that requires that the court and jury have the aid of knowledge or experience such as men not specially skilled do not have, and such therefore as cannot be obtained from ordinary witnesses. Second, the witness called as an expert must possess the knowledge, skill, or experience needed to inform court and jury in the particular case under consideration. Upon such a question such a witness may be called, and may testify not only to facts, but to his conclusions from the facts, because the court and jury are without the knowledge necessary to enable them to draw the conclusions for themselves without aid.[1]

[1] *Com.* v. *Farrell,* 187 Pa. 408, 41 Atl. 382, 11 Am. Crim. Rep. 468; *Merritt* v. *State,* 39 Tex. Crim. Rep. 70, 45 S. W. 21, 11 Am. Crim. Rep. 518.

See also *Milwaukee & St. P. R. Co.* v. *Kellogg,* 94 U. S. 469, 24 L. ed. 256; *Franklin F. Ins. Co.* v. *Gruver,* 100 Pa. 266; *Williams* v. *State,* 64 Md. 384, 1 Atl. 887, 5 Am. Crim. Rep. 512.

[2] *Coyle* v. *Com.* 104 Pa. 117, 4 Am. Crim. Rep. 379.

[1] *Reg.* v. *Silverlock,* 18 Cox, C. C. 104, 63 L. J. Mag. Cas. N. S. 233, [1894] 2 Q. B. 766, 10 Reports, 431, 72 L. T. N. S. 298, 43 Week. Rep. 14, 58 J. P. 788, 9 Am. Crim.

§ 403c. Medical experts.—In Wisconsin, physicians and surgeons are not allowed to give opinions as expert witnesses unless they have had experience in respect to the matter in controversy.[1] The better rule, however, is that, in a proper case for expert testimony, where the facts are admitted or proved by evidence not conflicting, the opinion of an expert upon such facts is admissible,[2] and that a witness as an expert may give his opinion upon a hypothetical statement of facts assumed to be in evidence, but not upon the conclusions or inferences of another witness.[3]

Rep. 276, 10 Am. Crim. Rep. 318. Best, Ev. p. 464.

Expert testimony as to the character and use of burglars' tools found in the possession of the defendant. *State* v. *Minot,* 79 Minn. 118, 81 N. W. 753, 14 Am. Crim. Rep. 623; *People* v. *Durrant,* 116 Cal. 179, 48 Pac. 75, 10 Am. Crim. Rep. 499; *Com.* v. *Sturtivant,* 117 Mass. 122, 19 Am. Rep. 401; *State* v. *Leabo,* 89 Mo. 247, 1 S. W. 788, 7 Am. Crim. Rep. 533.

An undertaker's assistant is not a competent witness as an expert as to when *rigor mortis* set in, especially when it did not appear that his attention had been specially called to that line of observation. *Com.* v. *Farrell,* 187 Pa. 408, 41 Atl. 382, 11 Am. Crim. Rep. 468.

[1] "I have not seen a case of strangulation, and do not know by experience." "The testimony of such a medical witness is at best merely hearsay what medical books and teachers taught or told them, repeated from memory. The learned counsel of the state asks this court to review and overrule this case as not supported by authority. But it is supported by authority and equally by reason. The decision was made deliberately, and we can see no reason for revising or changing it." *Soquet* v. *State,* 72 Wis. 659, 40 N. W. 391.

[2] *Coyle* v. *Com.* 104 Pa. 117, 4 Am. Crim. Rep. 379.

[3] *Williams* v. *State,* 64 Md. 384, 1 Atl. 887, 5 Am. Crim. Rep. 512.

"Where the evidence is conflicting, an expert cannot be asked his opinion as derived from the whole evidence. The questions to him should state specifically the particular facts in evidence, hypothetically assuming them to be true, upon which he is asked to express an opinion. He should be asked by independent questions his opinion as to facts testified to on the one hand, and his opinion as to opposing facts testified to on the other hand, in such manner that the jury can know upon what particular state of facts his several opinions were based." *Coyle* v. *Com.* 104 Pa. 117, 4 Am. Crim. Rep. 379.

§ 404. Specialists may be examined as to laws other than the lex fori.—It is elsewhere shown that foreign laws are to be proved by experts, which proof may be by parol.[1] Such is also the case with domestic systems of law not cognate with or included in the common law or the statute law of the jurisdiction. Hence the opinion of experienced military officers may be taken as to a point of military practice.[2] And in an action for libel arising out of a race horse transaction, it was held by Lord Denman, that a member of the Jockey Club might be asked, as a witness, whether he did not consider a certain course of conduct to be dishonorable.[3]

§ 405. Matters nonprofessional, expert cannot give an opinion.—The difficulty of distinguishing between "facts" and "opinions" has been already noticed; and it has been seen that, while all facts testified to are in one sense opinions, all opinions testified to are in one sense facts.[1] The question, therefore, is one as to the meaning of terms; and assuming, for the purpose of the present inquiry, that "opinion" means a conclusion from a series of facts capable of being substantially proved, we must accept as a general rule the proposition to be hereafter more fully illustrated,[2] that a witness cannot give his conclusions from facts, but must state the facts, leaving the drawing of conclusions to the court and jury. The same rule applies to experts in all matters as to which the lay mind is capable of forming a conclusion from facts susceptible of ascertainment, either as matters testified to by witnesses, or as matters of notoriety.[3] Thus, an ex-

[1] Wharton, Ev. § 435; supra, § 172.

[2] *Bradley* v. *Arthur*, 4 Barn. & C. 295, 6 Dowl. & R. 413.

[3] *Greville* v. *Chapman*, 5 Q. B. 731, 13 L. J. Q. B. N. S. 172, Dav. & M. 553, 8 Jur. 189; supra, §§ 7 et seq.

[1] Supra, §§ 7 et seq.

[2] Infra, §§ 411, 457.

[3] See cases cited Wharton, Ev. § 436; *Kennedy* v. *People*, 39 N. Y. 245. Compare *Com.* v. *Piper*, 120 Mass. 185; *People* v. *Manke*, 78 N. Y. 611; *Dillard* v. *State*, 58 Miss.

pert cannot be asked whether a railroad train stopped long enough for the passengers to get off, or whether it is safer to discharge passengers at a station or before reaching it,[4] or whether it was prudent to blow a steam whistle at a particular time.[5] So, a practising physician cannot be examined as to the amount of damages resulting to one physician from the violation of a contract by another, not to practise in the same district,[6] nor can a city fireman be asked as to the influence of the wind on extending a fire.[7] So, a physician cannot be asked as an expert whether a rape could have been committed in a particular way, when the question is one which requires no professional knowledge to answer,[8] nor as to the effect of sexual solicitations,[9] nor as to the effect on the health of an habitual use of intoxicating liquor;[10] nor can an expert in

368; *Jones* v. *State,* 71 Ind. 66; *Beasley* v. *People,* 89 Ill. 572; *Rash* v. *State,* 61 Ala. 89; *Monroe* v. *Lattin,* 25 Kan. 351; *Hunt* v. *State,* 9 Tex. App. 166; *Heacock* v. *State,* 13 Tex. App. 97.

[4] *Keller* v. *New York C. R. Co.* 2 Abb. App. Dec. 480.

[5] *Hill* v. *Portland & R. R. Co.* 55 Me. 438, 92 Am. Dec. 601.

[6] *Linn* v. *Sigsbee,* 67 Ill. 75.

[7] *State* v. *Watson,* 65 Me. 74.

[8] *Cook* v. *State,* 24 N. J. L. 843.

But in Michigan it has been held that it was permissible to call medical experts to testify as to the unlikeliness of sexual intercourse having been accomplishel, as the prosecutrix testified, in a buggy. *People* v. *Clark,* 33 Mich. 112, 1 Am. Crim. Rep. 660. And see *Woodin* v. *People,* 1 Park. Crim. Rep. 465.

In *Noonan* v. *State,* 55 Wis. 258, 12 N. W. 379, it was held not allowable to ask a witness whether inflammation in the sexual organs had not been produced by a violent, as distinguished from a voluntary, connection. A question of this character was permitted in *State* v. *Malley,* New Haven, 1882.

[9] *People* v. *Royal,* 53 Cal. 62.

[10] *Rawls* v. *American Mut. L. Ins. Co.* 27 N. Y. 282, 84 Am. Dec. 280. See *Carson* v. *State,* 69 Ala. 235.

In New York, on a trial for murder, a medical witness testified that he saw defendant on the evening of the day after the killing, conversed with him, and then thought him deranged; that he thought the insanity was delirium tremens; that he knew defendant's habit of drinking, and supposed drinking to be the cause of his insanity; that he had been present and heard all the evidence. The witness then stated, under objection, how long he thought defendant had been in this state of delirium, but was not al-

"the laws of vision" be received to prove that there cannot be recognition of an assailant by the flash of a pistol.[11]

lowed to state whether in his opinion he was in this state on the night of the alleged killing. It was held that this was no error. *McCann* v. *People*, 3 Park. Crim. Rep. 272.

When, in Missouri, in a murder trial, the counsel for the defendant put to a medical expert the following question, "When the defendant has been undeniably subject to fits of epilepsy, should he not have the benefit of every reasonable doubt that might arise as to his sanity?" it was correctly decided that the question was properly ruled out. *State* v. *Klinger*, 46 Mo. 224.

In *Com.* v. *Collier*, 134 Mass. 203, which was a prosecution for illegal sale of intoxicating liquors, a witness testified for the government that he tasted liquor sold by the defendant, that it was lager beer; and that he could tell by the taste alone whether it contained 3 per cent of alcohol. It was ruled that the defendant was not entitled to ask a witness, an expert in the manufacture and taste of beer, whether a person could determine from the taste alone the proportion of alcohol contained in a given sample of beer. In *Carson* v. *State*, 69 Ala. 235, it was held that a witness not an expert could testify as to the intoxicating character of certain liquors.

[11] *Smith* v. *State*, 2 Ohio St. 511. See Wharton & S. Med. Jur. 4th ed. § 939.

Opinions of experts have been received in the following cases, criminal in their nature:

Age.—12 Am. & Eng. Enc. Law, p. 490.

Alabama.—*Marshall* v. *State*, 49 Ala. 21, 1 Am. Crim. Rep. 482.

Connecticut.—*Morse* v. *State*, 6 Conn. 9.

Indiana.—*Foltz* v. *State*, 33 Ind. 215.

Kansas.—*State* v. *Grubb*, 55 Kan. 678, 41 Pac. 951.

Massachusetts.—*Com.* v. *O'Brien*, 134 Mass. 198.

Appearance and conduct:

Alabama.—*State* v. *Houston*, 78 Ala. 576, 56 Am. Rep. 59; *Jenkins* v. *State*, 82 Ala. 25, 2 So. 150; *Miller* v. *State*, 107 Ala. 40, 19 So. 37.

California.—*People* v. *Monteith*, 73 Cal. 7, 14 Pac. 373.

Iowa.—*State* v. *Huxford*, 47 Iowa, 16; *State* v. *Shelton*, 64 Iowa, 333, 20 N. W. 459.

Kansas.—*State* v. *Baldwin*, 36 Kan. 1, 12 Pac. 318, 7 Am. Crim. Rep. 377.

Michigan.—*Evans* v. *People*, 12 Mich. 27; *Brownell* v. *People*, 38 Mich. 732.

New York.—*People* v. *Eastwood*, 14 N. Y. 562; *Blake* v. *People*, 73 N. Y. 586.

Oregon.—*State* v. *Brown*, 28 Or. 147, 41 Pac. 1042.

Washington.—*State* v. *Dolan*, 17 Wash. 499, 50 Pac. 472.

Intoxication.—*People* v. *Monteith*, 73 Cal. 7, 14 Pac. 373; *People ex rel. Kelly* v. *MacLean*, 37 N. Y. S. R.

§ 406. Court to determine competency as expert.—Whether, as to the particular question, the witness is an ex-

628, 13 N. Y. Supp. 677; *People* v. *Eastwood,* 14 N. Y. 562.

Anger.—*Jenkins* v. *State,* 82 Ala. 25, 2 So. 150; *Miller* v. *State,* 107 Ala. 40, 19 So. 37; *State* v. *Shelton,* 64 Iowa, 333, 20 N. W. 459.

Excited, calm, or otherwise.—*State* v. *Houston,* 78 Ala. 576, 56 Am. Rep. 59; *State* v. *Brown,* 28 Or. 147, 41 Pac. 1042.

Friendly or hostile.—*Evans* v. *People,* 12 Mich. 27; *Blake* v. *People,* 73 N. Y. 586; *State* v. *James,* 31 S. C. 218, 9 S. E. 844.

Joyous, hopeful, or despondent.—*State* v. *Baldwin,* 36 Kan. 1, 12 Pac. 318, 7 Am. Crim. Rep. 377; *Brownell* v. *People,* 38 Mich. 732.

Jesting or in earnest.—*Ray* v. *State,* 50 Ala. 104; *Powers* v. *State,* 23 Tex. App. 42, 5 S. W. 153.

Health.—*Albert* v. *State,* 66 Md. 325, 59 Am. Rep. 159, 7 Atl. 697,

Identity.—*Walker* v. *State,* 58 Ala. 393; *James* v. *State,* 104 Ala. 20, 16 So. 94; *State* v. *Folwell,* 14 Kan. 105; *Com.* v. *Pope,* 103 Mass. 440; *Com.* v. *Williams,* 105 Mass. 62; *Com.* v. *Sturtivant,* 117 Mass. 122, 19 Am. Rep. 401; *State* v. *Babb,* 76 Mo. 501; *State* v. *Morris,* 84 N. C. 756; *Woodward* v. *State,* 4 Baxt. 322; *Hopper* v. *Com.* 6 Gratt. 684; *State* v. *Harr,* 38 W. Va. 58, 17 S. E. 794.

Illustrations.—*Woodward* v. *State,* 4 Baxt. 322; *Hopper* v. *Com.* 6 Gratt. 684; *State* v. *Harr,* 38 W. Va. 58, 17 S. E. 794.

Blood.—*People* v. *Burgess,* 153 N. Y. 561, 47 N. E. 889.

Blood stains.—4 Am. & Eng. Enc. Law, 2d ed. p. 588; *Greenfield* v. *People,* 85 N. Y. 75, 39 Am. Rep. 636.

Footprints.—*Com.* v. *Pope,* 103 Mass. 440; *State* v. *Morris,* 84 N. C. 756; *James* v. *State,* 104 Ala. 20, 16 So. 94; *State* v. *Reitz,* 83 N. C. 634.

Wheat.—*Walker* v. *State,* 58 Ala. 393.

Goods.—*State* v. *Babb,* 76 Mo. 501.

Identifying by voice.—*Com.* v. *Williams,* 105 Mass. 62.

Wagon.—*State* v. *Folwell,* 14 Kan. 105.

Insanity.—*Armstrong* v. *State,* 30 Fla. 170, 17 L.R.A. 484, 11 So. 618; *People* v. *Sanford,* 43 Cal. 29; *People* v. *Wreden,* 59 Cal. 392; *Berry* v. *State,* 10 Ga. 511; *Choice* v. *State,* 31 Ga. 424; *Upstone* v. *People,* 109 Ill. 169, 4 Am. Crim. Rep. 395; *Jamison* v. *People,* 145 Ill. 357, 34 N. E. 486; *State ex rel. Nave* v. *Newlin,* 69 Ind. 108; *Grubb* v. *State,* 117 Ind. 277, 20 N. E. 257, 725; *State* v. *Winter,* 72 Iowa, 627, 34 N. W. 475; *State* v. *McDonough,* 104 Iowa, 6, 73 N. W. 357; *People* v. *Finley,* 38 Mich. 482; *People* v. *Borgetto,* 99 Mich. 336, 58 N. W. 328; *Wood* v. *State,* 58 Miss. 741; *State* v. *Klinger,* 46 Mo. 224; *State* v. *Erb,* 74 Mo. 199; *State* v. *Bryant,* 93 Mo. 273, 6 S. W. 102; *Territory* v. *Roberts,* 9 Mont. 12, 22 Pac. 132; *Schlencker* v. *State,* 9 Neb. 241, 1 N. W. 857; *Polin* v. *State,* 14 Neb. 540, 16 N. W. 898; *Burgo* v. *State,*

pert, the trial court is to determine,[1] and on this point the witness may be examined and evidence may be received *aliunde*.[2] Except in an extraordinary case, an appellate court will not reverse on account of a mistake of judgment on the part of the trial court in determining qualifications of this class.[3] While expert testimony may be either founded upon

26 Neb. 639, 42 N. W. 701; *Shults* v. *State*, 37 Neb. 481, 55 N. W. 1080; *Pflueger* v. *State*, 46 Neb. 493, 64 N. W. 1094; *Hoover* v. *State*, 48 Neb. 184, 66 N. W. 1117; *State* v. *Lewis*, 20 Nev. 333, 22 Pac. 241, 8 Am. Crim. Rep. 574; *Genz* v. *State*, 58 N. J. L. 482, 34 Atl. 816; citing 7 Am. & Eng. Enc. Law, p. 505; *State* v. *Potts*, 100 N. C. 457, 6 S. E. 657; *Clark* v. *State*, 12 Ohio, 483, 40 Am. Dec. 481; *State* v. *Hansen*, 25 Or. 391, 35 Pac. 976, 36 Pac. 296; *State* v. *Fiester*, 32 Or. 254, 50 Pac. 561; *Taylor* v. *Com.* 109 Pa. 262; *State* v. *Leehman*, 2 S. D. 171, 49 N. W. 3; *Dove* v. *State*, 3 Heisk. 348; *Thomas* v. *State*, 40 Tex. 60; *Holcomb* v. *State*, 41 Tex. 125; *McClackey* v. *State*, 5 Tex. App. 320; *Webb* v. *State*, 5 Tex. App. 596; *Campbell* v. *State*, 10 Tex. App. 560; *Harris* v. *State*, 18 Tex. App. 287; 5 Am. Crim. Rep. 357; *State* v. *Hayden*, 51 Vt. 296; *State* v. *Maier*, 36 W. Va. 757, 15 S. E. 991; *R.* v. *Dove*, Stephen's Digest of Ev. Chase's ed. 149; *Real* v. *People*, 42 N. Y. 270; *Livingston* v. *Com.* 14 Gratt. 592.

Poison.—*Stephens* v. *People*, 4 Park. Crim. Rep. 396; *Zoldoske* v. *State*, 82 Wis. 580, 52 N. W. 778.

[1] Supra, § 357.

[2] *Davis* v. *State*, 38 Md. 15; *Mendum* v. *Com.* 6 Rand. (Va.) 704; *Caleb* v. *State*, 39 Miss. 721; *Waite* v. *State*, 13 Tex. App. 169. And see Wharton, Ev. §§ 666–721.

[3] *Gossler* v. *Eagle Sugar Refinery*, 103 Mass. 331; *Hills* v. *Home Ins. Co.* 129 Mass. 345; *Nelson* v. *Sun Mut. Ins. Co.* 71 N. Y. 453.

In *Dole* v. *Johnson*, 50 N. H. 455, it was held that the decision of the trial court is final.

In *Heacock* v. *State*, 13 Tex. App. 97, is was held that the question of competency of a witness offered as an expert was one for the court to determine, and should not be left to the jury.

"It having been shown that the witnesses were accustomed to handling firearms, it was proper to allow them to testify that they tested the condition of the defendant's gun by putting their fingers in it, and it was their opinion that the gun had been recently fired." *Meyers* v. *State*, 14 Tex. App. 35.

So, the opinions of medical men as to the instruments producing, and the nature and consequences of, wounds, are competent evidence in a prosecution for homicide. *Waite* v. *State*, 13 Tex. App. 169; *Lovelady* v. *State*, 14 Tex. App. 545; *Shelton* v. *State*, 34 Tex. 662.

An expert may be asked by either party as to the reasons on which his

the evidence or personal knowledge or postulated on a hypothetical case,[4] yet it must be limited to matters of science or skill, and is not allowable on the general merits of a case.[5]

§ 407. Opinion formed by reading authorities.—One testifying as an expert may give an opinion founded only upon his reading and study.[1] He cannot, however, be permitted to read as independent proof extracts from books in his department,[2] though he may refresh his memory when giving the conclusions arrived at in

opinion is based, or he may, with leave of the court, give such explanation on his own account. Beyond this he cannot go, though he may be examined in details, in order to test his credibility and judgment. *Leache* v. *State,* 22 Tex. App. 279, 58 Am. Rep. 638, 3 S. W. 539.

Also a physician is competent to prove kleptomania. *Harris* v. *State,* 18 Tex. App. 287, 5 Am. Crim. Rep. 357.

[4] *Hunt* v. *State,* 9 Tex. App. 166.

[5] *Hunt* v. *State,* 9 Tex. App. 166; *Cooper* v. *State,* 23 Tex. 331.

[1] *Reg.* v. *Thomas,* 13 Cox, C. C. 52; *State* v. *Wood,* 53 N. H. 484; *Collier* v. *Simpson,* 5 Car. & P. 73; *Cocks* v. *Purday,* 2 Car. & K. 269; *Carter* v. *State,* 2 Ind. 617; *Siebert* v. *People,* 143 Ill. 579, 32 N. E. 431. Contra.—*Soquet* v. *State,* 72 Wis. 659, 40 N. W. 391.

[2] *Washburn* v. *Cuddihy,* 8 Gray, 430; *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; *Stilling* v. *Thorp,* 54 Wis. 528, 41 Rep. 60, 11 N. W. 906; *Boyle* v. *State,* 57 Wis. 472, 46 Am. Rep. 41, 15 N. W. 827; infra, § 419.

As to admissibility of scientific works as independent authority, see infra, §§ 537–539.

In *Boyle* v. *State,* 57 Wis. 472, 46 Am. Rep. 41, 15 N. W. 827, Taylor, J., giving the opinion of the supreme court, said: "It seems to us that the court erred in permitting Dr. Cody to testify as to what was said in standard medical works upon the subject of strangulation, and what effect would be produced upon the body of the deceased when death resulted from such cause. The admission of such evidence is in direct conflict with the rulings of this court in the case of *Stilling* v. *Thorp,* 54 Wis. 528, 41 Am. Rep. 60, 11 N. W. 906. In that case, the question of admission of medical works in evidence was fully discussed, and it was held that they were not admissible. In addition to the cases cited by Justice Cassoday in that opinion, we cite the following cases sustaining the ruling in that case: *Whiton* v. *Albany City Ins. Co.* 109 Mass. 24; *Fowler* v. *Lewis,* 25 Tex. Supp. 380; *Collier*

his specialty by turning to standard works.[3] But unless an expert in his examination or cross-examination cites particular scientific works, such works cannot be afterwards put in evidence to discredit him.[4]

§ 408. An expert must be skilled specially.—To entitle a witness to be examined as an expert in a specific topic, he must, in the opinion of the court, have special practical acquaintance with the immediate line of inquiry.[1] Yet he need

v. *Simpson,* 5 Car. & P. 73; *Reg.* v. *Thomas,* 13 Cox, C. C. 52; *Carter* v. *State,* 2 Ind. 617; *State* v. *OBrien,* 7 R. I. 336; *Ware* v. *Ware,* 8 Me. 42; *Com.* v. *Brown,* 121 Mass. 69; *Fraser* v. *Jennison,* 42 Mich. 207, 3 N. W. 882; *Pinney* v. *Cahill,* 48 Mich. 584, 12 N. W. 862; *People* v. *Hall,* 48 Mich. 482, 42 Am. Rep. 477, 12 N. W. 665, 4 Am. Crim. Rep. 357; *Harris* v. *Panama R. Co.* 3 Bosw. 7; Rogers, Expert Testimony, 237–243. The author of this treatise cites the authorities showing that evidence of this kind is held not admissible by the English courts and the courts of Indiana, Maine, Maryland, Massachusetts, Michigan, North Carolina, Rhode Island, Wisconsin, California and New Hampshire, and admissible in the states of Iowa and Alabama. The rule stated by this court in *Stilling* v. *Thorp,* 54 Wis. 528, 41 Am. Rep. 60, 17 N. W. 906, was followed in the case of *Knoll* v. *State,* 55 Wis. 249–256, 42 Am. Rep. 704, 12 N. W. 369."

[3] See infra, §§ 537–539; *Darby* v. *Ouseley,* 1 Hurlst. & N. 1, 25 L. J. Exch. N. S. 227, 2 Jur. N. S. 497; *Pierson* v. *Hoag,* 47 Barb. 243; Hornblower, Ch. J., in *State* v. *Spencer,* 21 N. J. L. 196; *Connecticut Mut. L. Ins. Co.* v. *Ellis,* 89 Ill. 516; *Cory* v. *Silcox,* 6 Ind. 39; *Harvey* v. *State,* 40 Ind. 516; *Bowman* v. *Torr,* 3 Iowa, 571; *Ripon* v. *Bittel,* 30 Wis. 614; *Luning* v. *State,* 1 Chand. (Wis.) 264; *State* v. *Terrell,* 12 Rich. L. 321; *Merkle* v. *State,* 37 Ala. 139.

See *Melvin* v. *Easley,* 46 N. C. (1 Jones, L.) 386, 62 Am. Dec. 171.

[4] Infra, § 539; *Ripon* v. *Bittel,* 30 Wis. 614.

[1] Supra, § 406. See cases cited in Wharton, Ev. § 439. And compare *State* v. *Watson,* 65 Me. 74; *State* v. *Secrest,* 80 N. C. 450; *Heacock* v. *State,* 13 Tex. App. 97.

In *Brownell* v. *People,* 38 Mich. 735, Campbell, Ch. J., said: "It appears to us that the testimony of one called as an expert, upon the effect of pistol shot upon the clothing when fired at a certain distance, was based on too small an experience. A single pistol shot through his own clothing, without any proof of the comparative amount or kinds of loading, and without ever seeing further experiments at greater or less distances or

not be thoroughly acquainted with the *differentia* of the specialty under consideration. If this were necessary, few experts could be admitted to testify; certainly no courts could be found capable of determining whether such experts were competent. A general knowledge of the department to which the specialty belongs would seem to be sufficient.[2] And it has been held in Virginia that one who has played the game of "Keno" two or three times, but who has said he is no expert, is competent to describe the game.[3]

§ 408a. Witness required to state facts to show competency.—The witness, however, cannot be asked whether he has sufficient skill and experience to give an opinion. This is not for him to conclude. He should state facts from which the court may determine his competency and qualification,[1] and other witnesses may be called to testify as to his compe-

at the same distance with pistols of the same or different make or calibre, is too small a foundation for generalizing."

In *Sullivan* v. *Com.* 93 Pa. 284, a physician was allowed to give the result of his experiments in firing a pistol at muslin or cloth, and the muslin with the powder marks was also admitted.

[2] *State* v. *Wood,* 53 N. H. 484; *Dole* v. *Johnson,* 50 N. H. 452; *Com.* v. *Rich,* 14 Gray, 335; *Shattuck* v. *Train,* 116 Mass. 296; *Roberts* v. *Johnson,* 58 N. Y. 613; *Castner* v. *Sliker,* 33 N. J. L. 95, 507; *Consolidated Real Estate & F. Ins. Co.* v. *Cashow,* 41 Md. 59; *House* v. *Fort,* 4 Blackf. 293; *Washington* v. *Cole,* 6 Ala. 212; *Tullis* v. *Kidd,* 12 Ala. 648; *Spiva* v. *Stapleton,* 38 Ala. 171; *Morissey* v. *People,* 11 Mich. 327; *Davis* v. *State,* 35 Ind. 496, 9 Am. Rep. 760; *State* v. *Hinkle,* 6 Iowa, 380; *State* v. *Reddick,* 7 Kan. 143.

But in *Emerson* v. *Lowell Gaslight Co.* 6 Allen, 146, it was ruled that a physician who has had no experience of the effect on health of breathing illuminating gas could not be examined as an expert as to such effects. And the experience of an expert is to be considered in weighing his testimony. *Koons* v. *State,* 36 Ohio St. 195. See *Meyers* v. *State,* 14 Tex. App. 35, where it was held that experts in handling weapons may be examined as to their capacity.

[3] *Nuckolls* v. *Com.* 32 Gratt. 884.

[1] *Eggart* v. *State,* 40 Fla. 527, 25 So. 144; Abbott, Trial Brief, Crim. 318.

tency;[2] but not after the witness has been permitted to testify.[3]

§ 409. Court decides as to impeaching or sustaining experts.—The court also decides not only as to what constitutes an expert, but how he is to be sustained or impeached. "After a witness has been admitted to testify as an expert," so says an able writer, "evidence cannot be given to the jury, opinions of other experts in the same science, as to whether the witness was qualified to draw correct conclusions in the science on which he had been examined, though such testimony might have been properly offered to the court to show the competency of the witness before he was admitted to testify.[1] The rule imposing limitations upon such opinions is now well established, and the expert's own character is best protected by it, under the maxim of *experto crede,* since whatever might be said by one expert in derogation of another opinion might in turn be said of his own. *Mutato nomine de te fabula narratur.*[2] But it is difficult to understand why an

[2] *Mendum* v. *Com.* 6 Rand. (Va.) 704; *State* v. *Maynes,* 61 Iowa, 119, 15 N. W. 864.

[3] *Tullis* v. *Kidd,* 12 Ala. 648; *Brabo* v. *Martin,* 5 La. 275. Contra, *Thompson* v. *Ish,* 99 Mo. 160, 17 Am. St. Rep. 552, 12 S. W. 510; *Mason* v. *Phelps,* 48 Mich. 126, 11 N. W. 413, 837.

"One expert may testify to the skill of another who has already testified, where his knowledge of such skill is derived from personal observation." *Laros* v. *Com.* 84 Pa. 200.

Courts may allow a preliminary examination to determine the competency of the witness, before permitting the witness to be sworn. Abbott, Trial Brief, Crim. p. 318; *Sarle* v. *Arnold,* 7 R. I. 582; *Re Gorkow,* 20 Wash. 563, 56 Pac. 385; Abbott, Trial Brief, Civil, chap. 7.

Opinion of banker as to genuineness of bank note admissible. *Keating* v. *People,* 160 Ill. 487, 43 N. E. 724; *Crawford* v. *State,* 2 Ind. 132. See also *Lynch* v. *Grayson,* 5 N. M. 487, 25 Pac. 992; *People* v. *McQuaid,* 85 Mich. 123, 48 N. W. 161; *State* v. *Hayden,* 51 Vt. 296.

[1] *Tullis* v. *Kidd,* 12 Ala. 648.

[2] Ordronaux, Med. Jur. § 117.

expert should be withdrawn from the operation of the general rule of law which permits witnesses to be impeached by showing their incapacity. It is admissible to show that a witness who testifies that he saw a particular thing did not see it because he was absent or blind; and hence it may be shown that an expert who testifies to certain results is incapable of attaining them. But unless the capacity or reputation of an expert be assailed, it cannot be independently proved by the party calling him,[3] though his special knowledge may be thus proved by his own examination.[4] At all events, whether an expert can be thus impeached or sustained, and if so, how this is to be done, is exclusively for the court.

§ 410. Limit of specialty defined by the court.—Still more strikingly are we reminded that we must after all go back to the courts to determine the limits of expert testimony,

[3] *Dephue* v. *State,* 44 Ala. 32.

[4] Supra, § 406; *Laros* v. *Com.* 84 Pa. 200.

As to who are experts. *Hartung* v. *People,* 4 Park. Crim. Rep. 319; *State* v. *Hinkle,* 6 Iowa, 380; *Shelton* v. *State,* 34 Tex. 662; *Moore* v. *State,* 17 Ohio St. 521; *State* v. *Ward,* 39 Vt. 225; *Kendall* v. *May,* 10 Allen, 59; *Caleb* v. *State,* 39 Miss. 721; *Pickard* v. *Bailey,* 26 N. H. 152; *State* v. *Felter,* 25 Iowa, 67.

A surgeon is not competent to give an opinion as an expert as to the probable position of the body of the deceased when struck. *Kennedy* v. *People,* 39 N. Y. 245.

Distinction between stains of human blood and those of animals. *State* v. *Knight,* 43 Me. 11.

It is proper to interrogate a witness who observed the operations of a crowd who followed and killed a person, whether he discovered any difference of purpose among those forming the crowd. *Brennen* v. *People,* 15 Ill. 511. See also *State* v. *Clark,* 34 N. C. (12 Ired. L.) 151; *State* v. *Cheek,* 35 N. C. (13 Ired. L.) 114; *McLean* v. *State,* 16 Ala. 672; *Luning* v. *State,* 1 Chand. (Wis.) 178, 52 Am. Dec. 153, 1 Chand. (Wis.) 264.

An experienced physician, after having made a post mortem examination of the body of a female, may, as an expert, offer his opinion as to whether she had been pregnant, and what was the cause of her death. *State* v. *Smith,* 32 Me. 369, 54 Am. Dec. 578.

when we accept the position so often invoked, that while "men of science" are experts, "quacks" are not. But who are quacks? Are practitioners of new, and what may at the time be professionally viewed as heretical schools, quacks? This would have disqualified both Willis and Esquirol, each of whom was for a time viewed as a quack by the body of conservative practitioners. Is he a quack who adheres to a system of healing like the electric school of Christian Science, or homeopathy, or some other school which, though venerable and supported by high past authority, is now regarded as exploded? Would one of Bishop Berkeley's disciples be an expert as to the value of tar water? Is even a psychological physician of eminence an expert as to matters speculative or ethical? The latter question was justly negatived in 1869 in the court of appeals of Kentucky by Chief Justice Williams, who said that "the opinions of experts, not founded on science, but on a mere theory of morals or ethics, whether given by professional or unprofessional men, are wholly inadmissible as evidence. Hence the opinion of even physicians, that no sane man in a Christian country would commit suicide, not being founded on the science or phenomena of the mind, but rather a theory of morals, religion, and future responsibility, is not evidence." [1] We find ourselves, therefore, re-

[1] *St. Louis Mut. L. Ins. Co.* v. *Graves,* 6 Bush, 290.

Ethical questions.—12 Am. & Eng. Enc. Law, p. 424; *Grand Rapids & I. R. Co.* v. *Ellison,* 117 Ind. 234, 20 N. E. 135; *Missouri P. R. Co.* v. *Mackey,* 33 Kan. 299, 6 Pac. 291; *Raymond* v. *Lowell,* 6 Cush. 524, 53 Am. Dec. 57; *Nowell* v. *Wright,* 3 Allen, 166, 80 Am. Dec. 62.

If, in this cause, any specific rules of the medical profession had been given in evidence, the defendant perhaps might have been allowed to show that the plaintiff, by violating those rules, had rendered himself unworthy of the countenance of his brethren. But the question here was whether a physician, in refusing to consult with the plaintiff, had honorably and faithfully discharged his duty to the medical

duced to the following dilemma: Either the court must distinguish between rival schools, in which case it determines in advance that particular tenets of science are substantive, or it must decline so to decide, in which case there is no ground of discrimination between professed experts.

To the same result are we driven by the criterion invoked by Chief Justice Williams in the case just cited. To declare that experts are admissible to state what is "scientific," but not what is "speculative" or "ethical," is to define what "science" is, and what are its bounds, and to assume the right of rejecting from the domain of science anything that the law claims to belong to its own specific control. We then have either to abdicate such a right on the part of the court, and to give unrestrained license and final authoritativeness to experts, or we must revert to the old doctrine that experts, no matter on what they testify, simply supply data as to whose competency and relevancy the court is to judge, and as to which the court is finally to declare the law. And it is to this result that sound reason, as well as recent adjudications, tends.

§ 411. Abstract questions not permitted.—Experts can be asked hypothetical questions, but the hypothesis upon which they are examined must be based on facts admitted or established by the evidence, or which, if controverted, the jury might legitimately find on weighing the evidence. Purely imaginary or abstract questions, assuming facts or theories for which there is no foundation in the evidence, are not ad-

profession. The answer to that might depend altogether on the temper and peculiar opinions of the individual witness, and was a point on which the jury were as capable of forming a judgment as the witness himself. *Ramadge* v. *Ryan*, 9 Bing. 333, 2 Moore & S. 421, 2 L. J. C. P. N. S. 7.

missible as a matter of right,[1] and the inference from the direction of a wound is not that of a specialty.[2]

§ 412. Medical man if expert in his school may testify as such.—Between medical men of distinct schools, and between medical men of different grades of culture in the same school, another line of discrimination is to be invoked. Jurisprudence does not say to any particular school, "You are right, and the others are wrong," but it says to the members of each school, "You are bound to exercise the skill and possess the qualifications usual to good practitioners of your particular class." [1]

So, jurisprudence does not say to a physician or surgeon

[1] *People* v. *Augsbury*, 97 N. Y. 501.

Footprints and tracks. 3 Am. & Eng. Enc. Law, Supp. p. 488; *Alford* v. *State*, 47 Fla. 1, 36 So. 436; *Weaver* v. *State*, 43 Tex. Crim. Rep. 340, 65 S. W. 534; *State* v. *Sexton*, 147 Mo. 89, 48 S. W. 452; *State* v. *Davis*, 55 S. C. 339, 33 S. E. 449; *Davis* v. *State*, 126 Ala. 44, 28 So. 617; *Littleton* v. *State*, 128 Ala. 31, 29 So. 390; *Russell* v. *State*, 66 Neb. 497, 92 N. W. 751; *Smith* v. *State*, 137 Ala. 22, 34 So. 395, 13 Am. Crim. Rep. 410; *State* v. *Miller*, 71 N. J. L. 527, 60 Atl. 202; *Thompson* v. *State*, 45 Tex. Crim. Rep. 397, 77 S. W. 449; *Mosely* v. *State*, — Tex. Crim. Rep. —, 67 S. W. 103; *Smith* v. *State*, 45 Tex. Crim. Rep. 405, 77 S. W. 453; *Hester* v. *State*, — Tex. Crim. Rep. —, 51 S. W. 932; *Baines* v. *State*, 43 Tex. Crim. Rep. 490, 66 S. W. 847.

A witness testified that certain stains found on defendant's clothes at the time of the murder, he supposed, were blood stains: held not error. *State* v. *Henry*, 51 W. Va. 283, 41 S. E. 439. See title "Bloodstains," 4 Am. & Eng. Enc. Law, p. 587.

And a person of experience in the profession of the law of another country may state his opinion as to what, according to the law of that country, would be the legal effect of the facts previously spoken of by the witnesses, taking the facts to be accurate. *Wakefield's Case*, 2 Lewin, C. C. 279, Hullock, B.; *De Bode's Case*, 8 Q. B. 208; *Bristow* v. *Decqueville*, 3 Car. & K. 64. This ruling held correct by the full court. 5 Exch. 275.

[2] *People* v. *Westlake*, 62 Cal. 303; 3 Wharton & S. Med. Jur. 4th ed. § 299; infra, § 771.

[1] Wharton, Neg. § 733; 3 Wharton & S. Med. Jur. 4th ed. § 299; infra, § 771.

called to testify whether a wound or poison was fatal, "You must have a particular diploma or belong to a particular professional school," but it says, "If you have become familiar with such laws of your profession as bear upon this issue, then you can testify how the issue is affected by such laws.[2] Hence physicians, when in general practice, are admissible to state the nature and effect of a disease,[3] the conditions of gestation,[4] the effect of particular poisons on the human system[5] or on animals,[6] the effects of a particular treatment,[7] the likelihood that death could be produced by a particular disease,[8] though they have not made such topics a specialty.[9] Medical attendants neither specialists nor family physicians may be examined as to cases of insanity,[10] though they may not be competent to answer questions as to hypothetical cases.[11] And a surgeon is admissible to prove the nature of a wound and its probable cause and effects,[12] and that it was

[2] *Livingston* v. *Com.* 14 Gratt. 592; *New Orleans, J. & G. N. R. Co.* v. *Allbritton,* 38 Miss. 242, 75 Am. Dec. 98; *Polk* v. *State,* 36 Ark. 117.

As to restrictions in Wisconsin statute, see *Montgomery* v. *Scott,* 34 Wis. 339.

[3] See cases cited in Wharton, Ev. § 441; *Mitchell* v. *State,* 58 Ala. 417.

[4] *State* v. *Smith,* 32 Me. 369, 54 Am. Dec. 578; *Young* v. *Makepeace,* 103 Mass. 50; *Daegling* v. *State,* 56 Wis. 586, 14 N. W. 593; infra, § 816.

[5] *Stephens* v. *People,* 4 Park. Crim. Rep. 396; *Pierson* v. *People,* 18 Hun, 239; *Mitchell* v. *State,* 58 Ala. 417.

[6] *Hoard* v. *Peck,* 56 Barb. 202; *State* v. *Perry,* 41 W. Va. 641, 24 S. E. 634; *Cooper* v. *State,* 23 Tex. 331; *Hall* v. *Rankin,* 87 Iowa, 263, 54 N. W. 217; 7 Am. & Eng. Enc. Law, p. 514.

[7] *Barber* v. *Merriam,* 11 Allen, 322.

[8] *State* v. *Smith,* 32 Me. 369, 54 Am. Dec. 578; Wharton, Ev. § 441, and cases cited.

[9] *Dole* v. *Johnson,* 50 N. H. 452; *Castner* v. *Silker,* 33 N. J. L. 95, 507.

[10] *Hastings* v. *Rider,* 99 Mass. 622; *Chandler* v. *Barrett,* 21 La. Ann. 58, 99 Am. Dec. 701; *Davis* v. *State,* 35 Ind. 496, 9 Am. Rep. 760; *State* v. *Reddick,* 7 Kan. 143.

[11] See fully infra, § 418; *Com.* v. *Rich,* 14 Gray, 335.

[12] *State* v. *Knight,* 43 Me. 11; *Rowell* v. *Lowell,* 11 Gray, 420; *Linton* v. *Hurley,* 14 Gray, 191; *Com.* v. *Piper,* 120 Mass. 186; *Gardiner* v. *People,* 6 Park. Crim. Rep.

not of recent infliction,[13] and as to its probable period, based on the testimony of others,[14] though it has been held not admissible for a surgeon to give an opinion on merely speculative data.[15] And he may be asked which of several wounds produced death,[16] though not as to matters in respect to which the jury can judge as well as an expert.[17] But as to matters

155; *Rumsey* v. *People,* 19 N. Y. 41; *Fort* v. *Brown,* 46 Barb. 366; *People* v. *Kerrains,* 1 Thomp. & C. 333; *Com.* v. *Lenox,* 3 Brewst. (Pa.) 249; *Davis* v. *State,* 38 Md. 15, 43; *Livingston* v. *Com.* 14 Gratt. 592; *Batten* v. *State,* 80 Ind. 394; *Ulrich* v. *People,* 39 Mich. 245; *State* v. *Morphy,* 33 Iowa, 270, 11 Am. Rep. 122; *State* v. *Crenshaw,* 32 La. Ann. 406; *Ebos* v. *State,* 34 Ark. 520; *Shelton* v. *State,* 34 Tex. 662; *Banks* v. *State,* 13 Tex. App. 182; *Powell* v. *State,* 13 Tex. App. 244; *Waite* v. *State,* 13 Tex. App. 169.

As to cases where a medical examiner did not follow a statute regulating autopsies, see *Com.* v. *Taylor,* 132 Mass. 261.

In *Wilson* v. *People,* 4 Park. Crim. Rep. 619, the court rejected expert evidence to determine whether the wound was inflicted by a blunt or a sharp instrument.

In *Davis* v. *State,* 38 Md. 15, 43, expert testimony was received to show that the death was produced by a fall into a sink.

For cases relative to expert testimony in rape cases, see supra, § 405.

In *State* v. *Harris,* 63 N. C. 1, a physician was admitted to prove that a burn was produced after death, and in *State* v. *Clark,* 15 S. C. 403, to prove whether a party was dead before a train struck him. In *Rash* v. *State,* 61 Ala. 89, a surgeon was admitted to explain how a gunshot wound was inflicted.

In *State* v. *Porter,* 34 Iowa, 131, a question was allowed as to whether a particular blow could have come from a fall from a chair.

In *O'Mara* v. *Com.* 75 Pa. 424 (infra, §§ 721, 764, 778), a physician was admitted to testify as to the quantity of blood likely to flow from a particular wound.

In *Cowley* v. *People,* 83 N. Y. 464, 38 Am. Rep. 464, testimony of a physician was received as to what would have been likely to have produced particular emaciation in a child. In *State* v. *Slagle,* 83 N. C. 630, a physician was examined as to the deleterious effect of a particular medicine in a given case.

[13] *Lindsay* v. *People,* 63 N. Y. 143.

[14] *State* v. *Clark,* 15 S. C. 403.

[15] *Com.* v. *Piper,* 120 Mass. 186; *Hawks* v. *Charlemont,* 110 Mass. 110; *Kennedy* v. *People,* 39 N. Y. 245.

[16] Infra, § 774.

[17] *Kennedy* v. *People,* 39 N. Y. 245; *Cook* v. *State,* 24 N. J. L. 852, supra, § 405; *Noonan* v. *State,* 55 Wis. 258, 12 N. W. 379; *Cooper* v. *State,* 23 Tex. 331; *Dillard* v. *State,* 58 Miss 368.

out of the range of a specific department to which he has confined himself, an expert is not entitled to testify.[18] Practice, however, in such specialty, is not a prerequisite to admissibility, if the specialty has been made the object of study.[19] And a general family practitioner may be received to give an opinion, whatever may be its weight, as to whatever comes within the range of such practice.[20] But a medical man is not permitted to testify as an expert as to matters not distinctively belonging to his profession.[21] And it has been held that medical men cannot be admitted to testify, in order to contradict witnesses who had identified the head of a deceased person, that after a certain stage of decomposition a human head cannot be identified.[22]

[18] *Emerson* v. *Lowell Gaslight Co.* 6 Allen, 146, 83 Am. Dec. 621; *Com.* v. *Collier,* 134 Mass. 203, cited supra, § 405.

In *State* v. *Smith,* 49 Conn. 376, it was held that a physician could not be admitted to prove that the defendant was peculiarly susceptible to the influence of spirituous liquor.

[19] *State* v. *Wood,* 53 N. H. 484; *Baxter* v. *Abbott,* 7 Gray, 71, cited infra, §§ 417, 493.

[20] *Hastings* v. *Rider,* 99 Mass. 622; *State* v. *Clark,* 34 N. C. (12 Ired. L.) 151; *Horton* v. *Green,* 64 N. C. 64; *Everett* v. *State,* 62 Ga. 65 (see infra, §§ 460, 756); *State* v. *Cook,* 17 Kan. 392.

[21] Supra, § 405; Lawson, Expert Ev. Rule 28; *Emerson* v. *Lowell Gaslight Co.* 6 Allen, 146, 83 Am. Dec. 621, supra, § 408.

[22] *State* v. *Vincent,* 24 Iowa, 570, 95 Am. Dec. 753.

Injuries by means of a club.—*State* v. *Seymour,* 94 Iowa, 699, 63 N. W. 661; *Waite* v. *State,* 13 Tex. App. 169; *Carthaus* v. *State,* 78 Wis. 560, 47 N. W. 629.

Injuries with a knife.—*Batten* v. *State,* 80 Ind. 394; *State* v. *Morphy,* 33 Iowa, 270, 11 Am. Rep. 122; *State* v. *Clark,* 34 N. C. (12 Ired. L.) 151; *State* v. *Chee Gong,* 17 Or. 635, 21 Pac. 882; *Mendum* v. *Com.* 6 Rand. (Va.) 704.

Gunshot wounds.—*Rash* v. *State,* 61 Ala. 89; *Prince* v. *State,* 100 Ala. 144, 46 Am. St. Rep. 28, 14 So. 409; *People* v. *Wong Chuey,* 117 Cal. 624, 49 Pac. 833; *State* v. *Cross,* 68 Iowa, 180, 26 N. W. 62.

One testifying as a medical expert who has stated all that he had seen and heard, and given his own expert opinion concerning the sanity of a person, need not be allowed to say what medical science teaches on the subject. *Davis* v. *United States,* 165 U. S. 373, 41 L. ed. 750, 17 Sup. Ct. Rep. 360.

Asking a physician whether a professional examination was made in a superficial or in a careful and

§ 413. **So of scientists.**—Experts in physical science are admissible on the same condition.[1] Thus, it is allowable to examine chemists and microscopists as to whether certain stains are from blood,[2] as to the effects of a particular poison,[3] as to the nature of ink stains,[4] as to the effects of particular powders in erasing writing,[5] physicians with a general, though not special, knowledge of chemistry, as to whether a particular poison was found in the stomach of the deceased,[6] a machinist as to the causes of a leak in a water pipe,[7] and a college graduate who has studied chemistry with a distinguished chemist, has taught chemistry for five years, and is acquainted with gases and with the composition of camphene, as to the safety of a camphene lamp.[8]

thorough manner is not objectionable as substituting his opinion for the judgment of the jury. *Northern P. R. Co.* v. *Urlin*, 158 U. S. 271, 39 L. ed. 977, 15 Sup. Ct. Rep. 840.

The opinion of a medical witness whether or not a man standing at the hip of a recumbent person, and striking blows on that person's forehead and head with an ax, would necessarily be spattered with blood, is admissible. *Bram* v. *United States*, 168 U. S. 532, 42 L. ed. 568, 18 Sup. Ct. Rep. 183, 10 Am. Crim. Rep. 547.

[1] *Page* v. *Parker*, 40 N. H. 47.

[2] *State* v. *Knight*, 43 Me. 11; *People* v. *Gonzalez*, 35 N. Y. 49; *Gaines* v. *Com.* 50 Pa. 319. See Wharton, Homicide, § 683; infra, § 777.

[3] *Hartung* v. *People*, 4 Park. Crim. Rep. 319.

And this though the expert be not a physician or trained as such. *State* v. *Cook*, 17 Kan. 392.

[4] *Farmers' & M. Bank* v. *Young*, 36 Iowa, 45.

[5] *People* v. *Brotherton*, 47 Cal. 388. In this, which was a trial for forgery committed by altering a check by extracting writing therefrom, and writing new words or figures in place thereof, a witness who was not called as a scientific expert was permitted to testify as to the chemical effect that a powder found in the defendant's possession had on writing in a check similar to that by the alteration of which the forgery was committed.

[6] *State* v. *Hinkle*, 6 Iowa, 380.

[7] *Hand* v. *Brookline*, 126 Mass. 324. See *Sheldon* v. *Booth*, 50 Iowa, 209.

[8] *Bierce* v. *Stocking*, 11 Gray, 174; Wharton, Ev. § 444; *Downing* v. *State*, 66 Ga. 110, 66 Ga. 160.

Statements that certain cattle disease is ordinarily called "Texas fever," made by witnesses who have given the symptoms of the disease, are not improper, although the witnesses are not experts. *Grayson* v.

§ 414. And so of practitioners in a business capacity.—Nor is it necessary that a specialty, to enable one of its practitioners to be examined as an expert, should involve abstruse scientific conditions. No matter how humble may be a specialty, and how purely mechanical may be its practice, those familiar with it may be examined as to its laws.[1] But the specialty must be that in which the expert is skilled.[2] Thus, a painter cannot be examined as to the construction of a building,[3] nor can a surveyor of highways who is not an expert in road building as to the safety of a road,[4] nor a surveyor as to the legal interpretation to be given to a survey,[5] nor a person not skilled in anatomy as to whether a skeleton is that of a male or female person.[6] But practical surveyors may express their opinions as to whether certain marks on trees, piles of stones, etc., were intended as monuments of boundaries.[7] Farmers may be asked as to the smell of grain.[8] A person familiar with the use of revolvers, as to what barrels of a revolver have been fired;[9] persons familiar with the negro race, as to the mixture of negro blood in particular persons;[10] persons familiar with a game, as to the mode of playing such game.[11]

§ 415. Artists admissible as specialists.—A specialist in a particular art is admissible to prove the conditions of such

Lynch, 163 U. S. 468, 41 L. ed. 230, 16 Sup. Ct. Rep. 1064.

And that certain districts of Texas are infected with "Texas fever" may be stated by experts familiar with that disease, though they have never visited those districts in person. Ibid.

[1] *State* v. *Norton*, 76 Mo. 180.

[2] Supra, § 408; *State* v. *Smith*, 49 Conn. 376.

[3] *Kilbourne* v. *Jennings*, 38 Iowa, 533.

[4] *Lincoln* v. *Barre*, 5 Cush. 590.

[5] *Ormsby* v. *Ihmsen*, 34 Pa. 462; Wharton, Ev. § 972.

[6] *Wilson* v. *State*, 41 Tex. 320.

[7] *Davis* v. *Mason*, 4 Pick. 156.

[8] *Walker* v. *State*, 58 Ala. 393.

[9] *Wynne* v. *State*, 56 Ga. 113.

[10] *State* v. *Jacobs*, 51 N. C. (6 Jones, L.) 285.

[11] *Hall* v. *State*, 6 Baxt. 522.

art. Thus, a painter, whether professional or amateur, is admissible on the question of the genuineness of a picture;[1] a photographer, as to the character of the execution of a photograph.[2] So, where the question was whether a paper had contained pencil marks which were alleged to have been rubbed out, the opinion of an engraver, who had examined the paper with a mirror, was received.[3] And seal engravers may be called to give their opinions upon an impression, whether it was made from an original seal or from another impression.[4]

§ 416. So of persons familiar with a market.—Value can be proved only by obtaining the sense of those who determine the market price; since when we ask a witness as to the value of an article, we do not mean the value to him, but the value to those who, at the time in question, are buying or selling such articles. For this purpose it is proper to call as witnesses those familiar with the particular market, and interrogate them as to the value of the article in the open market.[1]

§ 417. Insanity; friends and attendants may give opinion.—If the object is to determine whether a particular supposed case is to be regarded as indicating insanity, only experts in insanity are to be called, since only experts are

[1] *Abbey* v. *Lill*, 5 Bing. 299, 304, 2 Moore & P. 534, 7 L. J. C. P. 96; *Woodcock* v. *Houldsworth*, 16 Mees. & W. 124, 16 L. J. Exch. N. S. 49.

[2] *Barnes* v. *Ingalls*, 39 Ala. 193.

[3] *Reg.* v. *Williams*, 8 Car. & P. 434, per Parke, B., and Tindal, Ch. J.

[4] *Folkes* v. *Chadd*, 3 Dougl. K. B. 157, per Lord Mansfield.

[1] Wharton, Ev. § 446.

On a prosecution for theft of a seal-skin cloak which the owner had worn, she may testify as to its value from having priced similar articles. *Printz* v. *People*, 42 Mich. 144, 36 Am. Rep. 437, 3 N. W. 306. See *People ex rel. Equitable Gaslight Co.* v. *Barker*, 144 N. Y. 94, 39 N. E. 13; *Birmingham F. Ins. Co.* v. *Pulver*, 126 Ill. 329, 9 Am. St. Rep. 598, 18 N. E. 804; *Conness* v. *Indiana, I. & I. R. Co.* 193 Ill. 464, 62 N. E. 221.

competent to describe the *differentia* of insanity scientifically.[1] But on the question whether a particular person is insane, there is a strong chain of decisions to the effect that not only physicians skilled in diseases of the mind, but intelligent and observant attendants and friends who have had constant intercourse with the patient may be examined,[2] so far as concerns stupor, senile dementia, or other chronic and obvious

[1] *Com.* v. *Rogers,* 7 Met. 500, 41 Am. Dec. 458; *State* v. *Windsor,* 5 Harr. (Del.) 512; and cases infra, § 418.

[2] *State* v. *Hayden,* 51 Vt. 296; *Real* v. *People,* 42 N. Y. 270; *Pannell* v. *Com.* 86 Pa. 260; *Livingston* v. *Com.* 14 Gratt. 592; *Brown* v. *Com.* 14 Bush, 398; *Clark* v. *State,* 12 Ohio, 483, 40 Am. Dec. 481; *Davis* v. *State,* 35 Ind. 496, 9 Am. Rep. 760; *State* v. *Reddick,* 7 Kan. 143; *State* v. *Ketchey,* 70 N. C. 621; *Powell* v. *State,* 25 Ala. 21; *Ford* v. *State,* 71 Ala. 385; *Baldwin* v. *State,* 12 Mo. 223; *State* v. *Erb,* 74 Mo. 199; *People* v. *Sanford,* 43 Cal. 29; *Pigg* v. *State,* 43 Tex. 108; *Schlencker* v. *State,* 9 Neb. 241, 1 N. W. 857; *Mutual L. Ins. Co.* v. *Leubrie,* 18 C. C. A. 332, 38 U. S. App. 37, 71 Fed. 843; *Burney* v. *Torrey,* 100 Ala. 157, 46 Am. St. Rep. 33, 14 So. 685; 7 Am. & Eng. Enc. Law, pp. 504, 505; *Beller* v. *Jones,* 22 Ark. 92; *People* v. *Wreden,* 59 Cal. 392; *Kimberly's Appeal,* 68 Conn. 428, 37 L.R.A. 261, 57 Am. St. Rep. 101, 36 Atl. 847; *Taylor* v. *United States,* 7 App. D. C. 27; *Armstrong* v. *State,* 30 Fla. 170, 17 L.R.A. 484, 11 So. 618; *Welch* v. *Stipe,* 95 Ga. 762, 22 S. E. 670; *Jamison* v. *People,* 145 Ill. 357, 34 N. E. 486; *West Chicago Street R. Co.* v. *Fishman,* 169 Ill. 196, 48 N. E. 447; *Girard Coal Co.* v. *Wiggins,* 52 Ill. App. 69; *Burkhart* v. *Gladish,* 123 Ind. 337, 24 N. E. 118; *Hemrick* v. *State,* 134 Ind. 324, 34 N. E. 3; *Mull* v. *Carr,* 5 Ind. App. 491, 32 N. E. 591; *State* v. *McDonough,* 104 Iowa, 6, 73 N. W. 357; *Wise* v. *Foote,* 81 Ky. 10; *Chase* v. *Winans,* 59 Md. 475; *People* v. *Borgetto,* 99 Mich. 336, 58 N. W. 328; *Woodcock* v. *Johnson,* 36 Minn. 217, 30 N. W. 894; *Wood* v. *State,* 58 Miss. 741; *State* v. *Bryant,* 93 Mo. 273, 6 S. W. 102; *State* v. *Lewis,* 20 Nev. 333, 22 Pac. 241, 8 Am. Crim. Rep. 574; *Commonwealth* v. *Title Ins. & T. Co.* v. *Gray,* 150 Pa. 255, 24 Atl. 640.

A witness may be allowed to express his opinion as to the state of mind of another witness during certain periods, and it is not necessary that such witness should be an expert or a physician. *State* v. *Ketchey,* 70 N. C. 621, approving *State* v. *Baker,* 63 N. C. 279; *State* v. *Henderson,* 68 N. C. 350. See supra, § 378, for other cases. But such an opinion must be based on intelligent and extended observation, which must be detailed as a prerequisite to admission *Powell* v. *State,* 25 Ala. 21.

mental disease which ordinary observers are competent to determine; the practical observation of business men coming into constant intercourse with a party is naturally more likely to attract confidence than are the speculative conclusions of experts.[3] It is otherwise, however, when a nonexpert is called upon to express an opinion as to facts capable of a contested interpretation, concerning which the jury are as competent to judge as is the witness,[4] though it is hard to see how his opinion, based on his personal observations of the patient's condition, can be in this way excluded,[5] since his opinion in such case is but a short way of expressing the facts, and the facts when he details them are all opinions. But as to hypothetical cases, a nonexpert or an expert without special cultivation [6] cannot be asked,[7] and while an expert who has personally visited a patient can be asked for his opinion as to

[3] *Rutherford* v. *Morris,* 77 Ill. 397; *Rankin* v. *Rankin,* 61 Mo. 295; *People* v. *Sanford,* 43 Cal. 29; *People* v. *Wreden,* 59 Cal. 392.

[4] As limiting nonexperts to a bare statement of facts, see *State* v. *Pike,* 40 N. H. 399, 6 Am. Rep. 533; *Dewitt* v. *Barley,* 9 N. Y. 371; *Clapp* v. *Fullerton,* 34 N. Y. 190, 90 Am. Dec. 681; *Real* v. *People,* 42 N. Y. 270; *Sears* v. *Shafer,* 1 Barb. 408; *Higgins* v. *Carlton,* 28 Md. 115, 92 Am. Dec. 666; *Runyan* v. *Price,* 15 Ohio St. 1, 86 Am. Dec. 459; *Caleb* v. *State,* 39 Miss. 722; *Farrell* v. *Brennan,* 32 Mo. 328, 82 Am. Dec. 137; *State* v. *Coleman,* 27 La. Ann. 691; *Gehrke* v. *State,* 13 Tex. 568.

That a nonexpert may be cross-examined as to basis of his opinion, see *Pannell* v. *Com.* 86 Pa. 260.

When nonprofessional witnesses were asked: "From what you saw of him that night, what impression did his words and acts make upon your mind? What impression as to his condition of mind did his conduct and acts and words make upon you at the time? In what state of mind did you believe him to be by reason of what he said and did upon that occasion?" and other like questions,—it was held that they were properly excluded. *Real* v. *People,* 42 N. Y. 270.

[5] *Com.* v. *Sturtivant,* 117 Mass. 122, 19 Am. Rep. 401. And compare authorities collected in Judge Doe's dissenting opinion in *State* v. *Pike,* 49 N. H. 399, 6 Am. Rep. 533; Bell, Expert Testimony, 21.

[6] Infra, § 418; *Com.* v. *Rich,* 14 Gray, 335; *Caleb* v. *State,* 39 Miss. 722.

[7] *Com.* v. *Rich,* 14 Gray, 335; *State* v. *Klinger,* 46 Mo. 228; *Caleb* v. *State,* 39 Miss. 722, and cases infra, § 418.

the patient's sanity,[8] his conclusions must be drawn from personal observation, not from the reports of others out of court.[9] As to whether a party at a given time was intoxicated, nonexperts as well as experts can speak.[10]

[8] *Rex* v. *Searle,* 1 Moody & R. 75; *Rex* v. *Offord,* 5 Car. & P. 168; *Com.* v. *Rogers,* 7 Met. 500, 41 Am. Dec. 458; *Baxter* v. *Abbott,* 7 Gray, 71; *Delafield* v. *Parish,* 25 N. Y. 9; *Clark* v. *State,* 12 Ohio, 483, 40 Am. Dec. 481; *Choice* v. *State,* 31 Ga. 424.

[9] *Heald* v. *Thing,* 45 Me. 392.

[10] *State* v. *Pike,* 49 N. H. 399, 6 Am. Rep. 533; *Gahagan* v. *Boston & L. R. Co.* 1 Allen, 187; *People* v. *Eastwood,* 14 N. Y. 562; *Pierce* v. *State,* 53 Ga. 365; *Stanley* v. *State,* 26 Ala. 26; *Dimick* v. *Downs,* 82 Ill. 570; *Parker* v. *Parker,* 52 Ill. App. 333; *Campbell* v. *Fidelity & C. Co.* 109 Ky. 661, 60 S. W. 492; *Castner* v. *Sliker,* 33 N. J. L. 95; *People ex rel. Flood* v. *Martin,* 15 Misc. 6, 36 N. Y. Supp. 437; *People* v. *Gaynor,* 33 App. Div. 98, 53 N. Y. Supp. 86; *Marshall* v. *Riley,* 38 Misc. 770, 78 N. Y. Supp. 827; *Re Van Alstine,* 26 Utah, 193, 72 Pac. 942; *Stacy* v. *Portland Pub. Co.* 68 Me. 279; *Edwards* v. *Worcester,* 172 Mass. 104, 51 N. E. 447; *McKillop* v. *Duluth Street R. Co.* 53 Minn. 532, 55 N. W. 739; *People* v. *Monteith,* 73 Cal. 7; 14 Pac. 373; *Choice* v. *State,* 31 Ga. 424; *State* v. *Huxford,* 47 Iowa, 16; *State* v. *Cather,* 121 Iowa, 106, 96 N. W. 722.

And this may be done without stating the facts upon which the opinion was based. *State* v. *Cather,* 121 Iowa, 106, 96 N. W. 722

So as to the condition of a person addicted to drugs. *Burt* v. *Burt,* 168 Mass. 204, 46 N. E. 622.

And a practising physician may testify to an injury or depression of the skull of a person accused of crime, and as to what effect in his judgment the use of intoxicating liquors would have upon him while in that condition, though he is not shown to have been experienced in the treatment or care of insane persons, or to have been connected with any asylum for the insane. *Territory* v. *Davis,* 2 Ariz. 59, 10 Pac. 359.

And where a confession of a criminal act is made, and there is evidence tending to prove that the person making it was laboring under delirium tremens, or was otherwise insane at the time, the opinion of an expert may be properly taken as to his mental condition indicated by the proved facts. *State* v. *Feltes,* 51 Iowa, 495, 1 N. W. 755; 1 Wharton & S. Med. Jur. 5th ed. § 372. See *Burt* v. *State,* 39 L.R.A. 305, and note entitled "Expert opinions as to sanity or insanity," with the following subheads:

I. Admissibility generally.
II. Privilege of witnesses.
  a. Effect on opinions generally.
  b. Waiver of privilege.

§ 417a. Mode of examining an expert.—The proper mode of examining an expert witness in a criminal prosecu-

III. From observation or examination.
IV. From the evidence.
  a. The general rule.
  b. The contrary rule.
V. On hypothetical statements or questions.
  a. Admissibility.
  b. Hypotheses; upon what based.
  c. Evidence in support of hypothesis.
  d. Form of question.
VI. Qualifications of experts.
VII. Basis of facts or reasons for opinions.
VIII. Scope.
  a. General considerations.
  b. Symptoms and causes.
  c. Comparisons; illustration; speculation.
  d. Questions of law for the court.
  e. Questions of fact for the jury.
  f. The question at issue.
IX. Cross-examination; contradiction; redirect examination.
X. Weight.
  a. Generally.
  b. As affected by facts and opportunity to observe.
  c. As affected by character, bias, and nature of the question.
  d. As compared with other expert opinions.
  e. As compared with non-expert opinions.
  f. A question for the jury.

The opinion of a physician based in part, at least, on representations made to him by the defendant or others prior to his trial, on the question of his insanity, cannot be considered in a criminal prosecution. *United States* v. *Faulkner,* 35 Fed. 730.

And an expert witness in a criminal prosecution cannot give his opinion as to the sanity or insanity of the accused at the time of the criminal act, based upon the story told by the accused himself, which is not in evidence, especially when the statements were made by the defendant long after the criminal act. *People* v. *Strait,* 148 N. Y. 566, 42 N. E. 1045.

The jury in a criminal prosecution is entitled to the facts on which an insanity expert bases his opinion, however, and where these facts are the result of his own interviews with the defendant, it is not only competent, but necessary, that they should be laid before the jury. *People* v. *Nino,* 149 N. Y. 317, 43 N. E. 853.

These two cases were distinguished upon the ground that this is not the case of a man claimed to be insane at the time of the criminal act, and admitted to have been sane ever since, but one in which it is asserted that the accused had been continuously insane from a period of some months before the crime up to the time of trial. Ibid.

Hypnotism.—And testimony to the effect of hypnotism upon per-

tion, upon the question of insanity, is first to inquire as to the particular symptoms of insanity, asking whether all or any, and which, of the circumstances spoken of by the witness upon the trial, should be regarded as such symptoms, and then to inquire of him whether any and what combination of these circumstances would in his opinion amount to proof of insanity.[1]

§ 417b. Inferences to be drawn by jury.—Inference from facts proven are to be drawn and found by the jury,

sons subject to such influence is not admissible in a criminal prosecution where there was no evidence which tended to show that the defendant was subject to hypnotism; showing merely that she was told to kill another, and that she did it, not establishing hypnotism. *People* v. *Worthington,* 105 Cal. 166, 38 Pac. 689.

Traits.—And the question whether a certain trait was an indication of insanity involves the question of its nature, and an expert witness on the subject of insanity in a criminal case may be permitted to state whether such trait was a vice or a disease. *United States* v. *Guiteau,* 1 Mackey, 498, 47 Am. Rep. 247; *Com.* v. *Buccieri,* 153 Pa. 535, 26 Atl. 228; *Pannell* v. *Com.* 86 Pa. 260.

[1] *McCann* v. *People,* 3 Park. Crim. Rep. 272.

But in asking such question the testimony must be specified, or it will be improper. *Re Storer,* 28 Minn. 9, 8 N. W. 827.

And a medical expert on a criminal prosecution in which insanity is alleged may be properly asked if, supposing a man had inherited a predisposition to insanity, great mental anxiety, loss of property, or the honor of one's family, and losses of other kinds, would be likely to develop the disease. *Dejarnette* v. *Com.* 75 Va. 867.

And so as to the defendant having been deprived of the use of opium when addicted to that habit. *Rogers* v. *State,* 33 Ind. 543.

And so as to deprivation of sleep. *Fain* v. *Com.* 78 Ky. 183, 39 Am. Rep. 213.

But not as to "domestic troubles." *Carter* v. *State,* 56 Ga. 463.

But an expert witness in a prosecution for homicide, who has stated that the facts assumed in a hypothetical question indicate insanity, may be asked in regard to the state and degree of mental soundness then indicated, and how far it will disqualify the person for business or render him unconscious of the nature of his conduct; and he should be inquired of as to whether the facts are explainable in any other mode than upon the theory of insanity, and with what degree of certainty they indicate the inference

and cannot be proved as facts by the opinion of witnesses.[1] Thus, inferences to be derived from general peculiarities in the manner, speech, behavior, and letters of an alleged lunatic, on the question of insanity, should be drawn by the jury themselves, and not from the opinions formed by medical witnesses.[2] And it has been held not error not to permit a non-expert witness in a criminal prosecution in which the question of insanity is involved, to express an opinion whether the accused could control his appetite for intoxicating liquor.[3]

§ 417c. Stating teachings of science or authorities.— One who has testified as an expert, and stated all that he has seen or heard, and given his own opinion thereon concerning the sanity of a person, will not be allowed to be asked what mental science teaches on the subject.[1] And a medical expert who has testified as to his opinion on the question of insanity cannot be asked on direct examination as to whether the theory in question is supported by the authorities, the medical works themselves being the best evidence as to what they teach. But on cross-examination, such question would be proper to test the accuracy of this knowledge.[2]

drawn by the witnesses. *Reed* v. *State,* 62 Miss. 405.

[1] *People* v. *Barber,* 115 N. Y. 475, 22 N. E. 182.

[2] *Morrison* v. *Maclean,* 13 Sc. Sess. Cas. 2d series, 419.

So, it is not for an expert witness to testify in a criminal case, whether particular conduct not in itself irrational is prompted by an insane delusion. *State* v. *Scott,* 41 Minn. 365, 43 N. W. 62.

Nor can he state whether in his opinion the accused was competent to apply the rules of "right and wrong" to any state of circumstances which might produce high excitement or an uncontrollable impulse. *Com.* v. *Rich,* 14 Gray, 335.

[3] *Goodwin* v. *State,* 96 Ind. 550.

[1] *Davis* v. *United States,* 165 U. S. 373, 41 L. ed. 750, 17 Sup. Ct. Rep. 360.

[2] *State* v. *Winter,* 72 Iowa, 627, 34 N. W. 475.

Nor can counsel for the prosecution read to an expert witness an eminent authority from a medical journal, and ask him if he agrees with that opinion. He can, however, use such journal to assist him in framing questions for the witness

§ 417d. Testimony of experts received with caution.—In all cases where medical experts are called as witnesses, their testimony should be received with great caution, and like opinions from neighbors and acquaintances should be regarded as of little weight if not well sustained by reasons and facts that admit of no misconstruction, and supported by authority of acknowledged credit.[1] And in all cases the amount of reliance to be placed upon such an opinion depends upon the means of judging of the true mental condition of the person, and the facts upon which such opinion is based.[2]

§ 417e. Right and wrong test; acts admissible to determine condition.—Thus, in those jurisdictions where the right and wrong test obtains in insanity, and such inquiry is permissible and proper, the fact that a person is unable to discriminate between right and wrong is best ascertained, not by the opinion of any medical witness nor by any medical theory, but by the acts of the individual himself.[1] And such acts and conduct on the part of one accused of crime, showing conclusively that he had sufficient reason to contemplate

as to his own opinions. *State* v. *Coleman,* 20 S. C. 441.

Nor can the witness be asked if he has read a designated article, and whether or not it agrees with his own knowledge and experience. *State* v. *Winter,* 72 Iowa, 627, 34 N. W. 475.

[1] *Clark* v. *State,* 12 Ohio, 483, 40 Am. Dec. 481.

[2] *People* v. *Lake,* 2 Park. Crim. Rep. 215; *Gay* v. *Union Mut. L. Ins. Co.* 9 Blatchf. 142, Fed. Cas. No. 5,282.

In *Burgo* v. *State,* 26 Neb. 639, 42 N. W. 701, it was said by Maxwell, J., that, in his opinion, ordinary medical expert testimony in regard to insanity, particularly where graduates of different schools of medicine are pitted against each other, is of the most unreliable character.

And in *Russell* v. *State,* 53 Miss. 367, it was said that medicine not being an exact science, the testimony of a medical witness on the question of sanity or insanity is at best of an exceedingly unsatisfactory character, and is often as much calculated to mislead, as to guide to a correct conclusion.

[1] *United States* v. *Shults,* 6 McLean, 121, Fed. Cas. No. 16,286.

the act that he did and its consequences at the time he did it, are of more value as evidence on the question of capacity than the opinions of witnesses, however learned or experienced they may be.[2]

§ 418. Expert's opinion admissible when facts are undisputed.—The reason for the rule excluding the opinion of the expert on the evidence rendered is based on two causes, one that it places the expert in the place of the jury in determining as to the credibility of those facts, and the other, because the duty devolving on court and jury of supervising the reasoning of experts is one which should not be surrendered.[1] It has been held, however, that when the facts are undisputed, the opinion of an expert can be asked as to the conclusions to be drawn from them,[2] and as to the conclusions

[2] *State* v. *Thomas,* Houst. Crim. Rep. (Del.) 511.

And where the mental capacity is thoroughly established by evidence other than hypothetical reasoning of experts, their mere speculation on the subject is entitled to but little weight. *Rankin* v. *Rankin,* 61 Mo. 295.

And expert testimony in a prosecution for crime which is made up largely of mere theory and speculation, and which suggests mere possibilities, ought never to be allowed to overcome clear and well-established facts. *State* v. *Hockett,* 70 Iowa, 442, 30 N. W. 742.

[1] *Reg.* v. *Higginson,* 1 Car. & K. 129; *Sills* v. *Brown,* 9 Car. & P. 604; *Reg.* v. *Frances,* 4 Cox, C. C. 57; *Reg.* v. *Richards,* 1 Fost. & F. 87; *Dexter* v. *Hall,* 15 Wall. 9, 21 L. ed. 73; *People* v. *McCann,* 3 Park. Crim. Rep. 272; *People* v. *Lake,* 12 N. Y. 358; *Sanchez* v. *People,* 22 N. Y. 147; *State* v. *Powell,* 7 N. J. L. 244; *Brown* v. *Com.* 14 Bush, 398; *State* v. *Medlicott,* 9 Kan. 257; *State* v. *Bowman,* 78 N. C. 509; *State* v. *Clark,* 15 S. C. 403; *Page* v. *State,* 61 Ala. 16; *Choice* v. *State,* 31 Ga. 424; *State* v. *White,* 76 Mo. 96; *State* v. *Anderson,* 10 Or. 448. See, however, *State* v. *Hayden,* 51 Vt. 296; *Hunt* v. *State,* 9 Tex. App. 166; *Webb* v. *State,* 9 Tex. App. 490; *Lovelady* v. *State,* 14 Tex. App. 546, where a wider range was assigned.

[2] *M'Naghten's Case,* 10 Clark & F. 200–212, 1 Car. & K. 130, note, 8 Scott, N. R. 595. Though see *Reg.* v. *Frances,* 4 Cox, C. C. 57.

In Massachusetts, we have the following from Chief Justice Shaw: "One caution in regard to this point it is proper to give. Even where the medical or other professional

to be drawn from the testimony of a particular witness,[3] and it is settled that experts of all classes may be asked as to a hypothetical case,[4] and as to whether certain testimony, if true, indicates certain conditions as to which an expert in the specialty is qualified to speak.[5] But if the facts on which the hypothesis is based fall, the answer falls also.[6] Nor can an

witnesses have attended the whole trial, and heard the testimony of the other witnesses as to the facts and circumstances of the case, they are not to judge of the credit of the witnesses or of the truth of the facts testified to by others. It is for the jury to decide whether such facts are satisfactorily proved. And the proper question to be put to the professional witness is this: If the symptoms and indications testified to by the other witnesses are proved, and if the jury are satisfied of the truth of them, whether in their opinion the party was insane; and what was the nature and character of that insanity; what state of mind did they indicate; and what they would expect would be the conduct of such a person in any supposed circumstances." *Com.* v. *Rogers,* 7 Met. 500, 41 Am. Dec. 458.

So, also, was it said by Chief Justice Chapman in *Andrews's Case.* "You may put a hypothetical case, and ask whether it shows insanity; or, if the witness has heard all the testimony, whether the facts in his opinion indicate insanity. The witness, however, must not discriminate upon the facts, but, assuming all the testimony to be true, he may state whether or no they indicate insanity." *Com.* v. *Andrews,* Pamph. 182. See *Com.* v. *Wilson,* 1 Gray, 338.

But the weight both of argument and authority is that when there is a conflict of testimony, the witness should be limited to a specific hypothetical case. See cases cited in this and prior note.

[3] *Hand* v. *Brookline,* 126 Mass. 324.

[4] *Caleb* v. *State,* 39 Miss. 722; *Dexter* v. *Hall,* 15 Wall. 9, 21 L. ed. 73; *United States* v. *McGlue,* 1 Curt. C. C. 1, Fed. Cas. No. 15,679; *People* v. *Lake,* 12 N. Y. 358; *Cowley* v. *People,* 83 N. Y. 464, 38 Am. Rep. 464; *State* v. *Windson,* 5 Harr. (Del.) 512; *Jerry* v. *Townshend,* 9 Md. 145; *Choice* v. *State,* 31 Ga. 424; *Griggs* v. *State,* 59 Ga. 738; *State ex rel. Nave* v. *Newlin,* 69 Ind. 108; *Yanke* v. *State,* 51 Wis. 464, 8 N. W. 276; *McAllister* v. *State,* 17 Ala. 434, 52 Am. Dec. 180; *Dove* v. *State,* 3 Heisk. 348; *Wood* v. *State,* 58 Miss. 741; *State* v. *Klingler,* 46 Mo. 224.

[5] *Goodrich* v. *People,* 3 Park. Crim. Rep. 622; *State* v. *Clark,* 15 S. C. 403.

[6] *Hovey* v. *Chase,* 52 Me. 304, 83 Am. Dec. 514; *Thayer* v. *Davis,* 38 Vt. 163; *Guetig* v. *State,* 66 Ind. 95, 32 Am. Rep. 99. See *Schlencker* v. *State,* 9 Neb. 241, 1 N. W. 857, where it is held that an expert may

expert be asked as to an hypothesis having no foundation in the evidence in the case,[7] or resting on statements made to him by persons out of court,[8] though it is not necessary that the case should be an exact reproduction of the evidence.[9]

§ 418a. Physician testifying as to party's statement.— The facts and statements of others, upon which people act in the usual affairs of life, ought to be received in evidence when those affairs are involved in a legal controversy. Thus, a physician's testimony should be received in all matters where his professional training and experience gives him a general knowledge of the subject.[1] His action, in part at least, in prescribing for, or administering remedies to, a patient, is

be asked his opinion on a supposed case in order to show what, under different conditions, the appearance of a wound made by the same agency would have been.

[7] *People* v. *Bodine,* 1 Denio, 281; *Guetig* v. *State,* 66 Ind. 95, 32 Am. Rep. 99; *Muldowney* v. *Illinois C. R. Co.* 39 Iowa, 615; *Re Ames,* 51 Iowa, 596, 2 N. W. 408; *State* v. *Stokeley,* 16 Minn. 282, Gil. 249; *Bomgardner* v. *Andrews,* 55 Iowa, 638, 8 N. W. 481; *State* v. *Hanley,* 34 Minn. 430, 26 N. W. 397; *People* v. *Smiler,* 125 N. Y. 717, 26 N. E. 312; *Ballard* v. *State,* 19 Neb. 610, 28 N. W. 271.

[8] *Heald* v. *Thing,* 45 Me. 392; *Cornwell* v. *Riker,* 2 Dem. 354.

[9] *Augsbury* v. *People,* 1 N. Y. Crim. Rep. 299; *Meeker* v. *Meeker,* 74 Iowa, 352, 7 Am. St. Rep. 489, 37 N. W. 773.

And whether the facts assumed in a hypothetical case put to an expert witness have been proved is a question for the jury. *State* v. *Baker,* 74 Mo. 292, 41 Am. Rep. 314; *Davis* v. *State,* 35 Ind. 496, 9 Am. Rep. 760; *Lake* v. *People,* 1 Park. Crim. Rep. 495; *People* v. *Thurston,* 2 Park. Crim. Rep. 49.

[1] *Germania L. Ins. Co.* v. *Ross-Lewin,* 24 Colo. 43, 65 Am. St. Rep. 215, 51 Pac. 488; *Siebert* v. *People,* 143 Ill. 579, 32 N. E. 431; *State* v. *Hinkle,* 6 Iowa, 385; *State* v. *Cole,* 63 Iowa, 698, 17 N. W. 183; *Young* v. *Makepeace,* 103 Mass. 53; *Hardiman* v. *Brown,* 162 Mass. 585, 39 N. E. 192; *People* v. *Thacker,* 108 Mich. 652, 66 N. W. 562; *Seckinger* v. *Phillibert & J. Mfg. Co.* 129 Mo. 590, 31 S. W. 957; *People* v. *Benham,* 160 N. Y. 402, 55 N. E. 11; *Horton* v. *Green,* 64 N. C. 67; *State* v. *Terrell,* 12 Rich. L. 327; *Kelly* v. *United States,* 27 Fed. 618; *Hathaway* v. *National L. Ins. Co.* 48 Vt. 351; *Emerson* v. *Lowell Gaslight Co.* 6 Allen, 146, 83 Am. Dec. 621; *State* v. *Simonis,* 39 Or. 111, 65 Pac. 595; *Fairchild* v. *Bascomb,* 35 Vt. 409.

based upon the patient's own statements, and the statement of the patient so made is generally receivable in evidence,[2] so that not only his opinion, founded in part upon such data, is received, but he may also state what the patient said in describing his bodily condition, if stated under circumstances which free it from suspicion of being spoken with reference to future litigation, or to give it the character of *res gestæ*.[3] In civil issues, when there is reason to believe that the declarations so uttered were made in view of subsequent legal proceedings, they are excluded.[4] In criminal issues, such declarations, when made after the defendant has had leisure to prepare himself for his defense, should be closely scrutinized.

§ 419. Examination of expert witnesses; basis of opinion.—The rules governing the examination of witnesses are equally applicable to expert witnesses,[1] and, as in the case of other witnesses, the latitude of the examination of the expert witness is within the discretion of the trial court.[2] A court may even suspend a trial to enable such witness to make an examination of persons or things, so that such witness may testify.[3] There is no particular form of question,

[2] *Shearer* v. *Buckley,* 31 Wash. 370, 72 Pac. 76; *Goodwin* v. *Harrison,* 1 Root, 80; *Mayo* v. *Wright,* 63 Mich. 32, 29 N. W. 832; *Gray* v. *McLaughlin,* 26 Iowa, 279; *State* v. *Hutchinson,* 95 Iowa, 566, 64 N. W. 610; *Hatch* v. *Fuller,* 131 Mass. 574. See *McMurrin* v. *Rigby,* 80 Iowa, 325, 45 N. W. 877; *Fay* v. *Harlan,* 128 Mass. 244, 35 Am. Rep. 372.

As to a statement of feeling being a statement of an ultimate fact, see *Vivian's Appeal,* 74 Conn. 257, 261, 50 Atl. 797.

[3] Supra, § 272.

[4] Supra, § 272; *Rowell* v. *Lowell,* 11 Gray, 420. See *Wetherbee* v. *Wetherbee,* 38 Vt. 454.

[1] *Northern P. R. Co.* v. *Urlin,* 158 U. S. 271, 39 L. ed. 977, 15 Sup. Ct. Rep. 840; *St. Louis & S. F. R. Co.* v. *Edwards,* 26 Kan. 72.

[2] *Forsyth* v. *Doolittle,* 120 U. S. 73, 30 L. ed. 586, 7 Sup. Ct. Rep. 408; *Northern P. R. Co.* v. *Urlin,* 158 U. S. 271, 39 L. ed. 977, 15 Sup. Ct. Rep. 840; *Lamb* v. *Lippincott,* 115 Mich. 611, 73 N. W. 887; *Melendy* v. *Spaulding,* 54 Vt. 517; *Fairchild* v. *Bascomb,* 35 Vt. 398.

[3] *Herndon* v. *State,* 111 Ga. 178, 36 S. E. 634.

save that it should be so framed that the witness can give an intelligent answer;[4] leading questions, however, are generally improper,[5] although, in propounding hypothetical questions, leading questions are often necessary, but are not a ground for reversal unless the privilege is abused.[6] Such expert may be asked by either party as to the reasons on which his opinion is based; or he may, by leave of court, give such explanation on his own account.[7] He cannot go beyond this in such examination,[8] though he may be examined in detail in order to test his credibility and judgment,[9] and even on a re-examination he may give facts transpiring since his examination in chief.[10]

§ 420. The value of expert testimony.—The object of all testimony is to determine accurately where to place the responsibility arising out of the violation of the laws governing human affairs. The testimony that persuades the understanding as to the truth of certain facts beyond a reasonable doubt possesses the highest legal value, and is the

[4] *Turner* v. *Ridgeway,* 105 Mich. 409, 63 N. W. 406. See *Hunt* v. *Lowell Gaslight Co.* 8 Allen, 169, 85 Am. Dec. 697; *Summerlin* v. *Carolina & N. W. R. Co.* 133 N. C. 550, 45 S. E. 898.

[5] *St. Louis & S. F. R. Co.* v. *Edwards,* 26 Kan. 72; *Springfield Consol. R. Co.* v. *Welsch,* 155 Ill. 511, 40 N. E. 1034; *Perry* v. *Cobb,* 4 Ind. Terr. 717, 76 S. W. 289; *Rapley* v. *Klugh,* 40 S. C. 134, 18 S. E. 680.

[6] *Hilton* v. *Mason,* 92 Ind. 157; *Northern P. R. Co.* v. *Urlin,* 158 U. S. 271, 39 L. ed. 977, 15 Sup. Ct. Rep. 840; *Filer* v. *New York C. R. Co.* 49 N. Y. 42, 10 Am. Rep. 327.

[7] *Keith* v. *Lothrop,* 10 Cush. 453; *Sexton* v. *North Bridgewater,* 116 Mass. 200; *Hawkins* v. *Fall River,* 119 Mass. 94; supra, § 407; *People* v. *Shattuck,* 109 Cal. 673, 42 Pac. 315; *Hitchcock* v. *Burgett,* 38 Mich. 501; *Fowlie* v. *McDonald,* 82 Vt. 230, 72 Atl. 989.

[8] *Ingledew* v. *Northern R. Co.* 7 Gray, 86.

[9] *Shaw* v. *Charlestown,* 2 Gray, 107; *Hunt* v. *Lowell Gaslight Co.* 8 Allen, 169, 85 Am. Dec. 697.

[10] *Farmers' & M. Bank* v. *Young,* 36 Iowa, 45; *Com.* v. *Sturtivant,* 117 Mass. 123, 19 Am. Rep. 401; supra, § 407.

best testimony. Such testimony is to be expected from the witness who has the most intimate acquaintance with the facts, and can communicate the same so as to be most clearly comprehended. A witness possessing these qualifications is properly an expert on the topic. The testimonial qualifications of a witness are measured by his competency to speak to the topic, and his credibility. In this view there can be no arbitrary line by which one witness is denominated an expert and the other a nonexpert.

When such a division exists, the expert is clothed with qualifications far beyond that which he would claim for himself, and such fact serves, in many instances, to discredit a valuable witness because his testimony does not fulfil the imaginary requirements called before the mind by the term "expert."

Placing experts within a specific class has caused much unfair and unjust criticism, and generated a fervency of feeling towards a class of qualified and valuable witnesses that has been injurious to litigation.

When experts were first introduced, they were viewed as the representatives of the science which they professed, endowed with complete knowledge of what, to the ordinary mind, was the fascinating mystery of that science.

When the scientific investigator, modest as to his own acquirements, testified, with carefully guarded qualifications, to the facts that he or like investigators had determined, and the sum of the whole appeared small compared with the expectations from the expert, instead of recognizing the value of the effort, the paucity of results brought from the bench a storm of criticism.[1] This is cited to-day, with all the force

[1] See, to this effect, *Neal's Case*, cited in 1 Redfield on Wills, chap. 3, § 13; Woodruff, J., *Gay* v. *Union Mut. L. Ins. Co.* 9 Blatchf. 142, 2 Bigelow, Life & Acci. Ins. Rep. 14, Fed. Cas. No. 5,282; *Brehm* v. *Great Western R. Co.* 34 Barb. 256; *Snyder* v. *State*, 70 Ind. 349; *People* v. *Morrigan*, 29 Mich. 4; *Grisby* v. *Clear Lake Waterworks*

of judicial precedent. Fortunately, in proportion to the fervency of the language used, we may find a temporary sus-

Co. 40 Cal. 396; *Watson* v. *Anderson,* 13 Ala. 202; 1 Wharton & S. Med. Jur. 1873, §§ 190, 269. See supra, § 8a.

In 1 Am. L. Rev. 45, is a learned article on this topic by Professor Washburn. See also Mr. Moak's address of September 20, 1881, before the New York State Bar Association; and article in 15 Cent. L. J. 7. On the subordination of experts to jury, see *Clark* v. *State,* 12 Ohio, 483, 40 Am. Dec. 481; *Re Tracy Peerage,* 10 Clark & F. 191. See also *Winans* v. *New York & E. R. Co.* 21 How. 101, 16 L. ed. 71; *American Middlings Purifier Co.* v. *Christian,* 4 Dill. 459, Fed. Cas. No. 307.

That in matters of physical science, experts, when they fairly and fully give the conclusions of such science, are to be regarded as contributing facts to the issue by which, if true, court and jury will be bound, has been already fully shown. It is otherwise, however, when they treat of psychological science, and especially of those branches of that science which discuss mental competency for the responsible performance of certain legal acts. Whatever may once have been the attitude of the courts in this respect, the present necessary tendency of the judicial mind is to regard the opinions of experts on questions of responsibility as of weight only as arguments on which the court is ultimately to decide. As affording rules by which courts are to be bound, such opinions have ceased to be regarded as of any efficacy. Chief Justice Chapman, of Massachusetts, on the trial of Andrews, Pamph. R. 356, in 1868, said: "I think the opinions of experts are not so highly regarded now as they formerly were; for, while they often afford great aid in determining facts, it often happens that experts can be found to testify to any theory, however absurd." And Judge Davis, of the supreme court of Maine (*Neal's Case,* cited in 1 Redfield on Wills, chap. 3, § 13), went so far as to say: "If there is any kind of testimony that is not only of no value, but even worse than that, it is, in my judgment, that of medical experts. They may be able to state the diagnosis of a disease most learnedly; but upon the question, whether it had, at a given time, reached such a stage that the subject of it was incapable of making a contract, or irresponsible for his acts, the opinion of his neighbors, if men of good common sense, would be worth more than that of all the experts in the country." And Judge Redfield, on commenting on this case, says that there seems to be "but one opinion as to the fact that this kind of testimony is extremely unsatisfactory. . . . We are more and more confirmed in an opinion that the difficulty comes largely from the manner in which the witnesses are selected. . . . If the state or

pension of the faculties of judgment and reflection, and thus allow for the personal factor in all such utterances.

the courts do not esteem the matter of sufficient importance to justify the appointment of public officers, . . it is certain the parties must employ their own agents to do it; and it is perhaps almost equally certain that, if it be done in this mode it will produce two trained bands of witnesses in battle array against each other, since neither party is bound to produce, or will be likely to produce, those of their witnesses who will not confirm their views." So, also, an eminent Federal judge, Judge Woodruff, said to a jury in 1871, that "where the opinion (of experts) is speculative, theoretical, and states only the belief of the witness, while yet some other opinion is consistent with the facts stated, it is entitled to but little weight in the minds of the jury. Testimony of experts of this latter description, and especially where the speculative and theoretical character or the testimony is illustrated by opinions of experts on both sides of the question, is justly the subject of remark, and has been often condemned by judges as of slight value. And like observations apply to a greater or less degree to the opinion of witnesses who are employed for a purpose, and paid for their services; who are brought to testify as witnesses for their employers. . . . The condemnation is not always applicable; often it would be unjust. Where an expert of integrity and skill states conclusions which are the necessary or even the usual results of the facts upon which his opinion is based, the evidence should not be lightly esteemed or hastily discredited." Woodruff, J., in *Gay* v. *Union Mut. L. Ins. Co.* 9 Blatchf. 149, 2 Bigelow, Life & Acci. Ins. Rep. 14, Fed. Cas. No. 5,282.

Three remarkable trials in the United States in 1872 may be cited in illustration of the text:

Mrs. E. G. Wharton was tried in Maryland for the poisoning of General Ketchum; and the experts called by the state to prove poison were flatly contradicted by experts of, at least, equal authority, called by the defense, who swore that neither in symptom nor in autopsy was poison shown. A few months later occurred the trial of Stokes for the murder of Fisk, in which experts, equal, at least, in respect to number, contradicted each other directly on the question whether Fisk was killed by Stokes, or by the surgeons who endeavored to extract Stoke's balls. And in September, 1872, as if to exhibit this capriciousness in the strongest possible relief, followed in Pennsylvania the second trial of Dr. Schoeppe. He was convicted on the former trial, on the testimony of a single expert, of murder by poison; and it was not till after a delay of more than two years, and then only by legislative action, that a new trial was obtained. Then was it discovered that there was nothing in the prosecutions's case. The expert on which it

In matters pertaining to engineering, sanitation, surgery, and those sciences, and the results of those sciences, which

relied, though respectable and conscientious, had been guided by tests which recent science has shown to be worthless. The court ordered an acquittal on the ground that there was not even a prima facie case of the *corpus delicti*.

As a criticism on such testimony, may be studied an address by Chief Justice Campbell, given at Michigan University in 1880 (21 Alb. L. J. 362).

On the other hand, in *Pannell* v. *Com.* (1878) 86 Pa. 260, the supreme court of Pennsylvania, after saying that the opinion of medical experts are of great value in insanity, ruled that it was error to charge a jury as follows: "We question very much whether you will realize much, if any, valuable aid from them, in coming to a correct conclusion as regards the responsibility for crime by this prisoner." To the same effect, see *Templeton* v. *People*, 3 Hun, 358, 60 N. Y. 643; Cf. Lawson, Expert Ev. Rule 44.

In *Belt* v. *Lawes*, already noticed, tried in London in 1883, the question was as to Mr. Belt's capacity to make certain statues. That such statues could have been made by him was emphatically denied by a series of experts, embracing some of the most eminent sculptors in England. On the other hand, Mr. Belt did a bust in court by which his capacity as a sculptor was, it was maintained, placed beyond doubt. The controversy is thus noticed in the Spectator of December 30, 1882: "Witness after witness testified that Mr. Belt was a total impostor, and could not even model a decent bust or make a trustworthy drawing; and sculptor after sculptor gave an opinion that the work he claimed could not, on internal evidence of style, be his. It is not for us to question, as Baron Huddleston does, the good faith of the witnesses for the defendant (by whom the libel charging Mr. Belt with being an impostor was published), but we suppose we may say that they showed marked bitterness, amounting, in the matter of the cheque, to unreasoning prejudice, and that they were opposed by testimony so direct that it is hardly possible—we do not say quite impossible—to reject it without supposing either perjury or the crassest stupidity. Several witnesses, however,—Canon Wilkinson, for example,—were men beyond either charge; and the jury, believing them, threw over the defendant's witnesses altogether. There remained the body of experts, headed by Sir Frederic Leighton, and they certainly testified with rare consistency that Mr. Belt's work was not his own, that, in fact, one man could not have had all those styles, or have stood at different times on such different steps of the great ladder of art. On the public, their evidence, obviously sincere, though possibly prejudiced, will, we imagine, produce the impression that

are computable in physical results, the testimony of men qualified in those sciences is invaluable; it is not the less valuable in psychological or mental phenomena, save that the investigations are less extensive, and the results less complete. So far as results, either physical or mental, have an influence on human affairs, they should be received in evidence as an aid in determining facts to which they are relevant.[2]

Mr. Belt did use much more assistance than he chose to allow, or possibly—for artists are vain—acknowledged even to himself; but in a court of justice such testimony, when confronted as it was with the direct and positive countertestimony of eyewitnesses, could not be expected to weigh heavily. Nor ought it. We should be prepared, we do not doubt, to swear in a court of justice that a poem obviously Mr. Tennyson's or Mr. Arnold's was not by Poet Close. But if half a dozen decent witnesses swore that they saw Mr. Close sketch the poem out, discuss particular lines, alter the lines on their advice,—for that was sworn as to Mr. Belt's work,—and take the poem to the printer, the jury would be bound to believe them, and not us. It would be uncontradicted fact against peremptory opinion, and if opinion is not rejected under such circumstances, there is an end to the utility of evidence. The jury were told this by the judge, they believed it, and an accident made their belief conviction. Mr. Belt had done a bust of Mr. Pagliatti, a man with a very pronounced expression. He was called on to do a second bust of Mr. Pagliatti in court, and did it, producing an admirable though exaggerated, and it may be, inartistic likeness. The experts swore that the second bust, though like, was so wanting in artistic qualities that it could not have been done by the hand that did the first bust, which is good work. But, unhappily, the evidence that Mr. Belt did do the first bust was irresistible, and artistic criticism was, in the jurymen's eyes, woefully discredited. The defendants' witnesses having broken down, the great experts having been discredited, and the plaintiff's witnesses being undestroyed, only one verdict was possible,—that given by the jury. The amount of damages is a separate question. It is unprecedentedly heavy, but the judge accepted it; the charge, if not disproved, would have deprived Mr. Belt of his whole income, and there may have been evidence as to the amount of that income which we missed."

The verdict was for £5,000 for the plaintiff. This was set aside by the divisional court, Lord Coleridge. C. J., presiding. Subsequently (March, 1884) the decision of the divisional court was reversed by the court of appeals, Sir B. Brett, M. R., giving the opinion.

[2] See Wharton & S. Med. Jur.

§ 421. Obtaining testimony by ex parte observations.—Where testimony is obtained *ex parte,* as when a chemist sent by one party examines remains supposed to contain poison, without notice of such examination to the other party; or where a physician, without notice to the other party, visits a patient whose sanity is in question, the conditions under which the testimony was obtained, the extent of the observations, and all the surrounding details, should be carefully inquired into. In such cases as these, testimony is open to peculiar suspicion; where the observation is surreptitious and clandestine, it is likely to prejudice the party under whose directions the observations were made.[1] Testimony, obtained without notice, should be very cautiously received. But where experts are appointed by the court, or agreed on by the parties, and the examinations are not *ex parte,* but are conducted with notice to the opposing parties, such testimony is entitled to great weight.[2] It is the duty of an expert to use all available materials, and to make the fullest examination known to the state of the science under consideration. A failure to do this renders the testimony secondary, because it is not the best afforded by the circumstances, and where not rejected by the court, it should be submitted to the jury under cautionary instructions.[3]

§ 422. Post mortem examinations.—As post mortem examinations generally take place under the direction of the

Bowlby's 5th ed.; Expert Testimony, §§ 1227–1233.

[1] *State* v. *Hays,* 22 La. Ann. 39; infra, § 777.

[2] Wharton, Crim. Law, 7th ed. § 821h; *Heald* v. *Thing,* 45 Me. 392; *Parlange* v. *Parlange,* 16 La. Ann. 17.

[3] *Heald* v. *Thing,* 45 Me. 392; *Parlange* v. *Parlange,* 16 La. Ann. 17; *Ferguson* v. *Hubbell,* 97 N. Y. 507, 49 Am. Rep. 544; *Re Tracy Peerage,* 10 Clark & F. 191; *Teerpenning* v. *Corn Exch. Ins. Co.* 43 N. Y. 279; *Consolidated Gas, E. L. & P. Co.* v. *State,* 109 Md. 186, 72 Atl. 651; *Meehan* v. *Great Northern R. Co.* 13 N. D. 432, 101 N. W. 183.

coroner or other officer, immediately after notice to the officer of the death, and often before any particular person is pointed out as the future defendant, there cannot be notice to any actual opposing interest,[1] but this fact does not render such testimony inadmissible,[2] and any witness present at such post mortem may testify as to what he saw,[3] and competent experts may give opinions based on the facts so ascertained.[4]

The proceedings before the coroner are generally prescribed by statute, which also generally prescribes the method of taking and preserving the testimony, and the conditions under which it becomes admissible in cases of homicide. Where, however, as in cases of alleged poisoning, the body is exhumed after proceedings commenced, no examination should take place, save in the presence of the representatives of both parties.[5] It is also competent in such cases, to show the results of the chemical analysis by experts of remaining portions of the substance alleged to have been taken by the deceased, but these must be identified, and shown to have remained in the same condition as at the time of the alleged taking of the same,[6] and the identity of the thing analyzed, the identity of the parts and the body from which they were taken, must first be established by the party offering the evidence.[7] And the competency of such testimony is not af-

[1] *Com.* v. *Dunan,* 128 Mass. 422, cited supra, § 403.

[2] *King* v. *State,* 55 Ark. 604, 19 S. W. 110; *Hayes* v. *State,* 112 Wis. 304, 87 N. W. 1076; *People* v. *Foley,* 64 Mich. 148, 31 N. W. 94; *State* v. *Brooks,* 92 Mo. 542, 5 S. W. 257, 330; *People* v. *Quimby,* 134 Mich. 625, 96 N. W. 1061; *People* v. *Collins,* 144 Mich. 121, 107 N. W. 1114.

[3] *Summers* v. *State,* 5 Tex. App. 365, 32 Am. Rep. 573.

[4] See article "Expert and Opinion Evidence," 5 Enc. Ev. p. 578.

[5] *State* v. *Bowman,* 80 N. C. 432.

[6] *State* v. *Best,* 111 N. C. 638, 15 S. E. 930; *Johnson* v. *State,* 20 Tex. App. 178; *People* v. *Williams,* 3 Park. Crim. Rep. 84; *People* v. *Quimby,* 134 Mich. 625, 96 N. W. 1061; *State* v. *Van Tassel,* 103 Iowa, 6, 72 N. W. 497; *Stephens* v. *People,* 4 Park. Crim. Rep. 396.

[7] *State* v. *Thompson,* 132 Mo. 301, 34 S. W. 31; *State* v. *Cook,* 17 Kan. 392.

fected by the lapse of time,[8] nor the disinterment of the body,[9] save when it is impossible to determine whether its condition is due to ante or post mortem causes.

§ 423. Expert and nonexpert testimony as to blood stains.—Inasmuch as men, in the usual concerns of life, must act upon the appearance that things present to the physical and mental senses, rather than upon what may be shown by the ultimate scientific analysis of the thing, it is competent for them to testify to such facts, and to state such appearance in ordinary terms. Such testimony is competent in matters of which all men have more or less knowledge, according to their mental capacity and habits of observation. Testimony as to any fact does not differ in kind, coming from the expert or the nonexpert, but only in degree,[1] and to exclude the ordinary observer would be to close an important avenue of truth in nearly every case.[2] The appearance of things with which men are familiar in everyday experience, and from which they draw conclusions that constitute a basis for their actions, is of high testimonial value, as tending to establish certain facts under investigation. These observations apply to every ordinary or usual occurrence.

For these reasons nonexperts have always been permitted to state their conclusions from the facts observed, as that certain stains on clothing or other substances looked like or resembled blood stains, and to describe them by color and appearance;[3] nor is it required as a testimonial qualification

[8] *Williams* v. *State,* 64 Md. 384, 1 Atl. 887, 5 Am. Crim. Rep. 512; *Hayes* v. *State,* 112 Wis. 304, 87 N. W. 1076.

[9] *People* v. *Quimby,* 134 Mich. 625, 96 N. W. 1061.

[1] *Gaines* v. *Com.* 50 Pa. 319.

[2] *Connecticut Mut. L. Ins. Co.* v. *Lathrop,* 111 U. S. 612, 28 L. ed. 536, 4 Sup. Ct. Rep. 533.

[3] *Gantling* v. *State,* 40 Fla. 237, 23 So. 857; *Com.* v. *Sturtivant,* 117

that such witness should be an expert in such matter.[4] This class of testimony should always be limited to the statement of appearance. It is only the microscopist, and that after an analysis of the thing in question, who is permitted to give a direct opinion that the thing is what it appears to be in actuality.[5]

In the present state of medical science, where there is no known body of authority, and the best that can be collated comes from the results attained by individual investigators in kindred lines, but acting under varying conditions, the expert should not go beyond a determined fact, and differentiate it into a subdivision. While it is conceded that a skilled expert may with reasonable certainty be able to distinguish between human blood corpuscles, and those of some domestic animal with which it would be likely to be confounded, still, where a human life is at stake, such expert is hardly warranted in going beyond the statement that the stain is the blood stain of an animal.[6]

Mass. 122, 19 Am. Rep. 401; *Greenfield* v. *People,* 85 N. Y. 75, 39 Am. Rep. 636; *Linsday* v. *People,* 63 N. Y. 143; *O'Mara* v. *Com.* 75 Pa. 424; *State* v. *Henry,* 51 W. Va. 283, 41 S. E. 439.

[4] *People* v. *Bell,* 49 Cal. 485; *People* v. *Loui Tung,* 90 Cal. 377, 27 Pac. 295; *Gantlang* v. *State,* 40 Fla. 237, 23 So. 857; *Thomas* v. *State,* 67 Ga. 460; *Woolfolk* v. *State,* 85 Ga. 69, 11 S. E. 814; *Com.* v. *Dorsey,* 103 Mass. 412; *Com.* v. *Pope,* 103 Mass. 440; *Dillard* v. *State,* 58 Miss. 368; *Dinsmore* v. *State,* 61 Neb. 418, 85 N. W. 445; *People* v. *Burgess,* 153 N. Y. 561, 47 N. E. 889; *Greenfield* v. *People,* 85 N. Y. 75, 39 Am. Rep. 636; *People* v. *Deacons,* 109 N. Y. 374, 16 N. E. 676; *McLain* v. *Com.* 99 Pa. 86; *Gaines* v. *Com.* 50 Pa. 319; *Richardson* v. *State,* 7 Tex. App. 487; *People* v. *Thiede,* 11 Utah, 241, 39 Pac. 837; *Barbour* v. *Com.* 80 Va. 287; *State* v. *Welch,* 36 W. Va. 690, 15 S. E. 419; *State* v. *Henry,* 51 W. Va. 283, 41 S. E. 439; *People* v. *Gonzalez,* 35 N. Y. 49; *State* v. *Robinson,* 117 Mo. 649, 23 S. W. 1066; *State* v. *Bradley,* 67 Vt. 465, 32 Atl. 238; *Thomas* v. *State,* 67 Ga. 460, 464; *Dillard* v. *State,* 58 Miss. 368; *People* v. *Smith,* 106 Cal. 73, 39 Pac. 40.

[5] *People* v. *Deacons,* 109 N. Y. 374, 16 N. E. 676; *Green* v. *State,* 97 Tenn. 50, 36 S. W. 700; *State* v. *Henry,* 51 W. Va. 283, 41 S. E. 439; *Com.* v. *Pope,* 103 Mass. 440.

[6] *People* v. *Bell,* 49 Cal. 485; *Com.* v. *Dorsey,* 103 Mass. 412, 420; *Gaines* v. *Com.* 50 Pa. 319; *State*

§ 423a. Blood stains and inferences therefrom.—Blood stains, as an *indicia* of crime, are of the greatest evidentiary importance, as a careful examination of the same very often conclusively establishes facts in dispute.

v. *Knight,* 43 Me. 11, 19–25; *Linsday* v. *People,* 63 N. Y. 143; *State* v. *Miller,* 9 Houst. (Del.) 564, 32 Atl. 137; *State* v. *Alton,* 105 Minn. 410, 117 N. W. 617, 15 A. & E. Ann. Cas. 806. See Reese, Med, Jur. 2d ed. 1889, p. 132.

The examination for blood stains, and their examination when found, is a subject full of interest, as is also the detection of hair and cerebral matter, for the purpose of proving criminal acts and punishing criminals, referred to here only to call attention to the extent to which scientific knowledge has at this day been carried; and how efficient an agent it is in criminal prosecutions is illustrated by the following case reported by Wharton and Stille: In Norwich, England, a female child nine years old was found lying on the ground in a small plantation, quite dead, with a large and deep gash in the throat. Suspicion fell upon the mother of the murdered girl, who, upon being taken into custody, behaved with the utmost coolness, and admitted having taken her child to the plantation where the body was found, but declared that, while there, the child was lost by getting separated from her while searching for flowers. Upon being searched, there was found in her possession a large and sharp knife, which was at once submitted to minute and careful examination. Nothing, however, was found upon it, with the exception of a few pieces of hair adhering to the handle, so exceedingly small as scarcely to be visible. The examination being conducted in the presence of the prisoner, and the officer remarking, "Here is a bit of fur or hair upon the handle of your knife," the woman immediately replied, "Yes, I dare say there is, and very likely some stains of blood, for as I came home I found a rabbit caught in a snare, and cut its throat." The knife was sent to London and, with the particles of hair, subjected to a microscopical examination. No trace of blood could at first be detected upon the weapon, which appeared to have been washed; but, upon separating the horn handle from its iron lining, it was found that between the two a fluid had penetrated which turned out to be blood, and certainly not the blood of a rabbit, but bearing every resemblance to that of the human body. The hair was then submitted to an examination. Without knowing anything of the facts of the case, the microscopist immediately declared the hair to be that of a squirrel. Around the neck of the child at the time of the murder, there was a tippet or "victorine" over which the knife, by whomsoever held, must have glided, and the victorine was of squirrel's

They may always be identified by circumstantial evidence.[1] Hence it is competent to show that they are on the clothing of the accused,[2] on movable property connected with the deceased about the time of the act alleged,[3] on weapons used in the commission of the act,[4] on property of the accused,[5] on objects along the route supposed to have been taken, either in concealing the body or by the accused after the crime;[6]

fur. Here was found sufficient evidence to convict the mother of the crime, and the truthfulness of the testimony was shown by her subsequent confession. Stewart, Legal Medicine, p. 276; 3 Wharton & S. Med. Jur. 5th ed. § 291.

[1] *State* v. *Brown,* 168 Mo. 449, 68 S. W. 568; *Cole* v. *State,* 48 Tex. Crim. Rep. 439, 88 S. W. 341; *State* v. *Henry,* 51 W. Va. 283, 41 S. E. 439.

[2] *White* v. *State,* 133 Ala. 122, 32 So. 139; *People* v. *Majors,* 65 Cal. 138, 52 Am. Rep. 295, 3 Pac. 597, 5 Am. Crim. Rep. 486; *Thomas* v. *State,* 67 Ga. 460; *Drake* v. *State,* 75 Ga. 413; *Woolfolk* v. *State,* 85 Ga. 69, 11 S. E. 814; *Beavers* v. *State,* 58 Ind. 530; *State* v. *Knight,* 43 Me. 11; *Com.* v. *Sturtivant,* 117 Mass. 122, 19 Am. Rep. 401; *Com.* v. *Dorsey,* 103 Mass. 412; *Dillard* v. *State,* 58 Miss. 368; *State* v. *Stair,* 67 Mo. 268, 56 Am. Rep. 449; *Greenfield* v. *People,* 85 N. Y. 75, 39 Am. Rep. 636; *People* v. *Johnson,* 140 N. Y. 350, 35 N. E. 604, 9 Am. Crim. Rep. 377; *McLain* v. *Com.* 99 Pa. 86; *Green* v. *State,* 97 Tenn. 50, 36 S. W. 700; *Moffatt* v. *State,* 35 Tex. Crim. Rep. 257, 33 S. W. 344; *State* v. *Henry,* 51 W. Va. 283, 41 S. E. 439; *State* v. *Welch,* 36 W. Va. 690, 15 S. E. 419; *State* v. *Baker,* 33 W. Va. 319, 10 S. E. 639; *People* v. *Gonzalez,* 35 N. Y. 49; *People* v. *Hong Ah Duck,* 61 Cal. 387; *People* v. *Antony,* 146 Cal. 124, 79 Pac. 858.

[3] *State* v. *Knight,* 43 Me. 11; *People* v. *Deacons,* 109 N. Y. 374, 16 N. E. 676; *Dinsmore* v. *State,* 61 Neb. 418, 85 N. W. 445; *Greenfield* v. *People,* 85 N. Y. 75, 39 Am. Rep. 636; *O'Mara* v. *Com.* 75 Pa. 424; *People* v. *Johnson,* 140 N. Y. 350, 35 N. E. 604, 9 Am. Crim. Rep. 377; *Dillard* v. *State,* 58 Miss. 368; *State* v. *Martin,* 47 S. C. 67, 25 S. E. 113; *Linsday* v. *People,* 63 N. Y. 143.

[4] *Thomas* v. *State,* 67 Ga. 460; *McLain* v. *Com.* 99 Pa. 86; *Barbour* v. *Com.* 80 Va. 287; *State* v. *Henry,* 51 W. Va. 283, 41 S. E. 439; *State* v. *Bradley,* 67 Vt. 465, 32 Atl. 238; *OMara* v. *Com.* 75 Pa. 424.

[5] *State* v. *Knight,* 43 Me. 11; *Greenfield* v. *People,* 85 N. Y. 75, 39 Am. Rep. 636; *Linsday* v. *People,* 63 N. Y. 143; *Thomas* v. *State,* 67 Ga. 460; *Walker* v. *State,* 139 Ala. 56, 35 So. 1011; *Davis* v. *State,* 126 Ala. 44, 28 So. 617; *People* v. *Neufeld,* 165 N. Y. 43, 58 N. E. 786; *People* v. *Pavlik,* 7 N. Y. Crim. Rep. 30, 3 N. Y. Supp. 232.

[6] *Linsday* v. *People,* 63 N. Y. 143; *People* v. *Johnson,* 140 N. Y. 350, 35 N. E. 604, 9 Am. Crim. Rep. 377;

and it is proper for the jury to inspect all tangible evidence containing the same.[7] And the witness may give his opinion as to which direction the blood came in making certain stains,[8] and the location of such stains is relevant to show the position of the deceased when killed.[9]

In other cases than homicide, blood stains are also of the greatest evidentiary value. Blood stains on money have been held competent evidence as fixing the identity of a robber where he was wounded during the act,[10] also to show that a woman was ravished,[11] and to identify a man accused of

Gaines v. *Com.* 50 Pa. 319; *Richardson* v. *State,* 7 Tex. App. 486; *Greenfield* v. *People,* 85 N. Y. 75, 39 Am. Rep. 636; *State* v. *Merriman,* 34 S. C. 16, 12 S. E. 619; 1 Taylor, Med. Jur. 372. See *Com.* v. *Sturtivant,* 117 Mass. 122, 19 Am. Rep. 401; *Drake* v. *State,* 75 Ga. 413; *Painter* v. *People.* 147 Ill. 444, 35 N. E. 64; *McCabe* v. *Com.* 3 Sadler (Pa.) 426, 8 Atl. 45; *State* v. *Martin,* 47 S. C. 67, 25 S. E. 113.

[7] *Thomas* v. *State,* 67 Ga. 460; *Dillard* v. *State,* 58 Miss. 368; *Com.* v. *Pope,* 103 Mass. 440; *People* v. *Gonzalez,* 35 N. Y. 49; *Udderzook* v. *Com.* 76 Pa. 340, 1 Am. Crim. Rep. 311; *O'Mara* v. *Com.* 75 Pa. 424; *State* v. *Baker,* 33 W. Va. 319, 10 S. E. 639; *Barbour* v. *Com.* 80 Va. 287; *Drake* v. *State,* 75 Ga. 413; *State* v. *Stair,* 87 Mo. 268, 56 Am. Rep. 449; *State* v. *Knight,* 43 Me. 11; *Woolfolk* v. *State,* 85 Ga. 69, 11 S. E. 814; *White* v. *State,* 133 Ala. 122, 32 So. 139; *People* v. *Johnson,* 140 N. Y. 350, 36 N. E. 604, 9 Am. Crim. Rep. 377; *McLain* v. *Com.* 99 Pa. 86; *State* v. *Martin,* 47 S. C. 67, 25 S. E. 113; *Green* v. *State,* 97 Tenn. 50, 36 S. W. 700; *State* v. *Henry,* 51 W. Va. 283, 41 S. E. 439; *Gaines* v. *Com.* 50 Pa. 319; *People* v. *Bell,* 49 Cal. 485.

[8] *State* v. *Knight,* 43 Me. 11; *Dinsmore* v. *State,* 61 Neb. 418, 85 N. W. 445; *Com.* v. *Sturtivant,* 117 Mass. 122, 19 Am. Rep. 401; *Dillard* v. *State,* 58 Miss. 368.

[9] *Richardson* v. *State,* 7 Tex. App. 486, 492; *Wilson* v. *United States,* 162 U. S. 613, 40 L. ed. 1090, 16 Sup. Ct. Rep. 895; *Jackson* v. *Com.* 100 Ky. 239, 66 Am. St. Rep. 336, 38 S. W. 422, 1091; *Hinshaw* v. *State,* 147 Ind. 334, 47 N. E. 157.

[10] *People* v. *Swist,* 136 Cal. 520, 69 Pac. 223; *Com.* v. *Tolliver,* 119 Mass. 312; *People* v. *Loui Tung,* 90 Cal. 377, 27 Pac. 295; *State* v. *Montgomery,* 79 Iowa, 737, 45 N. W. 292; *State* v. *Peterson,* 110 Iowa, 647, 82 N. W. 329.

[11] *State* v. *Montgomery,* 79 Iowa, 737, 45 N. W. 292; *State* v. *Peterson,* 110 Iowa, 647, 82 N W. 329; *Roszczyniala* v. *State,* 125 Wis. 414, 104 N. W. 113.

rape.[12] The credibility of blood-stain testimony, whether from the nonexpert or the expert, is exclusively for the jury, under the instructions of the court, to be viewed by it in connection with all the evidence in the case.[13]

It has been held that the negative evidence, the absence of blood stains, raises slight presumption of innocence where there has been opportunity to change the clothing,[14] but where it is established that there is a great effusion of blood, and that the accused had on the same clothing as at the time of the alleged crime, it affords strong evidence of innocence.

But, to render blood-stained objects admissible, the identity and unchanged condition of the same must be first established by the party offering them.[15] It is error to admit evidence of blood stains upon objects where the objects are not

[12] See note 11, supra.

[13] *People* v. *Smith,* 106 Cal. 73, 39 Pac. 40; *State* v. *Miller,* 9 Houst. (Del.) 564, 32 Atl. 137; *Linsday* v. *People,* 63 N. Y. 143; *McLain* v. *Com.* 99 Pa. 86; *Com.* v. *Twitchell,* 1 Brewst. (Pa.) 561; *State* v. *Henry,* 51 W. Va. 283, 41 S. E. 439; *State* v. *Knight,* 43 Me. 11; *State* v. *Martin,* 47 S. C. 67, 25 S. E. 113; *Green* v. *State,* 97 Tenn. 50, 36 S. W. 700; *People* v. *Johnson,* 140 N. Y. 350, 35 N. E. 604, 9 Am. Crim. Rep. 377; *White* v. *State,* 133 Ala. 122, 32 So. 139.

[14] *People* v. *Jackson,* 182 N. Y. 66, 74 N. E. 565. See *Vaughn* v. *State,* 130 Ala. 18, 30 So. 669; *White* v. *State,* 133 Ala. 122, 32 So. 139; *People* v. *Majors,* 65 Cal. 138, 52 Am. Rep. 295, 3 Pac. 597, 5 Am. Crim. Rep. 486; *Thomas* v. *State,* 67 Ga. 460; *Drake* v. *State,* 75 Ga. 413; *Woolfolk* v. *State,* 85 Ga. 69, 11 S. E. 814; *Beavers* v. *State,* 58 Ind. 530; *State* v. *Knight,* 43 Me. 11; *Com.* v. *Sturtivant,* 117 Mass. 122, 19 Am. Rep. 401; *Com.* v. *Dorsey,* 103 Mass. 412; *Dillard* v. *State,* 58 Miss. 368; *State* v. *Stair,* 87 Mo. 268, 56 Am. Rep. 449; *Greenfield* v. *People,* 85 N. Y. 75, 39 Am. Rep. 636; *People* v. *Johnson,* 140 N. Y. 350, 35 N. E. 604, 9 Am. Crim. Rep. 377; *McLain* v. *Com.* 99 Pa. 86; *Green* v. *State,* 97 Tenn. 50, 36 S. W. 700; *Moffatt* v. *State,* 35 Tex. Crim. Rep. 257, 33 S. W. 344; *State* v. *Henry,* 51 W. Va. 283, 41 S. E. 439; *State* v. *Welch,* 36 W. Va. 690, 15 S. E. 419; *State* v. *Baker,* 33 W. Va. 319, 10 S. E. 639; *People* v. *Gonzalez,* 35 N. Y. 49; *People* v. *Jackson,* 182 N. Y. 66, 74 N. E. 565; Taylor Med. Jur. Reese's ed. 290.

[15] *State* v. *McAnarney,* 70 Kan. 679, 79 Pac. 137; *State* v. *Moore,* 168 Mo. 432, 68 S. W. 358.

produced nor their absence satisfactorily accounted for,[16] and also where no evidence has been offered as to the character and nature of the wounds alleged to have caused such stains.[17] It is also error to admit them where it is shown that the death was due to choking;[18] or where the exhibition of the blood-stained objects would throw no light on any fact, it is error to exhibit them to the jury.[19] Such exhibitions, not throwing light upon any fact in issue, or being forced in issue for exhibition purposes only, are highly prejudicial, because they are in the nature of dramatic evidence, and tend to excite feelings of resentment and revenge.

§ 424. Proof of handwriting; general principles.—The best testimony as to the genuineness of any disputed writing is, first, the acknowledgment of the alleged writer that he wrote it;[1] second, the witness who saw the writing made, and is able to identify it as such;[2] third, general acquaintance

[16] *Johnson* v. *State,* 80 Miss. 798, 32 So. 49.

[17] *Melton* v. *State,* 47 Tex. Crim. Rep. 451, 83 S. W. 822.

[18] *Vaughn* v. *State,* 130 Ala. 18, 30 So. 669.

[19] *Crenshaw* v. *State,* 48 Tex. Crim. Rep. 77, 85 S. W. 1147.

[1] *Bardin* v. *Stevenson,* 75 N. Y. 164; *Hammond* v. *Varian,* 54 N. Y. 398; *Morvant's Succession,* 45 La. Ann. 207, 12 So. 349; *Taylor's Will,* 10 Abb. Pr. N. S. 300.

See further the article "Wills;" *Wentz* v. *Black,* 75 N. C. 491; *Com.* v. *Kepper,* 114 Mass. 278; *Avery* v. *Starbuck,* 127 N. Y. 675, 27 N. E. 1080; *Rogers* v. *Tyley,* 144 Ill. 652, 32 N. E. 393; *White* v. *Solomon,* 164 Mass. 516, 30 L.R.A. 537, 42 N. E. 104; *Hess* v. *State,* 5 Ohio, 5, 22 Am. Dec. 767; *State* v. *Nettleton,* 1 Root, 308; *State* v. *Brunson,* 1 Root, 307; *Redd* v. *State,* 65 Ark. 475, 47 S. W. 119; *State use of Medford* v. *Spence,* 2 Harr. (Del.) 348; *Hammond's Case,* 2 Me. 33, 11 Am. Dec. 39.

[2] *Salazar* v. *Taylor,* 18 Colo. 538, 33 Pac. 369; *Hamilton* v. *Smith,* 74 Conn. 374, 50 Atl. 884; *Thalheim* v. *State,* 38 Fla. 169, 20 So. 938; *Riggs* v. *Powell,* 142 Ill. 453, 32 N. E. 482; *Cross* v. *People,* 47 Ill. 152, 95 Am. Dec. 474; *Greenebaum* v. *Bornhofen,* 167 Ill. 640, 47 N. E. 857; *Snyder* v. *McKeever,* 10 Ill. App. 188; *State* v. *Farrington,* 90 Iowa, 673, 57 N. W. 606; *Hammond's Case,* 2 Me. 34, 11 Am. Dec. 39; *State* v. *Harvey,* 131 Mo. 339, 32 S. W. 1110; *State* v. *Stair,* 87

with the handwriting;[3] fourth, opinion evidence of expert, based on comparison of specimens submitted to him.[4]

The acknowledgment of the writer, and the testimony of the witness who saw the writing made, are both primary evidence of the writing, because the knowledge acquired was through the same means.[5] The same rules of proof apply in criminal as in civil cases,[6] with this qualification; that where a standard of comparison is resorted to, the genuineness of the standard in civil cases, can be established by a preponderance of the evidence, and in criminal cases it must be established beyond a reasonable doubt.[7]

In offering testimony as to handwriting, it is generally assumed that what a witness states is within his own knowledge,[8] although one authoritative writer says "that the witness, before proceeding with his testimony, must expressly appear to have had the means of knowledge, for the possession of it is not presumed beforehand."[9] But the witness need not state in terms that he knows it, if he shows knowl-

Mo. 268, 56 Am. Rep. 449; *West* v. *State,* 22 N. J. L. 212; *State* v. *Brown,* 4 R. I. 528, 70 Am. Dec. 168; *State* v. *Hall,* 16 S. D. 6, 65 L.R.A. 151, 91 N. W. 325; Wigmore, Ev. § 694.

[3] Wigmore, Ev. § 702; *Pinkham* v. *Cockell,* 77 Mich. 265, 43 N. W. 921; *Flowers* v. *Fletcher,* 40 W. Va. 103, 20 S. E. 870; *Talbott* v. *Hedge,* 5 Ind. App. 555, 32 N. E. 788; *Carr* v. *Carr,* 138 Mich. 396, 101 N. W. 550.

[4] Post, § 424e.

As to proof of handwriting, see also §§ 549 et seq. in chapter X. infra, as to Documentary Evidence. For note on comparison of handwriting generally, see 62 L.R.A. 818.

[5] *Ainsworth* v. *Greenlee,* 8 N. C. (1 Hawks) 190; *Foulkes* v. *Com.* 2 Rob. (Va.) 837; *Rex* v. *Benson,* 2 Campb. 508.

[6] *De La Motte's Case,* 21 How. St. Tr. 810. See *Rex* v. *Cator,* 4 Esp. 117; *Hammond's Case,* 2 Me. 33, 11 Am. Dec. 39; *Gallagher* v. *Delargy,* 57 Mo. 29; *State* v. *Grant,* 74 Mo. 33; 1 Greenl. Ev. § 573a.

[7] *People* v. *Molineux,* 168 N. Y. 264, 62 L.R.A. 193, 61 N. E. 286. Contra *State* v. *Branton,* 49 Or. 86, 87 Pa. 535; *Johnson* v. *State,* — Tex. Crim. Rep. —, 102 S. W. 1133; *Mahon* v. *State,* 46 Tex. Crim. Rep. 234, 79 S. W. 28.

[8] Wigmore, Ev. § 654; *Pearson* v. *Wheeler,* 55 N. H. 41.

[9] Wigmore, Ev. § 693 (last paragraph of section); *State* v. *Minton,*

edge,[10] it being generally sufficient to say that he is acquainted with the handwriting.[11] In certain relations knowledge may be presumed.[12] Where the witness swears that he is acquainted with the handwriting, the burden is on the opposing party to show his disqualification.[13]

§ 424a. Handwriting; sources of witnesses's knowledge.—Excluding the acknowledgment of the genuineness by the alleged writer, and the evidence, equally primary, of the witness who saw the disputed writing made, there are three sources from which the witness can acquire qualifying knowledge:

First, *ex visu scriptionis,* seeing the person write. It is the settled rule of law that this is sufficient to qualify the witness.[1] The subsidiary questions as to the number of times,[2] the quantity of writing seen,[3] and the time within which such knowl-

116 Mo. 605, 614, 22 S. W. 808; *State* v. *Harvey,* 131 Mo. 339, 32 S. W. 1110.

[10] See note 9, above.

[11] See note 9, supra.

[12] Lawson Expert & Opinion Ev. p. 346. But see *Farrell* v. *Manhattan R. Co.* 83 App. Div. 393, 82 N. Y. Supp. 334; *Moody* v. *Rowell,* 17 Pick. 490, 28 Am. Dec. 317.

See *Haun* v. *State,* 13 Tex. App. 383, 44 Am. Rep. 706.

[13] *Henderson* v. *Bank at Montgomery,* 11 Ala. 855; *Goodhue* v. *Bartlett,* 5 McLean, 186, Fed. Cas. No. 5,538; *Pradiere* v. *Combe,* 2 Treadway, Const. 625; *Hinchman* v. *Keener,* 5 Colo. App. 300, 38 Pac. 611; *First Nat. Bank* v. *Lierman,* 5 Neb. 249; *Barwick* v. *Wood,* 48 N. C. (3 Jones, L.) 310.

[1] Wigmore, Ev. § 694. See *Pittman* v. *State,* 51 Fla. 94, 8 L.R.A. (N. S.) 509, 41 So. 385; Lawson, Expert & Opinion Ev. p. 332, rule 47; *United States* v. *Gleason,* 37 Fed. 331; *State* v. *Stair,* 87 Mo. 268, 56 Am. Rep. 449; *State* v. *Harvey,* 131 Mo. 339, 32 S. W. 1110. But see *Nelms* v. *State,* 91 Ala. 97, 9 So. 193; *United States* v. *Crow,* 1 Bond, 51, Fed. Cas. No. 14,895; *State* v. *Bond,* 12 Idaho, 424, 86 Pac. 43; *Bess* v. *Com.* 118 Ky. 858, 82 S. W. 576; *State* v. *Freshwater,* 30 Utah, 442, 116 Am. St. Rep. 853, 85 Pac. 447; *Hynes* v. *McDermott,* 82 N. Y. 41, 37 Am. Rep. 538; *Re Diggin,* 68 Vt. 198, 34 Atl. 696.

[2] Wigmore, Ev. § 694. See note 1, above.

[3] *Gibson* v. *Trowbridge Furniture Co.* 96 Ala. 357, 361, 11 So. 365; *Re Marchall,* 126 Cal. 95, 58 Pac. 449; *Salazar* v. *Taylor,* 18 Colo.

edge was acquired,[4] are all immaterial as affecting the competency and admissibility of the evidence, although these questions go to the credibility of the witness as qualifying and limiting his knowledge.

Second, *ex scriptis olim visis,* seeing genuine writings. Here the witness has no knowledge from seeing the act, and the main controversy as to his testimonial qualifications is to determine the grounds of his belief that the person in question was the writer.[5] Qualifications are established here from writings purporting to be genuine, such as letters in answer to those written to the person in question,[6] where, in the usual course of business, writings purporting to be genuine have passed through his hands,[7] and where he held an official position and he had writings purporting to be genuine before him.[8]

Third, *ex comparatione scriptorium,* expert comparison of writings. The controversy in criminal cases here is to show

538, 545, 33 Pac. 369; *Kendall* v. *Collier,* 97 Ky. 446, 30 S. W. 1002; *Com.* v. *Hall,* 164 Mass. 152, 41 N. E. 133; *State* v. *Stair,* 87 Mo. 273, 56 Am. Rep. 449; *State* v. *Hall,* 16 S. D. 6, 65 L.R.A. 151, 91 N. W. 325; *Poncin* v. *Furth,* 15 Wash. 201, 46 Pac. 241.

[4] See note 3, above; *Wilson* v. *VanLeer,* 127 Pa. 371, 14 Am. St. Rep. 854, 17 Atl. 1097; *Karr* v. *State,* 106 Ala. 1, 17 So. 328; *Thomas* v. *State,* 103 Ind. 419, 2 N. E. 808.

[5] Wigmore, Ev. § 699.

[6] *Thomas* v. *State,* 103 Ind. 419, 2 N. E. 809; *State* v. *Harvey,* 131 Mo. 339, 32 S. W. 1110; Wigmore, Ev. § 702; *Allen* v. *State,* 3 Humph. 367; *State* v. *Barrett,* 5 Penn. (Del.) 147, 59 Atl. 45; *Redd* v. *State,* 65 Ark. 475, 47 S. W. 119.

[7] *Berg* v. *Peterson,* 49 Minn. 420, 52 N. W. 37; *Tuttle* v. *Rainey,* 98 N. C. 513, 4 S. E. 475.

[8] *Sill* v. *Reese,* 47 Cal. 343; *Redd* v. *State,* 65 Ark. 475, 47 S. W. 119; *Rex* v. *Slaney,* 5 Car. & P. 218, Tenterden Id. Ch. J.; *Re Stambro,* 1 Manitoba L. Rep. 263, 267; *Tyler* v. *Mutual Dist. Messenger Co.* 17 App. D. C. 85, 93; *Com.* v. *Webster,* 5 Cush. 300, 52 Am. Dec. 711; *Reyburn* v. *Belotti,* 10 Mo. 598; *Titford* v. *Knott,* 2 Johns. Cas. 214; *Hess* v. *State,* 5 Ohio, 7, 22 Am. Dec. 767; *State* v. *Allen,* 8 N. C. (1 Hawks) 9, 9 Am. Dec. 616 (semble); *United States* v. *Ortiz,* 176 U. S. 422, 44 L. ed. 529, 20 Sup. Ct. Rep. 466.

beyond a reasonable doubt that the specimens compared are genuinely the handwriting of the person in dispute.[9]

§ 424b. Handwriting; qualification of witness; comparison.—Aside from the acknowledgment by the alleged writer that he executed the disputed writing, or the witness who saw the disputed writing made, all knowledge of handwriting is obtained through comparison.[1] The ordinary person, obtaining his knowledge from experience and observation, and not from inference, is qualified to form and to express a judgment upon the genuineness of disputed handwriting, so far as empirical or experiential capacity is demanded, and hence the fundamental rule of our law is that the general experience of the ordinary person qualifies.[2]

By "comparison," in the language of Mr. Starkie, is meant "a comparison by the juxtaposition of two writings, in order, by such comparison, to ascertain whether both were written by the same person." And again, "comparison of handwriting is where other witnesses prove a paper to be the handwriting of a party, and the witness is desired to take the two

[9] *Allen* v. *State*, 3 Humph. 368; *Territory* v. *O'Hare*, 1 N. D. 30, 44 N. W. 1003.

[1] *Travis* v. *Brown*, 43 Pa. 12, 82 Am. Dec. 540; *Doe ex dem. Mudd* v. *Suckermore*, 5 Ad & El. 730, 2 Nev. & P. 16, W. W. & D. 405, 7 L. J. Q. B. N. S. 33; *Simpson* v. *Dismore*, 9 Mees. & W. 47, 1 Dowl. Pr. N. S. 357, 11 J. Exch. N. S. 137, 5 Jur. 1012; *Russell* v. *Smyth*, 9 Mees & W. 810, 1 Dowl. Pr. N. S. 929, 11 L. J. Exch. N. S. 308. See Russell, Crimes, 7th Eng. ed. p. 2149; *Graham* v. *Nesmith*, 24 S. C. 285; *People* v. *Molineux*, 168 N. Y. 264, 62 L.R.A. 193, 61 N. E. 286; *Re Gordon*, 50 N. J. Eq. 397, 26 Atl. 268; *Forgey* v. *First Nat. Bank*, 66 Ind. 123.

[2] *Redding* v. *Redding*, 69 Vt. 500, 38 Atl. 230; *Salazar* v. *Taylor*, 18 Colo. 538, 33 Pac. 369; *Wilson* v. *VanLeer*, 127 Pa. 371, 14 Am. St. Rep. 854, 17 Atl. 1097; *United States* v. *Gleason*, 37 Fed. 331; *State* v. *Stair*, 87 Mo. 268, 56 Am. Rep. 449; *State* v. *Harvey*, 131 Mo. 339, 32 S. W. 1110; *Nelms* v. *State*, 91 Ala. 97, 9 So. 193.

For note as to competency of witness to handwriting, see 63 L.R.A. 964.

papers in his hand, compare them, and say whether they are, or are not, the same handwriting." [3]

Hence, by comparison of handwritings" is meant the actual, mechanical comparison of the writings themselves, as distinguished from that comparison where the witness, from the exemplar in his mind, or previous knowledge, compares the writing then before him with such exemplar or previous knowledge, and then expresses his belief [4] as to the matter.

§ 424c. Handwriting; comparison by the jury; specimens proved genuine.—In all cases the jury has the right to make a comparison of the disputed writings before them, where the specimens submitted as a standard are genuine.[1] This condition is fundamental. It would be trifling with serious matters to permit a comparison where there was any question as to the genuineness of the standard.

In some states comparison is limited to those specimens admitted to be genuine writings. Such admission must come from the opposing party, and be a judicial admission.[2] In those states where the comparison is allowed with any written matter proved to be genuine, the proof of genuineness is to be determined by the court.[3] As to the quantum of proof,

[3] Starkie, Ev. pt. 4, p. 654; *Johnson* v. *Des Moines L. Ins. Co.* 105 Iowa, 273, 75 N. W. 101; *Rowt* v. *Kile,* 1 Leigh, 216.

[4] *Travis* v. *Brown,* 43 Pa. 12, 82 Am. Dec. 540.

[1] Comparison by the jury is not permitted in the states of Louisiana and North Carolina. *Wilber* v. *Eicholtz,* 5 Colo. 240. See *University of Illinois* v. *Spalding,* 62 L.R.A. 867 et seq. note, div. vii.; *Smith* v. *Hanson,* 34 Utah, 171, 18 L.R.A.(N.S.) 520, 96 Pac. 1087; *Merritt* v. *Straw,* 6 Ind. App. 360, 33 N. E. 657; *Sartor* v. *Bolinger,* 59 Tex. 411; *Heacock* v. *State,* 13 Tex. App. 97; *Crow* v. *State,* 37 Tex. Crim. Rep. 295, 39 S. W. 574; *Heard* v. *State,* 9 Tex. App. 1

[2] *Shorb* v. *Kinzie,* 80 Ind. 502; *Jones* v. *State,* 60 Ind. 241.

[3] *Com.* v. *Coe,* 115 Mass. 505; *Costello* v. *Crowell,* 133 Mass. 354; *Costello* v. *Crowell,* 139 Mass. 590, 2 N. E. 698; *State* v. *Thompson,* 80 Me. 194, 197, 6 Am. St. Rep. 192, 13 Atl. 892, 7 Am. Crim. Rep. 164; *Travis* v. *Brown,* 43 Pa. 9, 82 Am. Dec. 540; *State* v. *Ward,* 39 Vt.

this must be, generally, "to the satisfaction of the judge,"[4] and under the rule of criminal evidence, the judge should be satisfied beyond a reasonable doubt as to the genuineness of the specimens offered.[5]

This comparison ought to be made when the testimony is being offered during the trial. To permit the jury to take the writings on retirement, for farther comparison, is to permit the jury to determine facts from its own investigation, and not from the evidence adduced, and to give undue prominence to, and to emphasize particular portions of, the evidence. It has been held that it is error to permit the jury to take the writings on retirement to the jury room.[6]

§ 424d. Handwriting; comparison; nonexpert.—It is clear that no comparison of handwritings can be made by a nonexpert witness where he has no other knowledge than from the writings in evidence.[1] He can perform no service which the court or the jury could not perform for itself, and afford no light upon the questions which the observation of the jurors could not afford, and that, also, more satisfactorily, because of no intervening medium.[2]

235; *Rowell* v. *Fuller,* 59 Vt. 692, 10 Atl. 853; *State* v. *Hastings,* 53 N. H. 452; *Carter* v. *Jackson,* 58 N. H. 157; Wigmore, Ev. § 2550.

[4] *Cooper* v. *Dawson,* 1 Fost. & F. 550; *Reid* v. *Warner,* 17 Lower Can. Rep. (Dec. Des Tribunaux) 489; *Little* v. *Rogers,* 99 Ga. 95, 24 S. E. 856; *McCombs* v. *State,* 109 Ga. 496, 34 S. E. 1021; *People* v. *Molineux,* 168 N. Y. 264, 62 L.R.A. 193, 61 N. E. 286.

[5] *People* v. *Molineux,* 168 N. Y. 264, 62 L.R.A. 193, 61 N. E. 286.

For note as to competency of handwriting as standard for comparison, see 63 L.R.A. 428.

[6] *Re Foster,* 34 Mich. 21.

[1] See Lawson, Expert and Opinion Ev. 2d ed. pp. 453 et seq.

[2] *Evans* v. *People,* 12 Mich. 35; *Cooper* v. *State,* 23 Tex. 331, 337, 339; *Doe ex dem. Mudd* v. *Suckermore,* 5 Ad. & El. 749, 2 Nev. & P. 16, W. W. & D. 405, 7 L. J. Q. B. N. S. 33; *Page* v. *Homans,* 14 Me. 482.

As to competency of nonexpert witness to handwriting, see also note in 63 L.R.A. 964.

§ 424e. Handwriting; comparison by experts.—Expert comparison is always allowed, in most states, in aid of that of the jury, and in some states only expert comparison is allowed.[1]

The standard of comparison, and the degree of proof to establish the genuineness of the handwriting, vary in the different states, and to that end it will be an aid to give a general reference to the practice and statutes by states.[2]

[1] No comparison of handwriting is allowed to be made by the jury in the states of Louisiana and North Carolina.

For exhaustive notes upon comparison of handwriting, see *University of Illinois* v. *Spaulding,* 62 L.R.A. 817–874 (71 N. H. 163, 51 Atl. 731); *Smith* v. *Hanson,* 18 L.R.A.(N.S.) 520, (34 Utah, 171, 96 Pac. 1087).

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

[2] United States.—Cases not harmonious; but it seems the writings must not only be in the case but admitted to be genuine. *Moore* v. *United States,* 91 U. S. 270, 23 L. ed. 346; *Hickory* v. *United States,* 151 U. S. 303, 38 L. ed. 170, 14 Sup. Ct. Rep. 334; *Stokes* v. *United States,* 157 U. S. 187, 39 L. ed. 667, 15 Sup. Ct. Rep. 617. But see *Briggs* v. *United States,* 29 Ct. Cl. 178. In forgery, at least, it seems the only standards of comparison are such as are in evidence for some other relevant purpose, and admitted or proved to be in the handwriting of the defendant, or such as form a part of the record, as a pleading or recognizance bearing defendant's signature, or papers the court can notice judicially; but it cannot notice judicially the genuineness of other papers in other cases, and their admission, as standards of comparison, is error. *Withaup* v. *United States,* 62 C. C. A. 328, 127 Fed. 530. See *United States* v. *Darnaud,* 3 Wall. Jr. 143, Fed. Cas. No. 14,918; *United States* v. *McMillan,* 29 Fed. 247; *United States* v. *Mathias,* 36 Fed. 893.

Alabama.—Proof by comparison denied by earlier cases. See *Little* v. *Beazley,* 2 Ala. 703, 36 Am. Dec. 431. But see *Crist* v. *State,* 21 Ala. 137. Later cases return to the older rule. See *Bishop* v. *State,* 30 Ala. 34; *Williams* v. *State,* 61 Ala. 33; *Griffin* v. *State,* 90 Ala. 596, 8 So. 670. See *Kirksey* v. *Kirksey,* 41 Ala. 626, for rules intended to govern the question of comparison. *Washington* v. *State,* 143 Ala. 64, 39 So. 388 (irrelevant writings not allowed); *Griffin* v. *Working Women's Home Asso.* 151 Ala. 597, 44 So. 605 (a writing admitted to be genuine, but not shown to be relevant, not admissible).

Arizona.—Follows English statute, that any writing proved to the satisfaction of the judge to be genu-

§ 424f. Writings taken from the accused as standards of comparison.—Under a rule that a standard for comparine is admissible as a standard of comparison; and "any writing," under English construction, includes irrelevant writings; and the statute is expressly extended to criminal cases.

Arkansas.—Comparison may be only with other documents properly in the case. *Miller* v. *Jones,* 32 Ark. 337. Where the specimen writing is admitted to be genuine, it may be used. *McDonnell* v. *State,* 58 Ark. 242, 24 S. W. 105.

California.—Comparison may be made with any writings admitted or treated as genuine by the jury, but the witness, though not so limited in terms by the Code, must be an expert. *Goldstein* v. *Black,* 50 Cal. 462; *Neal* v. *Neal,* 58 Cal. 287. The document itself must be produced, a letter press copy is not admissible. *Spottiswood* v. *Weir,* 66 Cal. 525, 6 Pac. 381. Writing in the presence of the jury not admitted as standard of comparison with another writing of the party. See *Gulzoni* v. *Tyler,* 64 Cal. 334, 30 Pac. 981.

Colorado.—Comparison by the court or jury with any writing proved to the satisfaction of the judge to be genuine, but confined to writings in the case and relevant thereto. *Wilber* v. *Eicholtz,* 5 Colo. 240. See *Bradford* v. *People,* 22 Colo. 157, 43 Pac. 1013 (defendant compelled to write, where he had offered himself as a witness, where he denied his signature.)

Connecticut.—The writing used as a standard must not only be genuine, but must be admitted or proved to be such, before it can be used. *Tyler* v. *Todd,* 36 Conn. 218. Comparison allowed in a criminal case. *State* v. *Brunson,* 1 Root. 307.

Delaware.—Comparison allowed with writings admitted to be genuine. *Welch* v. *Coulborn,* 3 Houst. (Del.) 647.

District of Columbia.—English rule as to any writing, with the addition in one case that a party is estopped to deny the genuineness of certain writings and that these can be used for comparison. See *Keyser* v. *Pickrell,* 4 App. D. C. 198.

England.—Comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine shall be permitted to be made by witnesses; and such writings, and the evidence of witnesses respecting the same, may be submitted to the court and jury as evidence of the genuineness or otherwise, of the writing in dispute. Crim. Procedure act, 1865, 28 and 29 Vict. chap. 18, § 8. See *Reg.* v. *Wilbain,* 9 Cox, C. C. 448; *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. *Wilton,* 1 Fost. & F. 391; *Reg.* v. *Coleman,* 6 Cox, C. C. 163; *Reg.* v. *Shepherd,* 1 Cox, C. C. 237.

Florida.—English rule, by statute, adding the words that the writings may be submitted "to the court in case of a trial by the court," as well as to the jury. *Wooldridge* v. *State,* 49 Fla. 137, 38 So. 3.

son of handwriting must be established by direct proof or equivalent evidence, such a standard may be established by

Georgia. — Code provides that "other writings proved or acknowledged to be genuine may be admitted in evidence for the purpose of comparison by the jury. Such other new papers, when intended to be introduced, shall be submitted to the opposite party before he announces himself ready for trial." Code 1895, 5247; *Doe ex dem. Henderson* v. *Roe,* 16 Ga. 521; *Boggus* v. *State,* 34 Ga. 275. See *Bruce* v. *Crews,* 39 Ga. 544, 99 Am. Dec. 467; *Axson* v. *Belt,* 103 Ga. 578, 30 S. E. 262; *McCombs* v. *State.* 109 Ga. 496. 34 S. E. 1021 (insufficient showing as to standard); *Wimbish* v. *State,* 89 Ga. 294, 15 S. E. 325 (rule as to experts); *Washington* v. *State,* 124 Ga. 423, 52 S. E. 910 (signature to pleas filed cannot be used as standard).

Idaho.—Admission of irrelevant papers for the purpose of creating a standard of comparison not allowed, except papers conceded to be genuine writings, or such as the opposing party is estopped to deny, or fall within some equally well-recognized exception.

Illinois.—Comparison by juxtaposition not allowed, but the jury may compare the disputed writing with documents properly in evidence in the case. *Massey* v. *Farmers' Nat. Bank,* 104 Ill. 332; *Pate* v. *People,* 8 Ill. 644 (comparison by persons who have a general knowledge of the handwriting, Breese dissenting, and favoring comparison by juxtaposition); *Brobston* v. *Cahill,* 64 Ill. 356 (excluding irrelevant papers as basis of comparison, followed by later cases); *Gitchell* v. *Ryan,* 24 Ill. App. 372 (applying the same rule as to writings for a basis of comparison when made by experts as when made by witnesses with knowledge); *Frank* v. *Taubman,* 31 Ill. App. 592 (as to irrelevant papers, held to exclude even an appeal bond signed by the party, on file in the cause); *Jumpertz* v. *People,* 21 Ill. 414 (same rules obtained in criminal cases).

Indiana.—In Indiana the cases are in some confusion: *Clark* v. *Wyatt,* 15 Ind. 271, 77 Am. Dec. 90 (opinion of witness based on comparison with admittedly genuine writing refused); *Chance* v. *Indianapolis & W. Gravel Road Co.* 32 Ind. 472 (comparison by experts with admittedly genuine writing, opinion received.) *Burdick* v. *Hunt,* 43 Ind. 381, papers with admittedly genuine signatures may be submitted, with the disputed signature, to experts for comparison, who may give an opinion to the jury; but such papers cannot be submitted to the jury to make the comparison. But in *Jones* v. *State,* 60 Ind. 241, such comparison was held error because the papers had not been admitted to be genuine by the accused himself, and that evidence of his admission as to writing the paper submitted as a standard would not take the place of his direct admission. See *Shorb* v. *Kinzie,* 80 Ind. 500, and 100 Ind. 429, followed by later cases,

showing that it was attached to a slip handed in by one whose name it is; and it is not error to admit in evidence the name

that the standard used by the expert must come from admittedly genuine writings; that his opinion is then admissible, but the jury cannot make such comparison.

Iowa.—The Code provides that "evidence respecting handwriting may be given by comparison made by experts or by the jury with writings of the same person which are proved to be genuine. Code 1897, § 4620. *Mixer* v. *Bennett,* 70 Iowa, 329, 30 N. W. 587 (witness not qualifying as an expert cannot testify by comparison). See also *Patton* v. *Lund,* 114 Iowa, 201, 86 N. W. 296; *Coppock* v. *Lampkin,* 114 Iowa, 664, 87 N. W. 665.

Kansas.—Comparison by juxtaposition obtains in this state. See *Macomber* v. *Scott,* 10 Kan. 340; *Holmberg* v. *Johnson,* 45 Kan. 197, 25 Pac. 575 (enlarging rule as to standards of comparison); *State* v. *Zimmerman,* 47 Kan. 242, 27 Pac. 999; *State* v. *Stegman,* 62 Kan. 476, 63 Pac. 746. See *State* v. *Ryno,* 68 Kan. 348, 64 L.R.A. 303, 74 Pac. 1114.

Kentucky.—The Code provides for the comparison of the disputed handwriting with other handwritings of the person, though not in the case for any other purpose, but introduced for that purpose. Comparison may be made by witnesses and the writings and testimony may be submitted to the court or jury, provided that (a) the genuineness is proved to the judge's satisfaction by other than opinion evidence; (b) that it was written before the controversy and selected without fraud; (c) notice to opposing party, and (d) judge to limit the number of writings. Code, 1899, § 604. *Andrews* v. *Hayden,* 88 Ky. 455, 11 S. W. 428 (spurious and genuine signatures cannot be mingled, and witness asked to select genuine); *Froman* v. *Com.* 19 Ky. L. Rep. 948, 42 S. W. 728 (upon trial for forgery, signatures to affidavits, pleadings, and depositions, without further proof of genuineness than that afforded by inspection, admitted as standard of comparison); *Phœnix Nat. Bank* v. *Taylor,* 113 Ky. 61, 67 S. W. 27 (instrument executed after dispute started, excluded).

Louisiana.—In this state the civil Code and practice Code provisions as to proof of handwriting do not apply to criminal cases under the Revised Statutes, where the rules of evidence of the common law of England are to be applied, and documents not admitted in evidence are inadmissible when merely offered to prove handwriting by comparison. *State* v. *Batson,* 108 La. 479, 32 So. 478.

Maine.—Only experts can give an opinion from juxtaposed writings, the standard being produced in open court. Nonexperts can give opinions only where they have previous acquaintance and knowledge, and the standard need not be present. *Woodman* v. *Dana,* 52 Me. 9; *Hammond's Case,* 2 Me. 33, 11 Am. Dec.

and address on a card found in the pocket of the accused, in connection with a slip found near the dead body, in a homicide

39 (where witness had examined certain checks admitted by accused to have been written by him and later destroyed, witness might testify to the similitude, and then to his belief that the disputed signature was made by the accused). See *Chandler* v. *LeBarron,* 45 Me. 534; *Nichols* v. *Baker,* 75 Me. 334 (writings made in similar transactions at same time, admitted to show by comparison of handwriting identity of person accused of the transactions).

Maryland.—Comparison of disputed writing with any writing proved to the satisfaction of the court to be genuine permitted to be made by witnesses, and such writings, and the evidence of the witnesses respecting the same, may be submitted to the court and jury, or the court as the case may be, as evidence of the genuineness or otherwise of the writing in dispute. Code, art. 35, § 6.

Massachusetts. — Both jury and expert comparison allowed. But nothing but original signatures can be used as standards of comparison by which to prove other signatures genuine. *Com.* v. *Eastman,* 1 Cush. 189, 48 Am. Dec. 596; *Bacon* v. *Williams,* 13 Gray, 525 (collateral issues must be avoided in such matters); *Homer* v. *Wallis,* 11 Mass. 309, 6 Am. Dec. 169 (jury comparison); *Salem Bank* v. *Gloucester Bank,* 17 Mass. 1, 9 Am. Dec. 111 (comparison evidence proper to submit to the jury); *Moody* v. *Rowell,* 17 Pick. 490, 28 Am. Dec. 317 (expert comparison) See *Jacobs* v. *Boston Elev. R. Co.* 188 Mass. 245, 74 N. E. 349 (name and address on envelop admitted for standard of comparison; but no objection made in this case, however); *Com.* v. *Allen,* 128 Mass. 46, 35 Am. Rep. 356 (party not entitled to use his signature written for the occasion for comparing a signature with which his own is in controversy); *Com.* v. *Tucker,* 189 Mass. 457, 7 L.R.A.(N.S.) 1056, 76 N. E. 127 (shipping slips containing name of accused admitted as standards for comparison).

Michigan. — Papers properly in the case may be used as standards for comparison. *Vinton* v. *Peck,* 14 Mich. 287; *Van Sickle* v. *People,* 29 Mich. 61 (papers taken from a prisoner not admissible, being a disputed paper not belonging to the case); *People* v. *Parker,* 67 Mich. 222, 11 Am. St. Rep. 578, 34 N. W. 720 (bail bond, continuance affidavit being part of the files in the case, held admissible, as relevant to the purpose, but error to introduce probate court records); *People* v. *Gale,* 50 Mich. 237, 15 N. W. 99 (jury instructed that they could apply their own judgment to ascertain the evidentiary effect of a comparison of signatures, and need not rely wholly on expert opinion.) See *Dietz* v. *Fourth Nat. Bank,* 69 Mich. 287, 37 N. W. 220; *People* v. *Cline,* 44 Mich. 290, 6 N. W. 671; *People* v. *Hutchings,* 137 Mich. 527, 100 N. W. 753.

Minnesota. — Comparison with other writings admitted to be genuine, even if offered for no other purpose, by juxtaposition of writings, may be made both by experts and jury. *Morrison* v. *Porter,* 35 Minn. 425, 59 Am. Rep. 331, 29 N. W. 54.

Mississippi. — Expert testimony from writings "made before the controversy arose." *Wilson* v. *Beauchamp,* 50 Miss. 24, followed by *Roy* v. *First Nat. Bank,* — Miss. —, 33 So. 494; and in *Coleman* v. *Adair,* 75 Miss. 660, 23 So. 369 (extended to writings "admitted or proved" to be genuine).

Missouri.—English rule adopted by statute (stat. 1899, § 4679), and presumed to carry with it the meaning and construction given by the courts of England. See *St. Louis Nat. Bank* v. *Hoffman,* 74 Mo. App. 203. Before the statute the following cases allowed a liberal rule: *State* v. *Scott,* 45 Mo. 302 (indorsement on disputed check proved by eyewitness, allowed for comparison); *State* v. *David,* 131 Mo. 380, 33 S. W. 28 (in homicide, signature to inquest over body, allowed for comparison); *State* v. *Thompson,* 132 Mo. 301, 34 S. W. 31 (writings conceded to be genuine, or whose genuineness the party was estopped to deny, admitted as standards of comparison, but concession could not be made by the party offering them). See *Doud* v. *Reid,* 53 Mo. App. 553; *State* v. *Tompkins,* 71 Mo. 613; *State* v. *Goddard,* 146 Mo. 177, 48 S. W. 82 (checks found on body of deceased admitted).

Montana.—The Code provides "evidence respecting the handwriting may also be given by comparison made by the witness or jury, with writings admitted or treated as genuine by the party against whom the evidence is offered, or proved to be genuine to the satisfaction of the judge." Code, 1895, § 3235. *Strother* v. *Lucas,* 6 Pet. 767, 8 L. ed. 575.

Nebraska.—In Nebraska the Code provides: "Evidence respecting handwriting may be given by comparison made by experts or by the jury, with writings of the same person which are proved to be genuine." Stat. 1901, § 5918. *First Nat. Bank* v. *Carson,* 48 Neb. 763, 67 N. W. 779 (requiring writings to be used as standards to be regularly admitted in evidence upon proof of genuineness, so the jury may make the same comparison as experts); *Schmuck* v. *Hill,* 2 Neb. (Unof.) 79, 96 N. W. 158 (writing on envelops admitted by defendant to be his, admitted as standards for comparison).

New Hampshire.—*University of Illinois* v. *Spalding,* 62 L.R.A. 817, and exhaustive notes (71 N. H. 163, 51 Atl. 731). Writings otherwise irrelevant, not admitted to be genuine, may still be used as standards of comparison, if found genuine by the presiding judge upon clear and undoubted evidence; also signatures, if made before the controversy has arisen, or even after, if made under such circumstances as to preclude the idea of being made for the purpose of evidence.

New Jersey.— Now controlled by statute providing, generally, for comparison of the disputed writing with any writing proved to the judge's satisfaction to be genuine,

by the witness to the same, and the evidence to be submitted to the court or jury, provided, if sought to be used by the party making them, they must be proved to have been written before any controversy over the disputed writing. Stat. 1895, p. 1400, § 19; *Wheeler & W. Mfg. Co.* v. *Buckhout,* 60 N. J. L. 102, 36 Atl. 772.

New Mexico.—Comparison permitted, but papers must be properly in evidence. *Staab* v. *Jaramillo,* 3 N. M. 1, 1 Pac. 170.

New York.—Controlled by statute: Comparison of the disputed writing with any writing of the party proved to be genuine to the satisfaction of the judge shall be permitted and submitted to the court or jury. *Glenn* v. *Roosevelt,* 62 Fed. 550 (holding that the writing is not to be submitted to the jury unless comparison has been made by a witness). See *Mortimer* v. *Chambers,* 63 Hun, 335, 17 N. Y. Supp. 874 (construing proviso of statute as to proceedings pending at the time the act became effective); *Shaw* v. *Bryant,* 90 Hun, 374, 35 N. Y. Supp. 909 (holding statute not necessary, since before the act comparison with writings properly in evidence had always been allowed); *People* v. *Dorthy,* 50 App. Div. 44, 63 N. Y. Supp. 592, an opinion based upon comparison with standards not produced in court excluded. See *People* v. *Molineux,* 27 Misc. 79, 58 N. Y. Supp. 155 (decision of genuineness by the court as to standard offered, not binding on the jury); *People* v. *Molineux,* 168 N. Y. 264, 62 L.R.A. 193, 61 N. E. 286 (holding the disputed writing is any writing which the party at the trial seeks to prove as the genuine handwriting, and which is not admitted to be genuine, the comparison not being limited to the instrument which is the subject of the controversy); *Hobart* v. *Verrault,* 74 App. Div. 444, 77 N. Y. Supp. 483 (signature to application of an alien to become a citizen admissible as a standard for comparison, provided that it is shown that the person whose writing is in question actually signed it); *People* v. *Truck,* 170 N. Y. 203, 63 N. E. 281 (signatures made in ordinary business correspondence, proper standards for comparison by handwriting experts with letters purporting to have been written by a third person, declaring defendant innocent). See also *People* v. *Fletcher,* 44 App. Div. 199, 60 N. Y. Supp. 777, 14 N. Y. Crim. Rep. 328; *People* v. *Kennedy,* 34 Misc. 101, 69 N. Y. Supp. 470, 15 N. Y. Crim. Rep. 351.

North Carolina.—Unique rule; no jury comparison permitted, the jury to hear, but not to see, the evidence. See *Outlaw* v. *Hurdle,* 46 N. C. (1 Jones, L.) 150. Comparison with genuine writings as standard, with writing in dispute permitted by experts, but not by jury. See *Tunstall* v. *Cobb,* 109 N. C. 316, 14 S. E. 28, and *Ratliff* v. *Ratliff,* 131 N. C. 425, 63 L.R.A. 963, 42 S. E. 887.

Ohio.—*Hicks* v. *Person,* 19 Ohio, 426 (expert can compare disputed writing with signature of alleged signer to papers on file in the case) See *Calkins* v. *State,* 14 Ohio St. 222 (specimens may be introduced for the sole purpose of comparison); *Bragg* v. *Caldwell,* 19 Ohio St.

407 (standard offered must be proved "beyond a reasonable doubt" to be the genuine signature of the defendant); *Sperry* v. *Tebbs,* 20 Ohio L. J. 181 (standard must be proved by positive and direct testimony, by someone who had seen it written).

Oklahoma.—Comparison allowed, but "the law requires that the signature used as a basis of comparison by experts shall be either an admitted or proved signature," which would mean proof by direct or positive evidence. *Archer* v. *United States,* 9 Okla. 569, 60 Pac. 268.

Oregon.—The Code provides that "evidence respecting the handwriting may also be given by comparison made by a witness skilled in such matters, or the jury with writings admitted or treated as genuine by the party against whom the evidence is offered." Code, 1902, § 777. *State* v. *Tice,* 30 Or. 457, 48 Pac. 367; *State* v. *Branton,* 49 Or. 86, 87 Pac. 535.

Pennsylvania.—Under statute, experts can give their testimony after making comparison of disputed handwriting with documents admitted genuine, or proved to the satisfaction of the judge to be genuine, such evidence to be submitted to the jury; an expert can place writings in juxtaposition, and draw attention of the jury to the same, and on cross-examination such expert must give details and his opinion that the results are important to the issue, and the reasoning and analysis on which his opinion is based. Pa. Laws, 69, § 1, Act May 15, 1895. *Fullam* v. *Rose,* 181 Pa. 138, 37 Atl. 197 (that the signature "looked like the signature" was not sufficient, although apparently proved to be genuine to the satisfaction of the judge); *Shannon* v. *Castner,* 21 Pa. Super. Ct. 294 (holding that while the statute provided for expert comparison, it did not alter the rule as to the introduction of authenticated writings as the standard, and there must be direct evidence of the writing, such as by a party who saw it made or an admission that it was genuine); *Groff* v. *Groff,* 209 Pa. 603, 59 Atl. 65 (lead pencil signature admitted to be genuine, admitted as standard of comparison).

Rhode Island.—Follows English statute. Gen. Laws, 1896, chap. 244, § 44; *State* v. *Brown,* 4 R. I. 528, 70 Am. Dec. 168 (comparison allowed, but only by those who had seen the writing made, or have seen frequent writings in usual course of business; or with specimens admitted or proved genuine by clear evidence, and also not gotten up for the occasion).

South Carolina.—South Carolina does not admit comparison as original evidence, but only in aid of doubtful proof. *Boman* v. *Plunkett,* 2 M'Cord, L. 518; *State* v. *Ezekiel,* 33 S. C. 115, 11 S. E. 635 (trial judge in the first instance must decide as to whether sufficient doubt has been raised to authorize comparison; then the comparison need not be by technical experts, but must be with papers admitted, acknowledged or otherwise proved to be in the same handwriting); *McCreary* v. *Coggeshall,* 74 S. C. 42, 7 L.R.A.(N.S.) 433, 53 S. E. 978,

7 A. & E. Ann. Cas. 693 (record admitted from an office, presumably written by the incumbent, to prove as ancient writing). See *United States* v. *Mathias,* 39 Fed. 892 (Federal case modifying the general rule as to experts in South Carolina).

South Dakota.—Modern rule as to comparison, but varying decisions as to the writing to be used as a standard. *State* v. *Coleman,* 17 S. D. 594, 98 N. W. 175 (letter written by accused while in prison, handed to jail guard, was held sufficiently proven for comparison); *Mississippi Lumber & Coal Co.* v. *Kelly,* 19 S. D. 577, 104 N. W. 265, 9 A. & E. Ann. Cas. 449 (answer containing defendant's signature which he testified was genuine held admissible, but returned checks with indorsement thereon, where indorser's signature was questioned, as to the genuineness of which witness had no further knowledge, held insufficient as a standard of comparison).

Tennessee.—Controlled by statute providing that comparison of disputed writing with any writing be proved to the satisfaction of the judge to be genuine, be permitted by expert witnesses, and submitted to court or jury as evidence of genuineness. Code 1896, § 5560; *Franklin* v. *Franklin,* 90 Tenn. 44, 16 S. W. 557 (construing statute held in derogation of the common law; and while expert comparison permitted, it does not authorize any other than the genuine writings of the reputed writer,—following N. Y. Stat. of 1880, and same construction).

Texas.—Controlled by statute: Code providing that in criminal trials "it is competent in every case to give evidence by comparison made by experts or the jury; but proof by comparison only shall not be sufficient to establish the handwriting of a witness who denies his signature under oath." Crim. Code, 1900, § 794; *Caldwell* v. *State,* 28 Tex. App. 566, 14 S. W. 122.

Utah. — Comparison permitted where standard proved genuine. *Tucker* v. *Kellogg,* 8 Utah, 11, 28 Pac. 870; *State* v. *Freshwater,* 30 Utah, 442, 116 Am. St. Rep. 853, 85 Pac. 447 (expert permitted to state that certain typewritten letters were written by defendant, by showing that the defects in the letters offered corresponded to defects in the writing machine where defendant lived).

Vermont.—Comparison allowed. *Gifford* v. *Ford,* 5 Vt. 532; *State* v. *Ward,* 39 Vt. 225 (court must determine the qualifications of the expert, and jury determine the weight of the evidence; and in a criminal trial the prisoner to have the benefit of any reasonable doubt in the minds of such jurors as to the competency of such experts, precisely as in their determination as to the sufficiency of the testimony in the cause); *Wilmington Sav. Bank* v. *Waste,* 76 Vt. 331, 57 Atl. 241 (limits of comparison of writings).

Virginia.—Comparison with irrelevant papers excluded. See *Burress* v. *Com.* 27 Gratt. 934; *Hanriot* v. *Sherwood,* 82 Va. 1 (expert testimony admitted by comparison with writings proved to be genuine). See *Sprouse* v. *Com.* 81 Va. 374; *Johnson* v. *Com.* 102 Va. 927, 46 S. E. 789 (genuine writings of ac-

case, containing a name and address similar to that on the card taken from accused.[1] A letter written by accused, and handed to the jailer for delivery, was held sufficiently proved for a standard of comparison, where the accused's brother and sister testified also that it was in accused's handwriting.[2]

Where the prosecution claimed that checks found on the body of deceased showed that accused was trying to defraud deceased's wife of her property, accused could introduce other writings for comparison with checks found on the body, to sustain his claim that such checks were forgeries.[3] But where the issue was as to who committed a murder, and a check was found on the body of the woman and a pad in the room where she was murdered, evidence that both check and pad were in the defendant's handwriting, as shown by experts, was in-

cused and enlarged photograph thereof are admissible for comparison by expert testimony).

Washington.—Conceded genuine signatures admitted for comparison with the disputed writing. See *Crane* v. *Dexter, H. & Co.* 5 Wash. 479, 32 Pac. 223; *Moore* v. *Palmer,* 14 Wash. 134, 44 Pac. 142 (admission of writings for express purpose of comparison, where proved genuine, whether admitted so by the opposing party or not).

West Virginia.—Comparison with irrelevant papers excluded. See *Clay* v. *Robinson,* 7 W. Va. 348; *State* v. *Koontz,* 31 W. Va. 127, 5 S. E. 328. The law seems to be that genuineness of an instrument cannot be proved or disproved by comparison with other writings, but where a note was in suit, and pleas signed by alleged maker of the note were both of record, the jury may compare the note with the pleas, and if the papers are such as to allow comparison experts may compare them. See *Tower* v. *Whip,* 53 W. Va. 158, 63 L.R.A. 937, 44 S. E. 179.

Wisconsin.—English rule adopted by statute, but modified in 1881 to read: "Comparison of a disputed writing with any writing proved to the satisfaction of the court to be the genuine handwriting of any person claimed on the trial to have made or executed the disputed instrument or writing shall be permitted to be made by witnesses, and such writings and evidence respecting them may be submitted to the court or jury." Stat. 1898, § 4189a. See *Williams* v. *Riches,* 77 Wis. 569, 46 N. W. 817.

[1] *Com* v. *Tucker,* 189 Mass. 457, 7 L.R.A.(N.S.) 1056, 76 N. E. 127.

[2] *State* v. *Coleman,* 18 L.R.A. (N.S.) 523, note.

[3] *State* v. *Goddard,* 146 Mo. 177, 48 S. W. 82.

admissible;[4] and on a charge of forgery, where a diary was taken from accused, and neither the diary itself nor the writing contained in it was relevant to the case, it was not admissible as a standard of comparison, being a disputed paper not belonging to the case.[5]

§ 424g. Handwriting experts.—The law is settled that a witness who has seen the party write, or who saw the disputed writing made, or has a general knowledge of or an acquaintance with the handwriting of the alleged writer, is qualified to testify to the fact. Such testimony is not inference nor opinion. And it is equally well settled that the nonexpert cannot testify to the genuineness or otherwise of the disputed writing, where his opinion is founded wholly on comparison with genuine writings.[1] It would be useless to listen to opinion evidence from the nonexpert based on comparison only, where the jury, having the standards before them, can judge as well as he.[2]

Hence, the expert witness in handwriting must be such a person as, through the study of or from experience with writings, is able to afford the court special assistance in determining the truth.[3] Where the question can be determined only by comparison itself, it is, to that extent, a science based on previous study, and in this view the questioned or disputed

[4] *People* v. *Kennedy*, 34 Misc. 101, 69 N. Y. Supp. 470, 15 N. Y. Crim. Rep. 351.

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

[1] *Heacock* v. *State*, 13 Tex. App. 97; *United States* v. *Larned*, 4 Cranch, C. C. 312, Fed. Cas. No. 15,565; *United States* v. *Craig*, 4 Wash. C. C. 729, Fed. Cas. No. 14,883; *Jordt* v. *State*, 50 Tex. Crim. Rep. 2, 95 S. W. 514; *Withaup* v. *United States*, 62 C. C. A. 328, 127 Fed. 530. See *Re Burbank*, 104 App. Div. 312, 93 N. Y. Supp. 866.

[2] Wigmore, Ev. § 1997.

See also as to competency of witnesses to handwriting, note in 63 L.R.A. 964.

[3] Wigmore, Ev. § 2012.

As to competency of expert witness to handwriting, see notes in 63 L.R.A. 937, and 63 L.R.A. 985.

document is clearly the subject of expert testimony.[4] The qualification of such expert must be shown by the party producing him, and the determination of his skill is a question addressed to the trial judge.[5] This qualification depends upon knowledge, experience with the subject, and capacity to form an opinion.[6] The extent of the qualification does not affect the competency, but goes to the weight of the testimony.[7] The weight and value of the testimony is always for the jury,[8] and should be submitted by the court under proper, cautionary instructions and the rules of law by which its credibility is to be weighed and determined.[9]

[4] *Com.* v. *Webster,* 5 Cush. 295, 52 Am. Dec. 711; *State* v. *Noe,* 119 N. C. 849, 25 S. E. 812; *Calkins* v. *State,* 14 Ohio St. 222; *Koons* v. *State,* 36 Ohio St. 195; *Archer* v. *United States,* 9 Okla. 569, 60 Pac. 268; *Grooms* v. *State,* 40 Tex. Crim. Rep. 319, 50 S. W. 370; *State* v. *Hastings,* 53 N. H. 452; *State* v. *Shinborn,* 46 N. H. 497, 88 Am. Dec. 224.

[5] *State* v. *Webb,* 18 Utah, 441, 56 Pac. 159; *Hess* v. *State,* 5 Ohio, 5, 22 Am. Dec. 767.

[6] *Forgey* v. *First Nat. Bank,* 66 Ind. 125.

[7] *People* v. *Fletcher,* 44 App. Div. 199, 60 N. Y. Supp. 777; *Com.* v. *Williams,* 105 Mass. 62; *State* v. *Phair,* 48 Vt. 366; *People* v. *Spooner,* 1 Denio, 343, 43 Am. Dec. 672; *Hamilton* v. *Smith,* 74 Conn. 374, 50 Atl. 884; *Reg.* v. *Silverlock* [1894] 2 Q. B. 766, 63 L. J. Mag. Cas. N. S. 233, 10 Reports, 431, 43 Week. Rep. 14, 58 J. P. 788, 9 Am. Crim. Rep. 276, 10 Am. Crim. Rep. 318; *Wheeler & W. Mfg. Co.* v. *Buckhout,* 60 N. J. L. 102, 36 Atl. 772; *Com.* v. *Nefus,* 135 Mass. 533; *State* v. *David,* 131 Mo. 380, 33 S. W. 28; *State* v. *DeGraff,* 113 N. C. 688, 18 S. E. 507; *Bratt* v. *State,* 38 Tex. Crim. Rep. 121, 41 S. W. 622; *State* v. *Webb,* 18 Utah, 441, 56 Pac. 159; *Tower* v. *Whip,* 53 W. Va. 158, 63 L.R.A. 937, 44 S. E. 179; *United States* v. *Ortiz,* 176 U. S. 422, 44 L. ed. 529, 20 Sup. Ct. Rep. 466. See *Charles* v. *State,* 58 Fla. 17, 50 So. 419; *Ausmus* v. *People,* 47 Colo. 167, 107 Pac. 204, 19 A. & E. Ann. Cas. 491; *State* v. *Burns,* 27 Nev. 289, 74 Pac. 983. See also *Groff* v. *Groff,* 209 Pa. 603, 59 Atl. 65; *Miles* v. *Loomis,* 75 N. Y. 292, 31 Am. Rep. 470.

[8] *United States* v. *Ortiz,* 176 U. S 422, 44 L. ed. 529, 20 Sup. Ct. Rep. 466.

[9] *Christman* v. *Pearson,* 100 Iowa, 634, 69 N. W. 1055.

There is still a tendency on the part of courts to regard expert testimony relative to the genuineness of handwriting with suspicion, and to submit it to the jury with instructions cautioning them as to its un-

§ 424h. Selection of standards for comparison.—The establishment of the standard for comparison is clearly a matter to be determined by the trial judge. The general statutory provisions as to standards of comparison arrange themselves, as we have shown,[1] into two classes: (a) Other writings properly in the case, proved to the satisfaction of the judge to be genuine; (b) other writings introduced for the purpose of comparison, proved to the satisfaction of the judge to be genuine. Where the standard is to be taken from other writings properly in the case, few questions can arise as to the manner of obtaining the standard. But where other writings are introduced for the express purpose of comparison, and the statute does not expressly limit them to writings made before the controversy, difficulties present themselves.

Where a signature is made just before or at the trial, and tendered, the objection may well be raised that it is making evidence in the party's own favor. Where the judge directs the party to write, the objections may well be raised that a party cannot be made to incriminate himself. Hence, where signatures or writings made at the trial are tendered, the general rule is to exclude them.[2] While there are some cases holding directly that the accused may be required to make writings in court,[3] yet, where the witness objects, the weight

satisfactory character. See following cases: *State* v. *VanTassel*, 103 Iowa, 6, 72 N. W. 497; *Koons* v. *State*, 36 Ohio St. 195; *United States* v. *Pendergast*, 32 Fed. 198; *Crow* v. *State*, 37 Tex. Crim. Rep. 295, 39 S. W. 574; *State* v. *Ezekiel*, 33 S. C. 115, 11 S. E. 635; *Municipal Ct.* v. *Kirby*, 28 R. I. 287, 67 Atl. 8, 13 A. & E. Ann. Cas. 736.

[1] See supra, § 424e.

For note on subject of competency of writing as standard for comparison, see 63 L.R.A. 428.

[2] *Williams* v. *State*, 61 Ala. 39, *McGlasson* v. *State*, 37 Tex. Crim. Rep. 620, 66 Am. St. Rep. 842, 40 S. W. 503; *Whittle* v. *State*, 43 Tex. Crim. Rep. 468, 66 S. W. 771; *Hickory* v. *United States*, 151 U. S. 303, 307, 38 L. ed. 170, 173, 14 Sup. Ct. Rep. 334; *Doe ex dem. Devine* v. *Wilson*, 10 Moore, P. C. C. 529.

[3] *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; *Chand-*

of authority is that he cannot be compelled to make evidence against himself.[4] In a number of well-reasoned cases,[5] it is argued that the constitutional guaranty can be invoked only where such evidence is produced in answer to a process issued by the court, and that the objection is available only against the form in which the evidence is obtained, rather than against the evidence itself.

It is conceded that the weight of authority permits the use of the document or thing in evidence, no matter how illegally obtained.[6] But here the accused is required to do an affirmative act; under the order of the court (a summons or process as actual as though it was reduced to writing, signed by the judge, and tested by the clerk under the seal of the court), he is directed to produce evidence as a witness against himself. Under these circumstances he cannot be refused the protection of his constitutional privilege, and this is universally conceded to be the law.[7]

And even where the statute does not so provide, specimens

ler v. *LeBarron,* 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.

[4] *Hickory* v. *United States,* 151 U. S. 303, 38 L. ed. 170, 14 Sup. Ct. Rep. 334; *Boyd* v. *United States,* 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524; *Evans* v. *State,* 11 Am. Crim. Rep. 695, and note, 106 Ga. 519, 71 Am. St. Rep. 276, 32 S. E. 659. But see Wigmore, Ev. § 2264, discussing the question.

[5] *Gindrat* v. *People,* 138 Ill. 103, 27 N. E. 1085; *State* v. *Griswold,* 67 Conn. 290, 33 L.R.A. 727, 34 Atl. 1047; *Trask* v. *People,* 151 Ill. 523, 38 N. E. 248; *State* v. *Pomeroy,* 130 Mo. 489, 32 S. W. 1002; *People* v. *Adams,* 176 N. Y. 351, 63 L.R.A. 406, 98 Am. St. Rep. 675, 68 N. E. 636; *State* v. *Atkinson,* 40 S. C. 363, 42 Am. St. Rep. 877, 18 S. E. 1021.

[6] See supra, note 5.

[7] *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; *Roe ex dem. Haldane* v. *Harvey,* 4 Burr. 2484; *State* v. *Squires,* 1 Tyler (Vt.) 147; *Ex parte Wilson,* 39 Tex. Crim. Rep. 630, 47 S. W. 996; *Boyd* v. *United States,* 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524; *United States* v. *National Lead Co.* 75 Fed. 94; post, § 664.

written after the controversy are open to grave suspicion, and the judge may refuse to let them be used.[8]

Photographic copies may be used instead of the original, so far as the accuracy of the evidence is concerned.[9] And the weight of authority is, in expert comparison, that not only the photograph may be used, but the accurate enlargement of the written specimen brings out and makes clear characteristics that are often conclusive as to the spuriousness or genuineness of the disputed writing;[10] hence enlarged photographs of the writing may be used as supplemental to the specimens admitted as standards.

§ 425. Extent of expert determination; cross-examination.—All investigations made by the expert and all data obtained by him should be placed fully before the court, as aids in determining the question in controversy. Hence expert testimony is employed to determine the age of a document made, through an examination of the paper, the ink, the style of the document, and other proper *indicia;*[1] to decipher illegi-

[8] *Shorb* v. *Kinzie,* 100 Ind. 429, 433; *Singer Mfg. Co.* v. *McFarland,* 53 Iowa, 541, 5 N. W. 739; *Weidman* v. *Symes,* 116 Mich. 619, 74 N. W. 1008; *Springer* v. *Hall,* 83 Mo. 693, 53 Am. Rep. 598; *Hickory* v. *United States,* 151 U. S. 303, 38 L. ed. 170, 14 Sup. Ct. Rep. 334; *Sanderson* v. *Osgood,* 52 Vt. 312.

[9] *Marcy* v. *Barnes,* 16 Gray, 163, 77 Am. Dec. 405; *Duffin* v. *People,* 107 Ill. 119, 47 Am. Rep. 431; *Re Foster,* 34 Mich. 21. See *Grooms* v. *State,* 40 Tex. Crim. Rep. 319, 50 S. W. 370; *Owen* v. *Presidio Min. Co.* 9 C. C. A. 356, 23 U. S. App. 350, 61 Fed. 6; *Luco* v. *United States,* 23 How. 531, 16 L. ed. 547; *Riggs* v. *Powell,* 142 Ill. 453, 32 N. E. 482; *United States* v. *Ortiz,* 176 U. S. 422, 44 L. ed. 529, 20 Sup. Ct. Rep. 466.

[10] *Frank* v. *Chemical Nat. Bank,* 5 Jones & S. 26, affirmed in 84 N. Y. 209, 38 Am. Rep. 501; *Rowell* v. *Fuller,* 59 Vt. 688; *Green* v. *Terwilliger,* 56 Fed. 384. See Wigmore, Ev. § 797; *Hampton* v. *Norfolk & W. R. Co.* 35 L.R.A. 808, 813, note.

[1] *Furber* v. *Hilliard,* 2 N. H. 482; *Porell* v. *Cavanaugh,* 69 N. H. 364, 41 Atl. 860; *Re Tracy Peerage,* 10 Clark & F. 161; *Johnson* v. *State,* 2 Ind. 654; *Jones* v. *State,* 11 Ind. 360; *Owen* v. *Presidio Min. Co.* 9 C. C. A. 338, 13 U. S. App. 248, 61 Fed. 6; Wharton, Ev. § 972.

ble writings;[2] to determine alterations;[3] to determine identity of authorship;[4] and any other fact that can be determined from the writings relevant to the matter in dispute.[5] To make his meaning clear, the expert may use diagrams illustrating his testimony,[6] and he may state all the facts upon which he forms his opinion, so that the jury may determine whether or not his opinion is well founded.[7]

On cross-examination it is necessary that expert testimony be subjected to every legitimate test, in order that the jury may properly weigh it.[8]

In those states where, by statute, extraneous writings are

[2] *Masters* v. *Masters,* 1 P. Wms. 425; *Reg.* v. *Williams,* 8 Car. & P. 434; *Stone* v. *Hubbard,* 7 Cush. 597; *Kux* v. *Central Michigan Sav. Bank,* 93 Mich. 511, 513, 53 N. W. 828; *Hardin* v. *Ho-yo-po-nubby,* 27 Miss. 568, 593; *Sheldon* v. *Benham,* 4 Hill, 131, 40 Am. Dec. 271; *Dresler* v. *Hard,* 127 N. Y. 238, 12 L.R.A. 456, 27 N. E. 823; *Beach* v. *O'Riley,* 14 W. Va. 58; *State* v. *Wetherell,* 70 Vt. 274, 40 Atl. 728.

[3] *Pate* v. *People,* 8 Ill. 644; *Rass* v. *Sebastian,* 160 Ill. 604, 43 N. E. 708; *Com.* v. *Webster,* 5 Cush. 301; 52 Am. Dec. 711; *Vinton* v. *Peck,* 14 Mich. 287; *Dubois* v. *Baker,* 30 N. Y. 361; *State* v. *Tompkins,* 71 Mo. 617; *State* v. *Owen,* 73 Mo. 441. See *Yates* v. *Waugh,* 46 N. C. (1 Jones, L.) 483.

[4] *People* v. *Coombs,* 158 N. Y. 532, 53 N. E. 527. See *People* v. *Severance,* 67 Hun, 182, 22 N. Y. Supp. 91.

[5] *Page* v. *Homans,* 14 Me. 478; *Com.* v. *Webster,* 5 Cush. 301, 52 Am. Dec. 711; *Holmes* v. *Goldsmith,* 147 U. S. 150, 37 L. ed. 118, 13 Sup. Ct. Rep. 288; *State* v. *Webb,* 18 Utah, 441, 56 Pac. 159; *Tally* v. *Cross,* 124 Ala. 567, 26 So. 912; *Pate* v. *People,* 8 Ill. 644; *Fulton* v. *Hood,* 34 Pa. 370, 75 Am. Dec. 664. See *Yates* v. *Waugh,* 46 N. C. (1 Jones, L.) 483; *State* v. *Freshwater,* 30 Utah, 442, 116 Am. St. Rep. 853, 85 Pac. 447; *Ausmus* v. *People,* 47 Colo. 167, 107 Pac. 204, 19 A. & E. Ann. 491; *Van Wyk* v. *People,* 45 Colo. 1, 99 Pac. 1009.

[6] *Hagan* v. *Carr,* 198 Pa. 606, 48 Atl. 688; *Re Gordon,* 50 N. J. Eq. 397, 26 Atl. 268; *McKay* v. *Lasher,* 121 N. Y. 477, 24 N. E. 711.

[7] *Kendall* v. *Collier,* 97 Ky. 446, 30 S. W. 1002; *Com.* v. *Webster,* 5 Cush. 295, 52 Am. Dec. 711; *People* v. *Mooney,* 132 Cal. 13, 63 Pac. 1070; *Demerritt* v. *Randall,* 116 Mass. 331; *McDonald* v. *McDonald,* 142 Ind. 55, 41 N. E. 336; *Koons* v. *State,* 36 Ohio St. 195.

[8] *Birmingham Nat. Bank* v. *Bradley,* 108 Ala. 205, 19 So. 791; *Travelers' Ins. Co.* v. *Sheppard,* 85 Ga. 751, 12 S. E. 18.

inadmissible as standards of comparison, it is held that they are also inadmissible to use on cross-examination;[9] as are other writings of unknown authorship, not pertinent to the case.[10]

While these limitations may be supported by cases entitled to respect because of the ability of the courts that declare them, any limitation of the cross-examiner in testing the skill of the witness deprives the opposing party of a most valuable weapon.[11] Opinion evidence, in its most convincing form, is not fact, but inference, and becomes persuasive through argument; it may completely satisfy the logical faculties, and yet be vulnerable to evisceration. To deny free use of cross-examination for this purpose is to deny a test that may be conclusive of the entire matter.

Accordingly, an expert who has testified to the genuineness of a signature may be shown spurious signatures, and asked, if he was at fault as to the spurious signatures at the former trial, he might not be at fault as to the signatures now in question;[12] he may be shown incomplete writings, for the purpose of showing that he would mistake writing not done by the purported author for writing which he had done;[13] genuine and spurious signatures may be submitted at the same

[9] *United States* v. *Chamberlain*, 12 Blatchf. 390, Fed. Cas. No. 14,778; *Gaunt* v. *Harkness*, 53 Kan. 405, 42 Am. St. Rep. 207, 36 Pac. 739; *Van Wyck* v. *McIntosh*, 14 N. Y. 439; *First Nat. Bank* v. *Hyland*, 53 Hun, 108, 6 N. Y. Supp. 87; *Rose* v. *First Nat. Bank*, 91 Mo. 399, 60 Am. Rep. 258, 3 S. W. 876.

[10] *State* v. *Griswold*, 67 Conn. 290, 33 L.R.A. 227, 34 Atl. 1046; *Bacon* v. *Williams*, 13 Gray, 525; *Thomas* v. *State*, 103 Ind. 419, 2 N. E. 808.

[11] *Neal* v. *Neal*, 58 Cal. 287; *Brown* v. *Woodward*, 75 Conn. 254, 53 Atl. 112; *Thomas* v. *State*, 103 Ind. 439, 2 N. E. 808; *Browning* v. *Gosnell*, 91 Iowa, 448, 59 N. W. 340; *Gaunt* v. *Harkness*, 53 Kan. 405, 42 Am. St. Rep. 297, 36 Pac. 739; *Page* v. *Homans*, 14 Me. 482; *Howard* v. *Patrick*, 43 Mich. 128, 5 N. W. 84; *People* v. *Murphy*, 135 N. Y. 455, 32 N. E. 138; *Brown* v. *Chenoworth*, 51 Tex. 477.

[12] *Hoag* v. *Wright*, 174 N. Y. 36, 63 L.R.A. 163, 66 N. E. 579.

[13] *Travelers' Ins. Co.* v. *Shephard*, 85 Ga. 751, 12 S. E. 18.

time, and the expert be required to select the genuine from the spurious.[14] There should be no limitation of the right to test in an accurate and practical manner the skill of the witness as an expert.[15]

§ 425a. Typewritten documents.—The principles applicable to handwriting apply equally to typewritten documents. The general use of such machines is so recent that any purported typewritten document dated prior to 1876 would afford inherent evidence of its spurious character. Again, the date of such document may be accurately determined by the make of machine on which it was written.[1] The machine reveals the identity of the work through its imperfections, such as battered letters, lack of alignment, and the strikingly individual characteristics that mark each machine.[2]

There are no two operators whose work is identical, even though made on the same machine, writing the same matter. It is no longer in question that the individuality of the typewriter and of the operator are as distinctive and easily determined as are the characteristics of handwriting.

§ 425b. Illiterate's mark; proof by comparison.—Where a signature is made by a mark, the person so making it may testify that it is genuine;[1] and where a mark contains pecul-

[14] *Browning* v. *Gosnell,* 91 Iowa, 448, 59 N. W. 340. But see *Andrews* v. *Hayden,* 88 Ky. 455, 11 S. W. 428; *People* v. *Murphy,* 135 N. Y. 450, 32 N. E. 138 (forbidden in Kentucky by statute).

[15] *Hoag* v. *Wright,* 174 N. Y. 36, 63 L.R.A. 163, 66 N. E. 579.

For note as to cross-examination of expert, see 63 L.R.A. 170.

[1] Osborn, Questioned Documents, chap. 25, p. 441, citing *Peshtigo Lumber Co.* v. *Hunt,* — (Wis.) —.

[2] *Levy* v. *Rust,* — N. J. Eq. —, 49 Atl. 1025; *State* v. *Freshwater,* 30 Utah, 446, 116 Am. St. Rep. 853, 85 Pac. 447; *Huber Mfg. Co.* v. *Claudel,* 71 Kan. 441, 80 Pac. 960.

[1] *Ex parte Miller,* 49 Ark. 18, 4 Am. St. Rep. 17, 3 S. W. 883; *Thompson* v. *Davitte,* 59 Ga. 472; *Phœnix Nat. Bank* v. *Taylor,* 113 Ky. 61, 67 S. W. 27; *Ballow* v. *Collins,* 139 Ala. 543, 36 So. 712.

iarities that a witness has observed, he may testify that he believes it to be genuine;[2] and the same knowledge acquired by seeing the party write, by seeing the disputed writing made, or by general acquaintance with the writing of the alleged writer, also extends to a signature made by a mark, where it is actually made.[3]

It should be clearly shown that such signature was not made by the party merely touching the pen, but where actually made it may be identified by its inherent peculiarities.[4]

Hence a mark, equally with handwriting, is a proper subject of nonexpert testimony where it is established by one seeing it made, or attached to the disputed writing, or by general knowledge of its characteristics; or for expert testimony, by comparison, where a sufficient number of specimens known to be genuine can be furnished as a basis for comparison with the disputed mark.[5]

§ 426. Compensation of experts; credibility.—In some states experts are entitled by law to special fees,[1] but the fact of employment goes to their credibility only,[2] and not to the admissibility of their testimony.[3]

[2] *Paisley* v. *Snipes*, 2 Brev. 200; *Fogg* v. *Dennis*, 3 Humph. 47; *Strong* v. *Brewer*, 17 Ala. 706.

[3] *Re Hopkins*, 172 N. Y. 360, 65 L.R.A. 95, 92 Am. St. Rep. 746, 65 N. E. 173; *Little* v. *Rogers*, 99 Ga. 95, 24 S. E. 856; *Travers* v. *Snyder*, 38 Ill. App. 379.

[4] *State* v. *Tice*, 30 Or. 457, 48 Pac. 367; *Ausmus* v. *People*, 47 Colo. 167, 107 Pac. 204, 19 A. & E. Ann. Cas. 491.

[5] *Ausmus* v. *People*, 47 Colo. 167, 107 Pac. 204, 19 A. & E. Ann. Cas. 491.

[1] See supra, § 347; *Barrus* v. *Phaneuf*, 166 Mass. 123, 32 L.R.A. 619, 44 N. E. 141.

For note on subject of fees of experts, see 27 L.R.A. 669.

[2] See also comments in § 420; 16 Cent. L. J. 45; *Ex parte Roelker*, 1 Sprague, 276, Fed. Cas. No. 11,995; *Re Atty. Gen.* 104 Mass. 537.

[3] *People* v. *Montgomery*, 13 Abb. Pr. N. S. 207; *Buchman* v. *State*, 59 Ind. 1, 26 Am. Rep. 75, 2 Am. Crim. Rep. 187. See, however, *Lyon* v. *Wilkes*, 1 Cow. 591; *Sumner* v. *State*, 5 Tex. App. 374, 32 Am. Rep. 573.

The testimony of experts is to be tested by the same rules as are applied to the testimony of other witnesses,[4] and its credibility is exclusively for the jury;[5] but such testimony is not conclusive upon the jury,[6] nor does it deprive the jury of their right to accept or reject it, as they accept or reject other testimony in the case.[7]

§ 426a. Experts; right to compensation.—While it is said with some force that every member of the community ought to give his services in the administration of justice, for the benefit of the community, yet it is said with greater force that no person ought to be compelled to render such service at the price of his individual loss and expense. Hence an expert witness ought not to be arbitrarily summoned to give testimony unless provision is made for a proper compensation. The results of special study are his own property, and this should not be taken from him without just compensation. While many states have passed statutes with regard to the fees of experts, particularly in the case of the testimony of physicians, the law is settled that where the expert is summoned, before answering any question he should show to the court that he is called in as an expert to testify to an opinion founded on special study and experience.[1] He should then

[4] *Louisville & N. R. Co.* v. *Malone,* 109 Ala. 509, 20 So. 33; *Davis* v. *Mills,* 163 Mass. 481, 40 N. E. 852; *State* v. *Martin,* 47 S. C. 67, 25 S. E. 113; *Comstock* v. *State,* 14 Neb. 205, 15 N. W. 355; *Osgood* v. *State,* — Tex. Crim. Rep. —, 49 S. W. 94; *Goodwin* v. *State,* 96 Ind. 550; *State* v. *Pegels,* 92 Mo. 309, 4 S. W. 931; *The Conqueror,* 166 U. S. 110, 41 L. ed. 937, 17 Sup. Ct. Rep. 510.

[5] Supra, § 384.

[6] *The Conqueror,* 166 U. S. 110, 41 L. ed. 937, 17 Sup. Ct. Rep. 510; *Bourke* v. *Whiting,* 19 Colo. 1, 34 Pac. 172.

[7] Supra, note 6.

[1] *Snyder* v. *Iowa City,* 40 Iowa, 646; *Buchman* v. *State,* 59 Ind. 1, 26 Am. Rep. 75, 2 Am. Crim. Rep. 187; *United States* v. *Howe,* 12 Cent. L. J. 193, Fed. Cas. No. 15,404a; *People* v. *Montgomery,* 13 Abb. Pr. N. S. 207.

As to compensation of expert witness, see note in 27 L.R.A. 669. See also § 347, ante.

request, unless the matter has been decided upon before coming into court, that his compensation should be fixed before he is required to give testimony. It is a condition, of course, that wherever a statute prescribes certain qualifications as the basis of a state license for an expert, such as a physician, an engineer, or other specific calling, the party demanding expert fees should show that he belongs to the qualified class. It is to be observed also that an expert voluntarily testifying is subject to the court,[2] as any other witness, and he cannot withhold the benefit of his testimony by arbitrarily refusing to continue his testimony until it is complete.

VIII. Accused as a Witness.

§ 427. Accused's statement at common law.—At common law the accused, at least in capital cases, is entitled to address the jury at the close of his case, giving his own story as to any relevant facts.[1] In one case the right has been held to extend to an offense not capital.[2] This right, at least under some English decisions, does not seem to be absolute where the accused is defended by counsel, as in some cases such right was refused.[3] Where permitted, this statement can be made

[2] *Wright* v. *People*, 112 Ill. 540; *Summers* v. *State*, 5 Tex. App. 365, 374–377, 32 Am. Rep. 573. See *Ex parte Dement*, 53 Ala. 389, 25 Am. Rep. 611.

[1] *Higginbotham* v. *State*, 19 Fla. 557; London Law Times, Feb. 21, 1880, reviewing contra cases; *Ford* v. *State*, 34 Ark. 649.

People v. *Lopez*, 2 Edm. Sel. Cas. 262. In this case the statement of the defendant and the testimony of a sworn credible witness were opposed, and it was held error to instruct that the statement of accused was to give way to that of the witness. *Day* v. *State*, 63 Ga. 667; *Pease* v. *State*, 63 Ga. 631; *Coxwell* v. *State*, 66 Ga. 309.

[2] *Reg.* v. *Malings*, 8 Car. & P. 242. See London Law Times, April 13, 1878; *DeFoe* v. *People*, 22 Mich. 224.

[3] Supra, note 2, and authorities; *Reg.* v. *Manzano*, 2 Fost. & F. 64, 8 Cox, C. C. 321, 6 Jur. N. S. 406; *Reg.* v. *Burdett*, Dears. C. C. 431, 3 C. L. R. 440, 24 L. J. Mag. Cas. N. S. 63, 1 Jur. N. S. 119, 3 Week. Rep. 246, 6 Cox, C. C. 458. But

by the accused after his counsel has closed.[4] In making such statement the accused is not subject to cross-examination.

Where criminal procedure is at common law, in view of the general rule that any man may appear and personally defend against a charge, the right of address to the jury still remains. However, it has been held, that where he is entitled to be examined under oath, such unsworn statements are secondary, and cannot be received.[5]

In Georgia,[6] in all criminal trials, the accused has the right to make a statement to the court and jury, not under oath, the jury to give it such force as they may think right; and they may believe it in preference to the sworn testimony. He is not subject to cross-examination. In Wyoming,[7] in addition to rendering the accused competent as a witness at his own election, the statute also gives him the right to make a statement to the jury without being sworn.[8]

§ 428. Statutory removal of accused's disqualification as a witness.—With the exception of Georgia,[1] all the states have passed statutes regulating the conditions under which the accused becomes competent as a witness. Such statutes provide, generally, that the accused may, at his own election and in his own behalf, become a witness, the purpose being to give him the fullest opportunity to testify, but per-

see *Reg.* v. *Dyer,* 1 Cox, C. C. 113; *Reg.* v. *Burrows,* 1 Cox, C. C. 263, 20 L. T. N. S. 499, 17 Week. Rep. 682. See also London Law Times, Feb. 21, 1880, p. 301; *Blackburn* v. *State,* 71 Ala. 319, 46 Am. Rep. 323; *Chappell* v. *State,* 71 Ala. 322; *Beasley* v. *State,* 71 Ala. 328; *Whizenant* v. *State,* 71 Ala. 383.

[4] *Reg.* v. *Shimmin,* 73 L. T. 29.

[5] *Com.* v. *Scott,* 123 Mass. 222, 25 Am. Rep. 81.

[6] Ga. Crim. Code, 1895, §§ 1010, 1011. See *Walker* v. *State,* 116 Ga. 537, 67 L.R.A. 426, 42 S. E. 787.

[7] Wyo. Rev. Stat. 1887, § 3288.

[8] As to right of court to caution jury as to credibility of accused testifying in his own behalf, see note in 19 L.R.A.(N.S.) 802.

[1] Ga. Crim. Code, 1895, §§ 1010, 1011.

mitting no inference whatever to be drawn from his silence.[2] The statutes confer a privilege, but do not impose an obligation;[3] hence, while he is rendered competent, he cannot be compelled, in any criminal case, to become a witness against himself.[4]

The criminal jurisdiction of the Federal courts is purely statutory, and here the competency of the accused is also regulated by statute.[5]

When the accused in any case avails himself of his privilege, the credibility and weight of his evidence is for the jury alone, under proper instructions of the court.[6]

§ 428a. Cross-examination of accused; coindictees.— While the statutes regulate the competency of the accused, in nearly all instances there is a limitation that he is competent as a witness "in his own behalf;" many of the statutes make no mention of cross-examination of the accused;[1] others pro-

[2] See Code and statutory provisions in all the states.

[3] *People ex rel. Ferguson* v. *Reardon,* 124 App. Div. 818, 109 N. Y. Supp. 504; *Emery's Case,* 107 Mass. 172, 9 Am. Rep. 22; *Rogers* v. *State,* 4 Ga. App. 691, 62 S. E. 96; *Pitts* v. *State,* 140 Ala. 70, 37 So. 101; *Cooper* v. *State,* 86 Ala. 610, 4 L.R.A. 766, 11 Am. St. Rep. 84, 6 So. 110; *State* v. *Slamon,* 73 Vt. 212, 87 Am. St. Rep. 711, 50 Atl. 1097, 15 Am. Crim. Rep. 686.

[4] Fed. Const. 5th Amendment. See *Counselman* v. *Hitchcock,* 142 U. S. 547, 562, 35 L. ed. 1110, 1113, 3 Inters. Com. Rep. 816, 12 Sup. Ct. Rep. 195; *Emery's Case,* 107 Mass. 172, 9 Am. Rep. 22.

[5] Act March 16, 1878, 20 Stat. at L. 30, chap. 37, U. S. Comp. Stat. 1901, p. 660; *United States* v. *Hawthorne,* 1 Dill. 422, Fed. Cas. No. 15,332; *Logan* v. *United States,* 144 U. S. 263, 36 L. ed. 429, 12 Sup. Ct. Rep. 617.

[6] *Miller* v. *State,* 15 Fla. 577; *State* v. *Napper,* 141 Mo. 401, 42 S. W. 957; *Kirkham* v. *People,* 170 Ill. 9, 48 N. E. 465; *Wilson* v. *State,* 69 Ga. 224. See *Hickory* v. *United States,* 160 U. S. 408, 40 L. ed. 474, 16 Sup. Ct. Rep. 327; *Harrison* v. *State,* 144 Ala. 20, 40 So. 568.

[1] In the Codes and statutes of the following states, no mention is made as to cross-examination of the accused: Ala. Code 1897, § 5297; Colo. Rev. Stat. 1908, § 1984; D. C. Stat. 1894, chap. 16, § 8; Conn. Stat. 1887, § 1623; Idaho Stat. 1887, § 8143; Kan. Stat. 1897,

vide, generally, that he may be cross-examined as all other witnesses;[2] others, that the cross-examination is confined to matters elicited in chief only;[3] and in one state, by becoming a witness, the accused waives his privilege against self-crimination.[4] In this connection, a number of the statutes provide the manner of removing the disqualification attaching at common law to coindictees.[5]

Where the statute is silent as to the extent of the cross-examination of the accused, or the competency of coindictees, or no provision is made for instructing the jury as to the status of the accused, serious questions are presented, and in some jurisdictions the law upon these questions is not settled.

Where the statute is silent as to cross-examination, in many states the question is solved by reference to the general provision that the rules of evidence apply equally to criminal and civil proceedings.

chap. 102, § 218; Md. Laws, 1888, art. 35, § 3; Mass. Laws, 1902; Mich. Laws, 1897; Minn. Laws 1894, § 5658; Miss. Laws, 1892; Mo. Stat. 1899, § 2638; Mont. Stat. 1895, § 2442; Neb. Stat. 1897, § 7199; N. H. Stat. 1891, chap. 224, § 13; N. J. Stat. 1896, § 8; N. M. Laws 1897, § 3431; N. Y. Code 1881, § 393; Ohio Anno. Stat. 1898, § 7285; Pa. Laws 1896, § 22; R. I. Laws 1896, chap. 244, § 41; S. C. Crim. Code 1902, § 64; Tenn. Code 1896, § 5600; Vt. Stat. 1894, § 1915; W. Va. Code 1891, § 19; Wis. Stat. 1898, § 4071.

[2] In the Codes and statutes of the following states, it is provided that the accused may be cross-examined as any other witness: Fla. Stat. 1895, § 4400; La. Laws 1886, § 2; Me. Stat. 1883, § 94 (waives privilege against self-crimination); N. C. Code 1883, § 1353; Or. Laws 1892, § 1365; Va. Code 1898, § 3897.

[3] In the Codes and statutes of the following states, it is provided that the accused shall be cross-examined only on matters elicited on his direct examination: Ariz. Stat. 1887, § 2090; Cal. Code 1901, § 1323; Iowa Code 1897, § 5785.

[4] Me. Stat. 1883, § 94.

[5] In the Codes and statutes of the following states, coindictees are rendered competent to testify for or against each other: Ark. Stat. 1894, § 2911; Del. Stat. 1893, chap. 777, § 1; Ky. Stat. 1899, § 1648 (conspiracy proved to the satisfaction of the judge, each party accused may testify); La. Laws 1902; Tex. Stat. 1895, § 770 (where severance is had, only defendant on trial can testify); § 771 (persons

Where no such provision exists, he has the right to demand that he shall testify in the same manner as other witnesses;[6] he may explain his actions and the motives that prompted him;[7] and where both intent and act must unite, the accused is permitted to state his intent,[8] and in one case it was held error to exclude the question, "Why did you do that?"[9] Where the statute provides that he may be cross-examined "as any other witness," he cannot claim, as a witness, the privileges that belong to him as an accused[10]

acquitted may testify); § 777 (where punishment is fine, coindictee may testify after fine and costs fully paid); Utah Code 1898, §§ 4851, 4852; Wash. Code 1891, § 6950 (coindictees must testify for or against each other); Wyo. Stat. 1887, § 3295.

In the Codes and statutes of the following states, there is a provision, generally, to the effect that the judge, being satisfied that there is not sufficient evidence, may order a coindictee discharged before the evidence is disclosed, so that he may be used as a witness for or against his coindictee: Cal. Code 1901, §§ 1099, 1100; Ill. Stat. 1874, chap. 38, § 75; Ind. Stat. 1897, § 1895; Kan. Stat. 1897, chap. 102, § 264; Mo. Stat. 1899, § 2636; Mont. Stat. 1895 (any coindictee may testify against the other); Neb. Stat. 1897, § 7200; N. Y. Laws 1876, chap. 182, § 1; N. D. Code 1895, § 8188; Okla. Stat. 1893, § 5205; S. D. § 8649 (under court's opinion, jury may acquit and render coindictee competent.

[6] *Clark* v. *State*, 50 Ind. 514; *Fletcher* v. *State*, 49 Ind. 124, 19 Am. Rep. 673. See *People* v. *Brown*, 72 N. Y. 571, 28 Am. Rep. 183; *Hanoff* v. *State*, 37 Ohio St. 178, 41 Am. Rep. 496.

[7] *State* v. *King*, 86 N. C. 603; *Jackson* v. *Com.* 96 Va. 107, 30 S. E. 452; *Wohlford* v. *State*, 148 Ill. 296, 36 N. E. 107; *Crawford* v. *United States*, 30 App. D. C. 1; *State* v. *Barber*, 13 Idaho, 65, 88 Pac. 418; *State* v. *Palmer*, 88 Mo. 568; *Dunbar* v. *Armstrong*, 115 Ill. App. 549; *Filkins* v. *People*, 69 N. Y. 101, 25 Am. Rep. 143; *State* v. *Tough*, 12 N. D. 425, 96 N. W. 1025; *White* v. *State*, 53 Ind. 595; *Lynch* v. *People*, 137 Ill. App. 444; *Ryan* v. *Territory*, 12 Ariz. 208, 100 Pac. 770.

[8] *Ross* v. *State*, 116 Ind. 495, 19 N. E. 451. See *People* v. *Farrell*, 31 Cal. 576; *State* v. *Montgomery*, 65 Iowa, 483, 22 N. W. 639, 5 Am. Crim. Rep. 54.

[9] *People* v. *Quick*, 51 Mich. 547, 18 N. W. 375.

[10] *State* v. *Simmons*, 78 Kan. 852, 98 Pac. 277; *People* v. *Owen*, 154 Mich. 571, 21 L.R.A.(N.S.) 520, 118 N. W. 590. See *Welch* v. *Com.* 33 Ky. L. Rep. 51, 108 S. W. 863,

Where the statute does not limit the cross-examination of the accused to matter elicited on the direct examination, he may be cross-examined not only on strictly relevant matters, but those apparently irrelevant;[11] but this should be confined to matters honestly intended to test his credibility, as to cross-examine him upon every incident of his life, which can have no bearing upon the charge on trial, amounts to an abuse of the privilege.[12] And in those states providing by statute that the cross-examination of the accused shall only be as to matters elicited on the direct examination, it is reversible error to extend the cross-examination beyond the limits of the direct.[13]

Harrold v. *Territory*, 18 Okla. 395, 10 L.R.A.(N.S.) 604, 89 Pac. 202, 11 A. & E. Ann. Cas. 818.

[11] *Maloy* v. *State*, 52 Fla. 101, 41 So. 791; *Stalcup* v. *State*, 146 Ind. 270, 45 N. E. 334; *People* v. *Louie Foo*, 112 Cal. 17, 44 Pac. 453; *State* v. *Harvey*, 131 Mo. 339, 32 S. W. 1110; *People* v. *Un Dong*, 106 Cal. 83, 39 Pac. 12; *People* v. *Roemer*, 114 Cal. 51, 45 Pac. 1003; *Frank* v. *State*, 94 Wis. 211, 68 N. W. 657; *Com.* v. *Nichols*, 114 Mass. 285, 19 Am. Rep. 346; *State* v. *Pfefferle*, 36 Kan. 90, 12 Pac. 406; *Newman* v. *Com.* 28 Ky. L. Rep. 81, 88 S. W. 1089; *Com.* v. *Lannan*, 13 Allen, 563; *Thomas* v. *State*, 103 Ind. 419, 2 N. E. 808; *People* v. *Reinhart*, 39 Cal. 449; *Hanoff* v. *State*, 37 Ohio St. 178, 41 Am. Rep. 496; *People* v. *Tice*, 131 N. Y. 651, 15 L.R.A. 669, 30 N. E. 494; *Connors* v. *People*, 50 N. Y. 240; *Com.* v. *Morgan*, 107 Mass. 199; *State* v. *Witham*, 72 Me. 531; *State* v. *Ober*, 52 N. H. 459, 13 Am. Rep. 88; *State* v. *Cohn*, 9 Nev. 179; *Keyes* v. *State*, 122 Ind. 527, 23 N. E. 1097; *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. *Wentworth*, 65 Me. 234, 20 Am. Rep. 688; *Boyle* v. *State*, 105 Ind. 469, 55 Am Rep. 218, 5 N. E. 203; *Mitchell* v. *State*, 94 Ala. 68, 10 So. 518; *McKeone* v. *People*, 6 Colo. 346; *State* v. *Nelson*, 98 Mo. 414, 11 S. W. 997; *Yanke* v. *State*, 51 Wis. 464, 8 N. W. 276; *People* v. *Mayes*, 113 Cal. 618, 45 Pac. 860; *People* v. *Conroy*, 153 N. Y. 174, 47 N. E. 258.

[12] *People* v. *Crapo*, 76 N. Y. 288, 32 Am. Rep. 302. See *State* v. *Teasdale*, 120 Mo. App. 692, 97 S. W. 995.

[13] *People* v. *Manasse*, 153 Cal. 10, 94 Pac. 92; *State* v. *Saunders*, 14 Or. 300, 316, 12 Pac. 441; *State* v. *Patterson*, 88 Mo. 88, 57 Am. Rep. 374; *State* v. *Lurch*, 12 Or. 99, 6 Pac. 408.

But under no condition does the accused, by becoming a witness, waive the statutory protection of his privileged communications and confidential statements made to his minister, physician, or attorney.[14]

§ 429. Accused as a witness; rights and limitations.— The common-law incompetency of the accused was based on his interest in the matter. The statute removes this disqualification. Then, where the accused becomes a witness, on principles of logic he should not be classed differently from any other witness. Hence, unless otherwise provided by statute, he is subject to the usual duties, liabilities, prerogatives, and limitations of witnesses.[1] He may be called to contradict statements made by witnesses for the prosecution.[2] His admissions out of court may be used against him, in evidence, on the trial;[3] and also his prior contradictory statements.[4] He

[14] *Duttenhofer* v. *State*, 34 Ohio St. 91, 32 Am. Rep. 362.

But where the witnesses disclose such facts in the direct examination, the privilege is considered waived. See *State* v. *Tall*, 43 Minn. 273, 45 N. W. 449; *People* v. *Gallagher*, 75 Mich. 512, 42 N. W. 1063.

[1] *State* v. *Arnold*, 50 Vt. 316, 3 Am. Crim. Rep. 357; *McDaniels* v. *Robinson*, 26 Vt. 316, 62 Am. Dec. 574; *Donohue* v. *People*, 56 N. Y. 208; *People* v. *Courtney*, 1 N. Y. Crim. Rep. 557, 573; *Morrow* v. *State*, 48 Ind. 432; *State* v. *Beal*, 68 Ind. 345, 34 Am. Rep. 263; *State* v. *Red*, 53 Iowa, 69, 4 N. W. 831; *State* v. *Efler*, 85 N. C. 585; *State* v. *Rugan*, 68 Mo. 214; *State* v. *Swain*, 68 Mo. 605; *State* v. *Devlin*, 7 Mo. App. 32; *Mattingly* v. *State*, 8 Tex. App. 345; *People* v. *Russell*, 46 Cal. 121; *People* v. *Rodundo*, 44 Cal. 538.

Defendant's statement goes to the jury for what it is worth. See *Brown* v. *State*, 60 Ga. 210; *State* v. *Maguire*, 69 Mo. 197; *State* v. *Zorn*, 71 Mo. 415.

[2] *Morrow* v. *State*, 48 Ind. 432. See *Donohue* v. *People*, 56 N. Y. 208; *Howze* v. *State*, 59 Miss. 230.

[3] *Hall* v. *The Emily Banning*, 33 Cal. 522; post, § 685; *Morris* v. *State*, 146 Ala. 66, 41 So. 274.

[4] *State* v. *Avery*, 113 Mo. 475, 21 S. W. 193; *Huffman* v. *State*, 28 Tex. App. 174, 12 S. W. 588; *Chambers* v. *People*, 105 Ill. 409. *Angling* v. *State*, 137 Ala. 17, 34 So. 846; *Hicks* v. *State*, 99 Ala. 169, 13 So. 375; *State* v. *Boyles*, 80 S. C. 352, 60 S. E. 233; *State* v. *Hill*, 45 Wash. 694, 89 Pac. 160; *State* v. *Helm*, 97

may be asked on cross-examination as to whether or not he has been convicted of a felony;[5] as to previous imprisonment;[6] as to commission of like offenses;[7] and generally, as to all matters that go to affect his credibility.[8]

Although, by way of impeachment, his conviction of a prior crime may be brought out on cross-examination, yet the admission in evidence of the facts of the offense, on cross-examination, is reversible error.[9] And to compel him to answer as to past transactions, even though similar, but which are separate and distinct, so that through such admissions the jury might be led to infer his guilt, rather than to establish it from the evidence, is to violate the constitutional guaranty protecting him from giving evidence against himself. Hence questions tending to degrade must be those directly tending to affect his credibility as a witness, or to show his character.[10]

Prior conviction of an infamous crime does not incapacitate the accused as a witness, as the statute entitles him to testify

Iowa, 378, 66 N. W. 751; *Com.* v. *Tolliver,* 119 Mass. 312; *May* v. *State,* 33 Tex. Crim. Rep. 74, 24 S. W. 910.

[5] *People* v. *Oliver,* 7 Cal. App. 601, 95 Pac. 172.

[6] *Turpin* v. *Com.* 25 Ky. L. Rep. 90, 74 S. W. 734; *Davis* v. *State,* 52 Tex. Crim. Rep. 629, 108 S. W. 667; *People* v. *Courtney,* 31 Hun, 199. See *State* v. *Howard,* 30 Mont. 518, 77 Pac. 50 (proof of identity by the jailer); *Com.* v. *Bonner,* 97 Mass. 587.

[7] *State* v. *Barrett,* 117 La. 1086, 42 So. 513; *People* v. *Casey,* 72 N. Y. 393; *People* v. *Noelke,* 94 N. Y. 144, 46 Am. Rep. 128; *People* v. *Hooghkerk,* 96 N. Y. 149; *Fassinow* v. *State,* 89 Ind. 235; *State* v. *Vandiver,* 149 Mo. 502, 50 S. W. 892. But see contra, *Welch* v. *Com.* 33 Ky. L. Rep. 51, 108 S. W. 863.

[8] *State* v. *Rowell,* 75 S. C. 494, 56 S. E. 23; *Barden* v. *State,* 145 Ala. 1, 40 So. 948; *Viberg* v. *State,* 138 Ala. 100, 100 Am. St. Rep. 22, 35 So. 53; *Untreinor* v. *State,* 146 Ala. 26, 41 So. 285; *State* v. *Cornelius,* 118 La. 146, 42 So. 754; *Dungan* v. *State,* 135 Wis. 151, 115 N. W. 350; *State* v. *Stukes,* 73 S. C. 386, 53 S. E. 643; *Thompson* v. *United States,* 75 C. C. A. 172, 144 Fed. 14, 7 A. & E. Ann. Cas. 62; *Linnehan* v. *State,* 120 Ala. 293, 25 So. 6.

[9] *State* v. *Mount,* 73 N. J. L. 582, 64 Atl. 124.

[10] *People* v. *Brown,* 72 N. Y. 571, 28 Am. Rep. 183.

as an arbitrary and universal right;[11] but such conviction may be shown to affect his credibility,[12] though the conviction ordinarily should be proved by the record.[13] His reputation for truth may be assailed.[14] The fact that he is charged with a crime does not, in itself, impair his credit, as otherwise his guilt would be assumed before it is proved.

§ 429a. Accused; conclusiveness of answers on cross-examination.—The general rule is enforced equally in favor of the accused as in the case of other witnesses, that while the cross-examination, subject to the discretion of the court, may go into collateral matters, where the purpose is impeachment of the witness, the answer of the witness to such questions is conclusive.[1]

§ 430. Accused; cross-examination as to particular facts.—Within the limitations already noticed,[1] the accused subjects himself to the same liabilities on cross-examination as do other witnesses.[2] Thus, on a trial for adultery,

[11] *Newman* v. *People,* 63 Barb. 630.

[12] *State* v. *Kelsoe,* 76 Mo. 505.

[13] Supra, § 153; *Bartholomew* v. *People,* 104 Ill. 601, 44 Am. Rep. 97; post, § 432.

[14] Post, § 433; *State* v. *Cox,* 67 Mo. 392; *State* v. *Rugan,* 5 Mo. App. 592.

[1] *McKeone* v. *People,* 6 Colo. 346; *Marx* v. *People,* 63 Barb. 618; *People* v. *Ware,* 29 Hun, 473; *George* v. *State,* 16 Neb. 318, 20 N. W. 311.

[1] Supra, §§ 428 et seq.

[2] *State* v. *Wentworth,* 65 Me. 234; 20 Am. Rep. 688; *State* v. *Witham,* 72 Me. 531; *Marx* v. *People,* 63 Barb. 618; *Fralich* v. *People,* 65 Barb. 48; *Varona* v. *Socarras,* 8 Abb. Pr. 302; *Pontius* v. *People,* 82 N. Y. 339; *Brubaker* v. *Taylor,* 76 Pa. 83; *Brown* v. *State,* 60 Ga. 210; *State* v. *Clinton,* 67 Mo. 380, 29 Am. Rep. 506, 3 Am. Crim. Rep. 132; *Burden* v. *People,* 26 Mich. 162; *State* v. *Fay,* 43 Iowa, 651; *State* v. *Huff,* 11 Nev. 17; *State* v. *Harrington,* 12 Nev. 125.

A defendant's answers on cross-examination may be used against him on the second trial. § 664; *State* v. *Eddings,* 71 Mo. 545, 36 Am. Rep. 496; *Dumas* v. *State,* 63 Ga. 601. See *State* v. *Witham,* 72 Me. 531; *People* v. *Arnold,* 43 Mich. 303, 38 Am. Rep. 182, 5 N. W. 385.

For notes on cross-examination of defendant in criminal case, see 15

where the defendant and his alleged paramour, being examined, deny the act charged, it is competent to cross-examine them upon the intimacy of their mutual relations both before and after the act; and in particular as to their representations that they were man and wife, their residence in the same house nine months prior to the reputed birth of a child, and other criminating circumstances.[3] Also, whether or not he had been criminally intimate with a woman whose name is stated, where the matter is relevant.[4]

§ 431. Accused; examination of, as to his own motives.—Ordinarily, as shown elsewhere, a witness cannot be examined as to another person's motives,[1] but as to the accused's own motives, when relevant, he may be examined in chief or upon cross-examination.[2] In proving self-defense, he is entitled to testify, to the jury, that, at the time of the act charged, he believed himself to be in danger of his life;[3] and in larceny he may testify as to his intention in taking the goods.[4] While such answers are not conclusive,[5] they cannot be ignored, but must be considered in connection with all other evidence in the case. Where an instruction requires the jury to ignore such statements, it is error. The inference which the jury may draw from accused's own statement may

L.R.A. 669, and 10 L.R.A.(N.S.) 604.

[3] *Com* v. *Curtis*, 97 Mass. 574; post, § 432.

[4] *Carr* v. *State*, 81 Ark. 589, 99 S. W. 831.

[1] Post, § 456.

[2] Supra, § 428a, notes 7 and 8; *People ex rel. Smith* v. *Pease*, 27 N. Y. 45, 84 Am. Dec. 242; *Kerrains* v. *People*, 60 N. Y. 221, 19 Am. Rep. 158; *Babcock* v. *People*, 15 Hun, 347; *Greer* v. *State*, 53 Ind. 420; *White* v. *State*, 53 Ind. 595; *People* v. *Forrell*, 31 Cal. 576; *Bode* v. *State*, 6 Tex. App. 424.

[3] *State* v. *Harrington*, 12 Nev. 125; post, § 459; *Com.* v. *Damon*, 17 Rep. 559.

[4] *Smith* v. *State*, 13 Tex. App. 507.

[5] *Smith* v. *State*, 13 Tex. App. 507.

be strong enough to overcome the conclusion drawn from other acts and declarations.[6]

§ 432. Accused; extent of waiver of privilege against self-crimination.—If the accused offers himself as a witness to disprove a criminal charge, can he excuse himself from answering on the ground that, by so doing, he would criminate himself? The sound rule, and adhered to in most states, is that, so far as concerns questions touching the merits of the offense on trial, the accused, by offering himself as a witness to disprove the charge, waives his privilege as to all relevant facts connected with the offense, except those facts that merely affect his credibility.[1]

As we have seen,[2] to affect his credibility, he may be asked whether or not he has been in prison on other charges;[3]

[6] *Com.* v. *Thomas,* 31 Ky. L. Rep. 899, 104 S. W. 326. See *People* v. *Lopez,* 2 Edm. Sel. Cas. 262

[1] Wigmore, Ev. § 2276; England, crim. ev. act, 61 & 62 Vict. chap. 36, § 1, subd. f and 1.

Under this statute, see the following decisions. *Rex* v. *Chitson* [1909] 2 K. B. 945, 73 J. P. 491, 25 Times L. R. 818, 53 Sol. Jo. 746; *Rex* v. *Solomons* [1909]2 K. B. 980, 79 L. J. K. B. N. S. 8, 101 L. T. N. S. 496, 73 J. P. 467, 25 Times L. R. 747; *Rex* v. *Rouse* [1904] 1 K. B. 184, 73 L. J. K. B. N. S. 60, 68 J. P. 14, 52 Week. Rep. 236, 89 L. T. N. S. 677, 20 Times L. R. 68, 20 Cox, C. C. 592; *Rex* v. *Bridgewater* [1905] 1 K. B. 131, 74 L. J. K. B. N. S. 35, 69 J. P. 26, 53 Week. Rep. 415, 91 L. T. N. S. 838, 21 Times L. R. 69, 20 Cox, C. C. 737; *Rex* v. *Preston* [1909] 1 K. B. 568, 78 L. J. K. B. N. S. 335, 100 L. T. N. S. 303, 73 J. P. 173, 25 Times L. R. 280, 53 Sol. Jo. 322; *Reg.* v. *Marshall,* 63 J. P. 36. See Statutes of various states. *State* v. *Wentworth,* 65 Me. 234, 20 Am. Rep. 688; *State* v. *Ober,* 52 N. H. 459, 13 Am. Rep. 88; *Com.* v. *Lannan,* 13 Allen, 563; *Com.* v. *Mullen,* 97 Mass. 545; *Com.* v. *Curtis,* 97 Mass. 574; *Com.* v. *Morgan,* 107 Mass. 199; *Com.* v. *Nichols,* 114 Mass. 285, 19 Am. Rep. 346; *Com.* v. *Tolliver,* 119 Mass. 312; *Burdick* v. *People,* 58 Barb. 51; *Fralich* v. *People,* 65 Barb. 48; *McGarry* v. *People,* 2 Lans. 227; *Brandon* v. *People,* 42 N. Y. 265; *Connors* v. *People,* 50 N. Y. 240; *State* v. *Fay,* 43 Iowa, 651; *State* v. *Huff,* 11 Nev. 17; *Barber* v. *State,* 13 Fla. 675. See *People* v. *McGungill,* 41 Cal. 429.

[2] Supra, § 429.

[3] *Hanoff* v. *State,* 37 Ohio St. 178, 41 Am. Rep. 496; *State* v. *Ba-*

whether or not he has suborned testimony in the particular case;[4] whether or not he has been concerned in crimes that are a part of the same system;[5] though, unless the statute provides otherwise, his answers as to collateral offenses cannot be compelled.[6]

§ 433. Impeachment of accused.—When an accused offers himself as a witness, a dual testimonial capacity results. First, his capacity as an accused; second, his capacity as a witness. As the two coincide in point of time and presentation, some confusion has resulted, as seen in the various decisions.

But, unless controlled by statute, the rule supported both by reason and the weight of authority is that, as the accused, the question of privilege against self-crimination is waived only as to facts relevant to the offense charged; that aside from this limitation, in his testimonial capacity as a witness, he

con, 13 Or. 143, 57 Am. Rep. 8, 9 Pac. 393; *People* v. *Ogle,* 104 N. Y. 511, 11 N. E. 53. But see *People* v. *Brown,* 72 N. Y. 571, 28 Am. Rep. 183; *People* v. *Crapo,* 76 N. Y. 288, 32 Am. Rep. 302; *Ryan* v. *People,* 79 N. Y. 593; *State* v. *Huff,* 11 Nev. 17; *People* v. *Hamblin,* 68 Cal. 101, 8 Pac. 687; *People* v. *Buckley,* 143 Cal. 375, 77 Pac. 169; *Com.* v. *Bonner,* 97 Mass. 587; *People* v. *Cummins,* 47 Mich. 334, 11 N. W. 184, 186; *State* v. *Kelsoe,* 76 Mo. 505; *State* v. *Lawhorn,* 88 N. C. 634; *State* v. *Efler,* 85 N. C. 585; supra, §§ 153 and 429.

[4] *State* v. *Downs,* 91 Mo. 19, 3 S. W. 219; *Bates* v. *Holladay,* 31 Mo. App. 162; *Carothers* v. *State,* 75 Ark. 574, 88 S. W. 585; *State* v. *Deal,* 52 Or. 568, 98 Pac. 165; *Martineau* v. *May,* 18 Wis. 54.

[5] *Brandon* v. *People,* 42 N. Y. 265; cases cited post; supra, § 429, note 7.

[6] *People* v. *Brown,* 72 N. Y. 571, 28 Am. Rep. 183; *People* v. *Thomas,* 9 Mich. 321; *Gale* v. *People,* 26 Mich. 157; *Ingalls* v. *State,* 48 Wis. 647, 4 N. W. 785. But see *State* v. *Ober,* 52 N. H. 459, 13 Am. Rep. 88; post, § 463. See *Hayward* v. *People,* 96 Ill. 492; *McGarry* v. *People,* 2 Lans. 227, and authorities cited; *People* v. *Casey,* 72 N. Y. 393; 19 Alb. L. J. pp. 343, 388; *People* v. *Crapo,* 76 N. Y. 288, 32 Am. Rep. 302; *People* v. *Genung,* 11 Wend. 19, 25 Am. Dec. 594; *People* v. *Gay,* 7 N. Y. 378, 15 Hun, 269; *Gifford* v. *People,* 87 Ill. 210; *People* v. *Gale,* 50 Mich. 237, 15 N. W. 99; supra, § 32.

assumes all the obligations and liabilities, and is protected by the limitations provided for all witnesses.

Having in view, also, that the accused can never be impeached by evidence of bad moral character, until he himself first opens the door by attempting to show good character,[1] he is open to impeachment as any other witness.[2] He may be contradicted as to matters material to the issue,[3] but as to irrelevant matters elicited on cross-examination, his answers are conclusive.[4] He may be contradicted by proof of prior inconsistent statements,[5] and this without previously questioning him as to such statements.[6] And when he has offered evidence as to his character, his character for truth and veracity may be impeached,[7] and his testimony commented on by counsel to the same effect as the testimony of other witnesses.[8]

§ 434. Re-examination of accused.—On re-examination, the rule is settled that a witness may explain his motives or reasons for statements elicited on cross-examination.[1]

[1] Supra, § 64. See *Maloy* v. *State*, 52 Fla. 101, 41 So. 791; *Fletcher* v. *State*, 49 Ind. 124, 19 Am. Rep. 673; *State* v. *Kirkpatrick*, 63 Iowa, 554, 19 N. W. 660; *State* v. *Beal*, 68 Ind. 345, 34 Am. Rep. 263.

[2] Wigmore, Ev. § 2277.

[3] *Fralich* v. *People*, 65 Barb. 48; *State* v. *Horne*, 9 Kan. 119.

[4] *Marx* v. *People*, 63 Barb. 618; supra, § 429a; post, § 484.

[5] Supra, §§ 429, 431; *Brubaker* v. *Taylor*, 76 Pa. 83; *Woods* v. *State*, 63 Ind. 353.

[6] Post, § 483; *Kreiter* v. *Bomberger*, 82 Pa. 59, 22 Am. Rep. 750. Compare § 429, supra; *Re Foster*, 44 Vt. 570; *Laramore* v. *Minish*, 43 Ga. 282. See *People* v. *Arnold*, 43 Mich. 303, 38 Am. Rep. 182, 5 N. W. 385. As to admissibility of his evidence on subsequent trials, see post, § 664.

[7] *Com.* v. *Bonner*, 97 Mass. 587; *State* v. *Cox*, 67 Mo. 392; *People* v. *Beck*, 58 Cal. 212; post, § 486.

But general inquiries into his moral character are precluded. *Fletcher* v. *State*, 49 Ind. 124, 19 Am. Rep. 673. See *State* v. *Clinton*, 67 Mo. 380, 29 Am. Rep. 506, 3 Am. Crim. Rep. 132; *People* v. *Cummins*, 47 Mich. 335, 11 N. W. 184, 186.

[8] *State* v. *Harrington*, 12 Nev. 125.

[1] *Sanders* v. *State*, 131 Ala. 1, 31 So. 564; *Sims* v. *State*, 146 Ala. 109, 41 So. 413; *People* v. *Darr*, 3 Cal. App. 50, 84 Pac. 457; *Boles* v. *People*, 37 Colo. 41, 86 Pac. 1030; *Wilson* v. *People*, 94 Ill. 299; *State* v.

Hence, the accused who has been examined in his own behalf may be re-examined in rebuttal of the prosecution's testimony,[2] and may contradict, under the usual limitations, testimony offered on his own side,[3] or explain ambiguities in his own testimony;[4] he may explain how or why or under what circumstances he made statements contradictory of his direct testimony;[5] and where, under the statute, it is permitted to elicit new matter on cross-examination, he may be re-examined as to such new matter.[6] His credit, like that of all other witnesses, is for the jury.[7]

§ 435. Accused's failure to testify raises no presumption against him.—In nearly all the states it is provided, by the enabling statute, that accused's failure to offer himself as a witness is not to be taken as a presumption against him. Independently of such provision, it is proper for the court in all cases where the accused declines to avail himself of his

Rohn, 140 Iowa, 640, 119 N. W. 88; *State* v. *Vickers,* 209 Mo. 12, 106 S. W. 999; *Craig* v. *State,* 78 Neb. 466, 111 N. W. 143; *Weaver* v. *State,* 46 Tex. Crim. Rep. 607, 81 S. W. 39; *Grabowski* v. *State,* 126 Wis. 447, 105 N. W. 805.

[2] *Donohue* v. *People,* 56 N. Y. 208; *People* v. *Crapo,* 76 N. Y. 288, 32 Am. Rep. 302.

[3] Post, § 493.

[4] *Cousins* v. *Jackson,* 52 Ala. 262; *Sims* v. *State,* 146 Ala. 109, 41 So. 413.

[5] *Campbell* v. *State,* 23 Ala. 44; *Bressler* v. *People,* 117 Ill. 422, 8 N. E. 62; *People* v. *Mills,* 94 Mich. 630, 54 N. W. 488; *Kennelly* v. *Savage,* 18 Mont. 119, 44 Pac. 400.

[6] *State* v. *Williams,* 111 La. 179, 35 So. 505; *Com.* v. *Dill,* 156 Mass. 226, 30 N. E. 1016; *People* v. *Robinson,* 135 Mich. 511, 98 N. W. 12; *State* v. *Saidell,* 70 N. H. 174, 85 Am. St. Rep. 627, 46 Atl. 1083; *People* v. *Noblett,* 184 N. Y. 612, 77 N. E. 1193; *State* v. *Ussery,* 118 N. C. 1177, 24 S. E. 414; *Renfro* v. *State,* 42 Tex. Crim. Rep. 393, 56 S. W. 1013; *State* v. *Botha,* 27 Utah, 289, 75 Pac. 731; *State* v. *McCoy,* 15 Utah, 136, 49 Pac. 420; *State* v. *Hopkins,* 50 Vt. 316, 3 Am. Crim. Rep. 357; *State* v. *Erving,* 19 Wash. 435, 53 Pac. 717; *State* v. *Anderson,* 20 Wash. 193, 55 Pac. 39; *Williams* v. *State,* 61 Wis. 281, 21 N. W. 56.

See *Struth* v. *Decker,* 100 Md. 368, 59 Atl. 727 (time of re-examination).

[7] Supra, § 429; *State* v. *Stewart,* 9 Nev. 130; *Brown* v. *State,* 60 Ga. 210.

right to testify, to hold firmly to the position that no inference is to be drawn against him from such omission.[1] Otherwise, exposing himself to this ordeal will become obligatory; it will practically abrogate the great constitutional and juridical principle, that no man can be compelled to testify against himself. Following this view, it has been held error for the judge trying the case to decline to charge the jury that no presumption is to be drawn from such withholding.[2] It has been held error for the court to permit counsel for the prosecution, over the objection of accused, in addressing the jury, to comment on the omission as a circumstance against the accused, or that the omission is a fact to be considered in determining the case.[3]

However, in Maine, where the enabling statute provides that if the accused elects to testify "he waives his privilege of not criminating himself," and that his omission "shall not be taken as evidence of his guilt," it has been held that the trial judge, in his charge to the jury, may call attention to the fact, and instruct the jury that it is a circumstance for their consideration;[4] and in Vermont, where accused's omission to testify "shall not be considered by the jury as evidence against him," the court instructed the jury that his omission was not to be taken as a presumption against him, but intimated that it would be attempting impossibilities to say that the fact is not to be taken into consideration at all.[5]

An interesting question that seems impossible of a com-

[1] See *State* v. *Wentworth*, 65 Me. 234, 20 Am. Rep. 688; *Com.* v. *Nichols*, 114 Mass. 285, 19 Am. Rep. 346; *Ruloff* v. *People*, 45 N. Y. 213; 14 Am. Law. Rev. 753, article by Maury.

[2] *State* v. *Cameron*, 40 Vt. 555; *Beavers* v. *State*, 58 Ind. 530; *McKenzie* v. *State*, 26 Ark. 334; *People* v. *Tylor*, 36 Cal. 522. See *State* v. *Grebe*, 17 Kan. 458.

[3] Post, § 435a. As to presumption of silence, post, § 681.

[4] *State* v. *Lawrence* (1870) 57 Me. 574 (Appleton Ch. J.); *State* v. *Bartlett*, 55 Me. 200; *State* v. *Cleaves*, 59 Me. 298, 8 Am. Rep. 422.

[5] *State* v. *Cameron*, 40 Va. 555.

pletely satisfactory solution arises: Shall the omission of the accused to testify be entirely ignored? Some states affirm this by providing that no attorney, nor the court, nor the jury shall comment on the accused's failure to testify, and it has been held that the court is therefore not at liberty to make any comment;[6] and it has been held that a charge on this point would many times do harm by calling attention of the jury to the failure of the defendant.[7] It has been held that while comment is strictly forbidden to the attorneys in the case, yet this does not prohibit the court from telling the jury that this raises no presumption against the accused.[8] Shall the omission of the accused to testify be called to the attention of the jury? Other states affirm this by making it the duty of the court to instruct on the question.[9] Other states hold that while the charge is proper, the court is not bound to instruct on the question, unless so requested.[10] The abstract logic in favor of the rule completely ignoring the point is equally impregnable with that which directs that the point be directly called to the attention of the jury.

[6] *State* v. *Robinson,* 117 Mo. 649, 23 S. W. 1066.

[7] *State* v. *Pearce,* 56 Minn. 226, 57 N. W. 652, 1065.

[8] *State* v. *Weems,* 96 Iowa, 426, 65 N. W. 387; *Fulcher* v. *State,* 28 Tex. App. 465, 13 S. W. 750; *Pearl* v. *State,* 43 Tex. Crim. Rep. 189, 63 S. W. 1013.

[9] *Linbeck* v. *State,* 1 Wash. 336, 25 Pac. 452; *State* v. *Cameron,* 40 Vt. 555.

[10] *Grubb* v. *State,* 117 Ind. 277, 20 N. E. 257, 725; *People* v. *Flynn,* 73 Cal. 511, 15 Pac. 102, 7 Am. Crim. Rep. 126; *Metz* v. *State,* 46 Neb. 547, 65 N. W. 190; *Foxwell* v. *State,* 63 Ind. 539, 3 Am. Crim. Rep. 297; *Felton* v. *State,* 139 Ind. 531, 39 N. E. 228; *Matthews* v. *People,* 6 Colo. App. 456, 41 Pac. 839; *Torey* v. *State,* 41 Tex. Crim. Rep. 543, 56 S. W. 60.

But when requested the instruction should be granted. See *Haynes* v. *State,* — Miss. —, 27 So. 601; *Farrell* v. *People,* 133 Ill. 244; *People* v. *Rose,* 52 Hun, 33, 4 N. Y. Supp. 787; *State* v. *Landry,* 85 Me. 95, 26 Atl. 998; *State* v. *Carr,* 25 La. Ann. 408; *State* v. *Goff,* 62 Kan. 104, 61 Pac. 683; *State* v. *Evans,* 9 Kan. App. 889, 58 Pac. 240.

A text writer of authority [11] says: "The inference is drawn by virtue of the nonproduction of the testimony of a competent witness, and not by virtue of the claim of the privilege."

Based upon human experience, and in view of wide-spread intelligence and general knowledge of the fundamental principles of the law, as well as the fact that in nearly every jurisdiction the jury must be instructed as to the law of the concrete case by the court, the safer rule to follow is for the trial judge fully to instruct as to the status of the accused. It is almost inborn in the Anglo Saxon, that a man is innocent until proved guilty. Hence an instruction by the court, that the accused, from the outset of the trial, is presumed to be innocent; that the presumption is not a mere form of law, but intended as a substantial protection for the accused; that the accused is not compelled to produce any evidence whatever, but that the burden of proof is on the prosecution to establish every essential element of the offense charged beyond a reasonable doubt; that the prosecution cannot rely upon the silence of the accused, nor upon any inferences drawn from such silence, but must establish the charge by affirmative proof beyond a reasonable doubt,—would reproduce in concrete form the basis and the policy of the privilege.

To ignore what every man intelligent enough for jury duty knows to be the fact, that the accused is always a competent witness at his own election, is to permit an inference that is generally prejudicial to the accused. But to supply the jury, through the judge, with the basic law as to the accused, is to give a reason satisfactory to the mind, and prevent an inference that is apt to be drawn, where the reason showing why the inference must not be drawn is supplied from the law of the land through the trial judge.

[11] Wigmore, Ev. 2272, argument third.

§ 435a. Comment on accused's silence by counsel; error; exceptions.—Where, by statute, counsel for the prosecution are prohibited from making any comment, in argument, on the silence of the accused, such comment is ground for a new trial, even where counsel has been checked by the court.[1] Other cases hold that where the counsel withdraws his remarks, or the court excludes them, and instructs the jury on the law as to the silence of the accused, the error is cured;[2] and some few say that the judicial declaration does not remove the effect, and the right to the new trial is absolute.[3] Others hold that the error is not cured by the court checking the counsel, and where he refuses or even omits to charge upon the law on that point, when checking the counsel, a new trial must be had.[4] The decisions, again, are not harmonious upon the practice in reserving the point. Some of the cases hold that it is the duty of the court to check the prosecuting counsel, and also to charge that the silence of the accused creates

[1] Supra, § 429; *Long* v. *State*, 56 Ind. 182, 26 Am. Rep. 19.

See *Baker* v. *People*, 105 Ill. 452; *Chambers* v. *People*, 105 Ill. 409; *State* v. *Holmes*, 65 Minn. 230, 68 N. W. 11; *Sanders* v. *State*, 73 Miss. 444, 18 So. 541; *Reddick* v. *State*, 72 Miss. 1008, 16 So. 490; *Angelo* v. *People*, 96 Ill. 209, 36 Am. Rep. 132; *Quinn* v. *People*, 123 Ill. 333, 346, 15 N. E. 46; *Hunt* v. *State*, 28 Tex. App. 149, 19 Am. St. Rep. 815, 12 S. W. 737; *State* v. *Brownfield*, 15 Mo. App. 593; *State* v. *Cameron*, 40 Vt. 555; *Tines* v. *Com.* 25 Ky. L. Rep. 1233, 77 S. W. 363. See also post, note No. 5.

[2] *Herndon* v. *State*, 50 Tex. Crim. Rep. 552, 99 S. W. 558; *Clinton* v. *State*, 56 Fla. 57, 47 So. 389; *People* v. *Hess*, 85 Mich. 128, 48 N. W. 181; *Com.* v. *Worcester*, 141 Mass. 58, 6 N. E. 700; *Staples* v. *State*, 89 Tenn. 231, 14 S. W. 603.

[3] *Quinn* v. *People*, 123 Ill. 333, 15 N. E. 46; *State* v. *Cameron*, 40 Vt. 555.

[4] *Hunt* v. *State*, 28 Tex. App. 149, 19 Am. St. Rep. 815, 12 S. W. 737; *People* v. *Brown*, 53 Cal. 66; *State* v. *Banks*, 78 Me. 490, 7 Atl. 269, 7 Am. Crim. Rep. 526; *State* v. *Chisnell*, 36 W. Va. 659, 15 S. E. 412; *Com.* v. *Harlow*, 110 Mass. 411; *State* v. *Moxley*, 102 Mo. 374, 14 S. W. 969, 15 S. W. 556; *People* v. *Rose*, 52 Hun, 33, 4 N. Y. Supp 787; *State* v. *Currie*, 13 N. D. 655, 69 L.R.A. 405, 112 Am. St. Rep. 687, 102 N. W. 875.

See *Barnard* v. *State*, 48 Tex. Crim. Rep. 111, 122 Am. St. Rep. 736, 86 S. W. 760; *State* v. *Levy*, 9 Idaho, 483, 75 Pac. 227.

no presumption against him, and that the question of accused's silence is excluded from the consideration of the jury.[5] Other courts hold that, to avail the accused, he must promptly object to the comment, and take a ruling thereon.[6] A strict compliance with the statute is required by the courts.[7] But even in states where the statute is silent, a new trial must be granted if the court permits such comments over the objection of the accused.[8]

This protection from comment does not apply in those cases in which the accused, submitting himself as a witness, declines to answer particular questions on the ground of self-crimi-

[5] *Wilson* v. *United States,* 149 U. S. 60, 37 L. ed. 650, 13 Sup. Ct. Rep. 765; *State* v. *Mitchell,* 32 Wash. 64, 72 Pac. 707; *State* v. *Weaver,* 165 Mo. 1, 88 Am. St. Rep. 406, 65 S. W. 308; *Staples* v. *State,* 89 Tenn. 231, 14 S. W. 603; *Roberts* v. *State,* 122 Ala. 47, 25 So. 238; *Showalter* v. *State,* 84 Ind. 562; *People* v. *Brown,* 53 Cal. 66; *People* v. *Doyle,* 58 Hun, 535, 12 N. Y. Supp. 836; *State* v. *Mosley,* 31 Kan. 355, 2 Pac. 782, 4 Am. Crim. Rep. 529; *Gray* v. *State,* 42 Fla. 174, 28 So. 53; *State* v. *Mathews,* 98 Mo. 125, 10 S. W. 144, 11 S. W. 1135; *State* v. *Tennison,* 42 Kan. 330, 22 Pac. 429; *Quinn* v. *People,* 123 Ill. 333, 15 N. E. 46; *Parrott* v. *Com.* 20 Ky. L. Rep. 761, 47 S. W. 452; *State* v. *Banks,* 78 Me. 490, 7 Atl. 269, 7 Am. Crim. Rep. 526.

See also, as to allusion by court to accused's silence as error, *Ruloff* v. *People,* 45 N. Y. 213; *Com.* v. *Hanley,* 140 Mass. 457, 5 N. E. 468.

[6] *Matthews* v. *People,* 6 Colo. App. 456, 41 Pac. 839; *Metz* v. *State,* 46 Neb. 547, 65 N. W. 190; *Martin* v. *State,* 79 Wis. 165, 48 N. W. 119.

[7] *Baker* v. *State,* 122 Ala. 1, 26 So. 194; *Lamb* v. *State,* 69 Neb. 212, 95 N. W. 1050; *Austin* v. *People,* 102 Ill. 261; *State* v. *Wisnewski,* 13 N. D. 649, 102 N. W. 883; *Martinez* v. *State,* 48 Tex. Crim. Rep. 33, 85 S. W. 1066; *Davis* v. *State,* 138 Ind. 11, 37 N. E. 397; *State* v. *Baldoser,* 88 Iowa, 55, 55 N. W. 97; *Tudor* v. *Com.* 19 Ky. L. Rep. 1039, 43 S. W. 187.

[8] *Ruloff* v. *People,* 45 N. Y. 213; *Crandall* v. *People,* 2 Lans. 309; *Ormsby* v. *People,* 53 N. Y. 472; *Dailey* v. *State,* 28 Ind. 285; *People* v. *Tyler,* 36 Cal. 522; *People* v. *Brown,* 53 Cal. 66.

But see *Calkins* v. *State,* 18 Ohio, 366, 98 Am. Dec. 121.

[9] *State* v. *Ober,* 52 N. H. 459, 13 Am. Rep. 88; *Com.* v. *Mullen,* 97 Mass. 547; *Russell* v. *State,* 77 Neb. 519, 110 N. W. 380, 15 A. & E. Ann. Cas. 222; *Comstock* v. *State,* 14 Neb. 205, 15 N. W. 355; *Solander* v. *People,* 2 Colo. 48; *State* v. *Anderson,* 89 Mo. 312, 1 S. W. 135; *Cotton* v.

nation,[9] or fails to explain inculpatory facts,[10] and in such case counsel may comment fully not only on his testimony, but on his appearance and manner when testifying,[11] as well as his failure to produce certain testimony and particular witnesses;[12] and where the wife of accused is by statute made a competent witness, comment may be made on his failure to call her,[13] but unless she is made competent by statute, the prosecution ought not to comment on her absence.[14]

The law is violated by calling the attention of the jury to the silence of the accused upon another occasion than that of the trial,[15] or by paraphrasing the statute by stating that if the accused is silent, the prosecution is prevented from commenting on it;[16] but only that comment evades the law which by direct or indirect reference tends to direct the attention of the jury to the fact that the accused is silent.[17]

State, 87 Ala. 103, 6 So. 372; *State* v. *Glave*, 51 Kan. 330, 33 Pac. 8; *Lee* v. *State*, 56 Ark. 4, 19 S. W. 16; *State* v. *Walker*, 98 Mo. 95, 9 S. W. 646, 11 S. W. 1133; *State* v. *Tatman*, 59 Iowa, 471, 13 N. W. 632; *Brashears* v. *State*, 58 Md. 563; *Toops* v. *State*, 92 Ind. 13; *Stover* v. *People*, 56 N. Y. 315; *Com.* v. *McConnell*, 162 Mass. 499, 39 N. E. 107; *McFadden* v. *State*, 28 Tex. App. 241, 14 S. W. 128; *Heldt* v. *State*, 20 Neb. 492, 47 Am. Rep. 835, 30 N. W. 626; *State* v. *Ulsemer*, 24 Wash. 657, 64 Pac. 800.

[10] *Stover* v. *People*, 56 N. Y. 315.

[11] *Huber* v. *State*, 57 Ind. 341, 26 Am. Rep. 57.

See 19 Alb. L. J. 429; *Taylor* v. *Com.* 17 Ky. L. Rep. 1214, 34 S. W. 227.

[12] See *Porch* v. *State*, 50 Tex. Crim. Rep. 335, 99 S. W. 102; *Sutton* v. *Com.* 85 Va. 128, 7 S. E. 323; *State* v. *Costner*, 127 N. C. 566, 80 Am. St. Rep. 809, 37 S. E. 326; *Com.* v. *Harlow*, 110 Mass. 411; *State* v. *Shipley*, 174 Mo. 512, 74 S. W. 612.

[13] *State* v. *Millmeier*, 102 Iowa, 692, 72 N. W 275; *Taylor* v. *Com.* 90 Va. 109, 17 S. E. 812; *Mercer* v. *State*, 17 Tex. App. 452, 5 Am. Crim. Rep. 292; *Com.* v. *Weber*, 167 Pa. 153, 31 Atl. 481.

[14] *State* v. *Hatcher*, 29 Or. 309, 44 Pac. 584; *State* v. *Taylor*, 134 Mo. 109, 35 S. W. 92; *Graves* v. *United States*, 150 U. S. 118, 37 L. ed. 1021, 14 Sup. Ct. Rep. 40; *Johnson* v. *State*, 63 Miss. 313.

[15] *State* v. *Moxley*, 102 Mo. 374, 393, 14 S. W. 969, 15 S. W. 556.

[16] *State* v. *Holmes*, 65 Minn. 230, 68 N. W. 11; *Hoff* v. *State*, 83 Miss. 488, 35 So. 950; *Jordan* v. *State*, 29 Tex. App. 595, 16 S. W. 543; *State* v. *Bennett*, 21 S. D. 396, 113 N. W. 78; *Austin* v. *People*, 102 Ill. 261.

[17] *Watt* v. *People*, 126 Ill. 9, 32,

The safe and sound rule of practice, on preserving the error, is that, even in the absence of objection from the accused, and in view of the sound principle of law that the accused in a criminal prosecution cannot waive any right by implication, it is encumbent upon the court to check the comment, and instruct the jury on the law of the point; that when the court of its own motion goes to that extent, the question of a new trial for such error is discretionary with the trial court, and ought not to be reviewed, except in case of manifest error and abuse of the discretion.

§ 436. Accused's statements; Georgia.—Georgia is the only state [1] in the Union in which the accused is allowed to make a statement in lieu of offering himself as a witness, although in Washington the accused [2] has the two rights, first to offer himself as a witness, second to make a statement.

§ 437. Competency of husband and wife.—When not specifically included, husband and wife, under the statutes, cannot be called as witnesses for each other, except in cases of violence. They are excluded on the grounds of public policy, and the statutes almost uniformly declare this reason in terms; and the statutes do not touch the question of the competency of husband and wife, when they only relieve from the exclusion attached to parties.[1]

§ 438. Otherwise as to coindictees.—As we have shown, coindictees, under the statutes, may be witnesses for each other,[1] and even where the statute does not render the

1 L.R.A. 403, 18 N. E. 340; *State* v. *Mosley*, 31 Kan. 355, 2 Pac. 782, 4 Am. Crim. Rep. 529.

[1] Supra, § 424e.

[2] Supra, § 424e.

[1] Supra, §§ 400 et seq.

For notes as to competency of husband or wife as witness for or against the other in criminal case, see 2 L.R.A.(N.S.) 862, and 22 L.R.A.(N.S.) 240.

[1] Supra, § 428a.

coindictee competent in terms, yet the sound rule is that where the statute removes the disqualification of the accused, his coindictee can be called for him,[2] and there is no substantive reason why such coindictee may not be called against him. At common law, coindictees were disqualified.[3]

IX. Accomplices and Coindictees.

§ 439. Competency of accomplices; joint and separate indictments.—An accomplice is always a competent witness for the prosecution,[1] although his expectation of pardon depends upon the accused's conviction,[2] except where he is

[2] Post, § 445.

[3] Post, § 445; *United States* v. *Clements*, 3 Hughes, 509, Fed. Cas. No. 14,817. See *Burdick* v. *People*, 58 Barb. 51; *Com.* v. *Woodward*, 102 Mass. 159; supra, § 428a.

[1] Gilbert, Ev. 136; 1 Hale, P. C. 303; 2 Hawk. P. C. 46, § 94; *Mead* v. *Robinson*, Willes, Rep. 423; *Com.* v. *Brown*, 130 Mass. 279; *Wixson* v. *People*, 5 Park. Crim. Rep. 119; *Lindsay* v. *People*, 63 N. Y. 143; *State* v. *Brien*, 32 N. J. L. 414; *Noyes* v. *State*, 41 N. J. L. 418; *State* v. *Hudson*, 50 Iowa, 157. Compare *United States* v. *Henry*, 4 Wash. C. C. 428, Fed. Cas. No. 15,351; *United States* v. *McKee*, 3 Dill. 546, Fed. Cas. No. 15,685; *State* v. *Stanley*, 48 Iowa, 221; *People* v. *Gibson*, 53 Cal. 601; *Carroll* v. *State*, 5 Neb. 31, 2 Am. Crim. Rep. 424; *Marler* v. *State*, 67 Ala. 55, 42 Am. Rep. 95; *Lee* v. *State*, 51 Miss. 566; *State* v. *Crowley*, 33 La. Ann. 782; *State* v. *West*, 69 Mo. 401, 33 Am. Rep. 506; *Russell* v. *State*, 11 Tex. App. 288; *People* v. *Lee*, 2 Utah. 441; *Rex* v. *Dodd*, 1 Leach, C. L. 155; 2 East, P. C. 596, 1003; *Rex* v. *Castell Careinion*, 8 East, 77; *Tonge's Case*, 6 How. St. Tr. 226; *Rex* v. *Westbeer*, 1 Leach, C. L. 12; *Rex* v. *Russell*, 1 Moody, C. C. 356. See *Bilmore's Case*, 1 Hale, P. C. 305; *Clark's Case*, 1 Hale, P. C. 305; *Rex* v. *Tinkler*, 1 East, P. C. 354; *Reg.* v. *Lyons*, 9 Car. & P. 555; *Cresby's Case*, 1 Hale, P. C. 303; *United States* v. *Hunter*, 1 Cranch, C. C. 446, Fed. Cas. No. 15,425; *State* v. *Umble*, 115 Mo. 452, 22 S. W. 378; *State* v. *Riney*, 137 Mo. 102, 38 S. W. 718; *Lucre* v. *State*, 7 Baxt. 148; *People* v. *Donnelly*, 2 Park. Crim. Rep. 182; *State* v. *Walker*, 98 Mo. 95, 9 S. W. 646, 11 S. W. 1133; *Rhodes* v. *State*, 141 Ala. 66, 37 So. 365; *State* v. *Black*, 143 Mo. 166, 44 S. W. 340; *McKenzie* v. *State*, 24 Ark. 636.

[2] *Tong's Case*, J. Kelyng, 18; *State* v. *Cook*, 23 La. Ann. 347; *Casey* v. *State*, 37 Ark. 67; supra, note 1 above.

actually under trial jointly with his confederates, and in such case the evidence of persons accused jointly applies.[3]

Accomplices jointly indicted and jointly tried are not competent witnesses against each other.

Where accomplices are indicted separately, they are competent witnesses against each other,[4] or where they are separately indicted and separately tried.

Accomplices separately indicted are competent witnesses for each other,[5] but in the absence of a statute, a separate trial does not permit them to testify for each other, where they are jointly indicted,[6] nor until the indictment is disposed of;[7] but an accomplice who pleads guilty or is convicted is a competent witness for his joint indictee;[8] or upon his acquittal of the charge.[9]

In the absence of a controlling statute, it is not a matter

[3] See *Parker* v. *Green*, 2 Best & S. 299, 31 L. J. Mag. Cas. N. S. 133, 8 Jur. N. S. 409, 6 L. T. N. S. 46, 10 Week. Rep. 316, 9 Cox, C. C. 169; *Reg.* v. *Sullivan*, Ir. Rep. 8 C. L. 404; Taylor, Ev. 10th ed. § 895.

[4] *Allison* v. *State*, 14 Tex. App. 402; *Benson* v. *United States*, 146 U. S. 326, 36 L. ed. 991. See *United States* v. *Henry*, 4 Wash. C. C. 428, Fed. Cas. No. 15,351.

[5] See note 1, cases cited above.

[6] *State* v. *Jones*, 51 Me. 125; *Com.* v. *Marsh*, 10 Pick. 57; *Lewis* v. *State*, 85 Miss. 35, 37 So. 497; *State* v. *Franks*, 51 S. C. 259, 28 S. E. 908; *Davis* v. *State*, 122 Ga. 564, 50 S. E. 376; *Benson* v. *United States*, 146 U. S. 325, 36 L. ed. 991, 13 Sup. Ct. Rep. 60.

[7] *Collier* v. *State*, 20 Ark. 36; *State* v. *Dunlop*, 65 N. C. 288; *Ballard* v. *State*, 31 Fla. 266, 12 So. 865; *Moss* v. *State*, 17 Ark. 327, 65 Am. Dec. 433; *United States* v. *Reid*, 12 How. 361, 13 L. ed. 1023; *Wixson* v. *People*, 5 Park. Crim. Rep. 119; *Com.* v. *Marsh*, 10 Pick. 57; *People* v. *Williams*, 19 Wend. 377; *State* v. *Jones*, 51 Me. 125; *People* v. *Bill*, 10 Johns. 95.

[8] *Simpson* v. *Com.* 126 Ky. 441, 103 S. W. 332; *State* v. *Jones*, 51 Me. 125; *Com.* v. *Eastman*, 1 Cush. 189, 48 Am. Dec. 596; *South* v. *State*, 86 Ala. 617, 6 So. 52; *Strawhern* v. *State*, 37 Miss. 422; *State* v. *Loney*, 82 Mo. 82; *Com.* v. *Marsh*, 10 Pick. 57; *State* v. *Stotts*, 26 Mo. 307; *Wixson* v. *State*, 5 Park. Crim. Rep. 119.

[9] *State* v. *Jones*, 51 Me. 125; *People* v. *Bill*, 10 Johns. 95; *Bacon* v. *State*, 22 Fla. 51, 85 *McKenzie* v. *State*, 24 Ark. 636; *People* v. *Vermilyea*, 7 Cow. 369.

of course to admit an accomplice to give evidence on a trial, but an application to the court for that purpose must be made.[10] The court considers the two questions, whether or not the accused can be convicted without the evidence of the accomplice, and whether or not he can be convicted with it.[11] If the evidence is sufficient without it, or, on the other hand, if there is no probability of a conviction with it, the court will refuse to admit the accomplice as a witness.[12]

Where the admission of the accomplice as a witness for the prosecution is sought upon an implied promise of pardon, the matter rests in the discretion of the court, and not exclusively on that of the prosecution.[13] But this limitation is only prop-

[10] Phillipps, Ev. 9th ed. 28; *State* v. *Hunt,* 91 Mo. 491, 3 S. W. 868; *Perry* v. *State,* — Tex. Crim. Rep. —, 34 S. W. 618; *Com.* v. *Eastman,* 1 Cush. 189, 218, 48 Am. Dec. 596; *State* v. *White,* 48 Or. 416, 87 Pac. 137; *State* v. *Jones,* 51 Me. 125; *Reg.* v. *Ford,* 2 Salk. 690; *Reg.* v. *George,* Car. & M. 111.

[11] *R.* v. *Mellor,* Staff. Sum. Ass. 1833; *R.* v. *Saunders,* Worc. Spr. Ass. 1842. On a motion to admit an accomplice, Patterson said: "I doubt whether or not I shall allow him to be a witness; if you want him for the purpose of identification, and there is no corroboration, that will not do." In *R.* v. *Salt,* Staff. Spr. Ass. 1843, where there was no corroboration of an accomplice, Wightman, J., refused to allow him to become a witness. 3 Russell, Crimes, by Greaves 4th ed. p. 599. And again, in *Reg.* v. *Sparks,* 1 Fost. & F. 388, where the counsel for the prosecution applied for leave to call an accomplice who had plead guilty, Hill, J., refused to permit it until the other evidence had been given, in order to see whether or not it was sufficient to corroborate that of the accomplice. See to same effect *People* v. *Whipple,* 9 Cow. 707, *Taylor* v. *People,* 12 Hun, 213. See *Solander* v. *People,* 2 Colo. 48; *Com.* v. *Bosworth,* 22 Pick. 397.

See *United States* v. *Richards,* 149 Fed. 443; *State* v. *Conlin,* 45 Wash. 478, 88 Pac. 932; *Hanley* v. *United States,* 59 C. C. 153, 123 Fed. 849.

Contra as to caution, *Myers* v. *State,* 43 Fla. 500, 31 So. 275; *People* v. *Dumas,* 161 Mich. 45, 125 N. W. 766; *Murphy* v. *State,* 124 Wis. 635, 102 N. W. 1087.

[12] *R.* v. *Mellor,* Staff. Sum. Ass. 1833; *R.* v. *Saunders,* Worc. Spr. Ass. 1842; *R.* v. *Salt.* Staff. Spr. Ass. 184; 3 Russ. by Greav. 4th ed. p. 599; *Reg.* v. *Sparks,* 1 Fost. & F. 388.

See *People* v. *Whipple,* 9 Cow. 707; *Taylor* v. *People,* 12 Hun, 213.

[13] *Ray* v. *State,* 1 G. Greene, 316,

erly applied in those cases where the accomplice is a coindictee and even in these cases the court cannot intervene so as to exclude the accomplice, under statutes which make a coindictee a competent witness.[14]

§ 440. An accomplice is a voluntary coworker; informers, etc.—An accomplice is a person who knowingly, voluntarily, and with common intent with the principal offender, unites in the commission of the crime.[1] The co-operation in the crime must be real, not merely apparent.[2] The co-operation must be voluntary; hence one who co-operates under fear of life or liberty is not an accomplice.[3] The co-operation must

48 Am. Dec. 379; *Wight* v. *Rindskopf*, 43 Wis. 344.

See *State* v. *Colby*, 51 Vt. 291; *Freeman* v. *State*, 11 Tex. App. 92, 40 Am. Rep. 787; *Reg.* v. *Jellyman*, 8 Car. & P. 604; *Lindsay* v. *People*, 63 N. Y. 153; *Com.* v. *Smith*, 12 Met. 238; *Runnels* v. *State*, 28 Ark. 121 (said to be in discretion of the prosecuting attorney).

[14] See 19 Alb. L. J. 352.

[1] *Dunn* v. *People*, 29 N. Y. 523, 86 Am. Dec. 319; *Rhodes* v. *State*, 11 Tex. App. 503; *Allison* v. *State*, 14 Tex. App. 122; *Hancock* v. *State*, 14 Tex. App. 392.

See *Rex* v. *Neal*, 7 Car. & P. 168 (wife of accomplice requires corroboration); *McCarney* v. *People*, 83 N. Y. 408, 38 Am. Rep. 456 (constructive presence of accomplice); *Mitchell* v. *Com.* 33 Gratt. 845; *Harris* v. *State*, 7 Lea, 124; *State* v. *Jones*, 115 Iowa, 113, 88 N. W. 196; *Territory* v. *Baker*, 4 N. M. 236, 13 Pac. 30; *Redd* v. *State*, 63 Ark. 457, 40 S. W. 374; *People* v. *Collum*, 122 Cal. 186, 54 Pac. 589; *Cross* v. *People*, 47 Ill. 152, 95 Am. Dec. 474; *State* v. *Ean*, 90 Iowa, 534, 58 N. W. 898; *State* v. *Roberts*, 15 Or. 187, 13 Pac. 896; *Smith* v. *State*, 37 Tex. Crim. Rep. 488, 36 S. W. 586; *State* v. *Duff*, 144 Iowa, 142, 24 L.R.A.(N.S.) 625, 138 Am. St. Rep. 269, 122 N. W. 829.

[2] *United States* v. *Henry*, 4 Wash. C. C. 428, Fed. Cas. No. 15,351; *Parham* v. *State*, 10 Lea, 498; *Matthews* v. *State*, 6 Tex. App. 23.

See *Rex* v. *Hargrave*, 5 Car. & P. 170. But see *Reg.* v. *Coney*, L. R. 8 Q. B. Div. 534, 15 Cox, C. C. 46, 51 L. J. Mag. Cas. N. S. 66, 46 L. T. N. S. 307, 30 Week. Rep. 678, 46 J. P. 404; post, § 698; *Polk* v. *State*, 36 Ark. 117; *Gatlin* v. *State*, 40 Tex. Crim. Rep. 116, 49 S. W. 87; *Hunnicutt* v. *State*, 18 Tex. App. 498, 51 Am. Rep. 330.

But contra, see *State* v. *Umble*, 115 Mo. 452, 22 S. W. 378; *People* v. *Chadwick*, 7 Utah, 134, 25 Pac. 737.

[3] *Cook* v. *State*, 80 Ark. 495, 97

be active; mere knowledge that a crime is to be committed is not generally sufficient to make the party an accomplice;[4] hence a bystander does not become an accomplice by mere approval of a murder committed in his presence.[5] But a woman who is voluntarily guilty of incest,[6] or who voluntarily and deliberately co-operates with others to produce an abortion on herself, is an accomplice;[7] but she is not an accomplice where she herself is the victim of fraud, force, or undue influence.[8] The principal and the accomplice must co-operate in the commission of the same crime; hence, one who receives stolen goods with guilty knowledge, but did not co-operate in the larceny of them, is not an accomplice, because larceny and receiving stolen goods are distinct crimes;[9] so an officer, in taking an affidavit that he knows to be false, does not become an accomplice merely because he administers the oath.[10]

S. W. 683; *Green* v. *State*, 51 Ark. 189, 10 S. W. 266; *People* v. *Miller*, 66 Cal. 468, 6 Pac. 99; *Burns* v. *State*, 89 Ga. 527, 15 S. E. 748; *Beal* v. *State*, 72 Ga. 200.

[4] *Watson* v. *State*, 9 Tex. App. 237; *Edwards* v. *Territory*, 1 Wash. Terr. 196.

[5] *State* v. *Cox*, 65 Mo. 29.

[6] *Freeman* v. *State*, 11 Tex. App. 92, 40 Am. Rep. 787.

[7] *People* v. *Josselyn*, 39 Cal. 393; *Smith* v. *State*, 37 Ark. 274.

But see *Watson* v. *State*, 9 Tex. App. 237; 25 Alb. L. J. 239; *Reg.* v. *Jellyman*, 8 Car. & P. 604; *Rex* v. *Tate* [1908] 2 K. B. 680, 77 L. J. K. B. N. S. 1013, 99 L. T. N. S. 620, 72 J. P. 391, 52 Sol. Jo. 699, 21 Cox, C. C. 693, 15 A. & E. Ann. Cas. 698.

[8] *Rex* v. *Hargrave*, 5 Car. & P. 170; *Reg.* v. *Bowes*, 1 Best & S. 311, 2 Fost. & F. 157, 30 L. J. Q. B. N. S. 301, 7 Jur. N. S. 1158, 5 L. T. N. S. 147, 9 Week. Rep. 690, 9 Cox, C. C. 32; *Com.* v. *Boynton*, 116 Mass. 343; *Dunn* v. *People*, 29 N. Y. 523, 86 Am. Dec. 319; *State* v. *Hyer*, 39 N. J. L. 598; *Rafferty* v. *People*, 72 Ill. 37; *Com.* v. *Wood*, 11 Gray, 86; *State* v. *Briggs*, 9 R. I. 361, 11 Am. Rep. 270.

[9] *State* v. *Shapiro*, 216 Mo. 359, 115 S. W. 1022; *People* v. *Barric*, 49 Cal. 342, 1 Am. Crim. Rep. 178; *Roberts* v. *State*, 55 Ga. 220; *People* v. *Holden*, 127 App. Div. 758, 111 N. Y. Supp. 1019; *Springer* v. *State*, 102 Ga. 447, 30 S. E. 971; *Young* v. *State*, — Tex. Crim. Rep. —, 44 S. W. 835; *Walker* v. *State*, — Tex. Crim. Rep. —, 37 S. W. 423; *Crutchfield* v. *State*, 7 Tex. App. 65.

[10] *Wilson* v. *State*, 49 Tex. Crim. Rep. 496, 93 S. W. 547.

But there are certain relations recognized by the law, in which the voluntary co-operation of a person with the accused does not render such person an accomplice. Thus, those who co-operate with a view to aid justice by detecting a crime,[11] such as accepting money with which to purchase intoxicating liquors to obtain evidence of a violation of the law,[12] for the purpose of prosecuting the seller for an unlawful sale, is not an accomplice;[13] nor is an informer technically an accomplice;[14] nor a detective who joins a criminal organization for the purpose of exposing it, even though, to aid such exposure, he unites in and apparently approves its counsels;[15] nor the agent who purchases a libelous publication for the purpose of giving evidence against the publisher;[16] nor a dis-

[11] *Reg.* v. *Mullins,* 3 Cox, C. C. 326; *Rex* v. *Bickley,* 73 J. P. 239, 53 Sol. Jo. 402, 2 Crim. App. Rep. 53.

[12] *State* v. *O'Brien,* 35 Mont. 482, 90 Pac. 514, 10 A. & E. Ann. Cas. 1006.

[13] *Com.* v. *Downing,* 4 Gray, 29; *People* v. *Smith,* 1 N. Y. Crim. Rep. 72.

See *Dunn* v. *People,* 29 N. Y. 523, 86 Am. Dec. 319; *Williams* v. *State,* 55 Ga. 391, 1 Am. Crim. Rep. 413; *Stone* v. *State,* 3 Tex. App. 675; *Wright* v. *State,* 7 Tex. App. 574, 32 Am. Rep. 599. *People* v. *Smith,* 28 Hun, 626.

[14] *State* v. *McKean,* 36 Iowa, 343, 14 Am. Rep. 530; *People* v. *Farrell,* 30 Cal. 316; *People* v. *Barric,* 49 Cal. 342, 1 Am. Crim. Rep. 178.

[15] *Campbell* v. *Com.* 84 Pa. 187; *State* v. *McKean,* 36 Iowa, 343, 14 Am. Rep. 530.

See *Reg.* v. *Bernard,* 1 Fost. & F. 240; *Reg.* v. *Mullins,* 3 Cox, C. C. 526; *Com.* v. *Wood,* 11 Gray, 86; *Com.* v. *Cohen,* 127 Mass. 282; *Berry* v. *People,* 1 N. Y. Crim. Rep. 43, 57; Wharton, Crim. Law, 10th ed. § 149; articles in 25 Alb. L. J. 184; 30 Am. Rep. 129, 10 Fed. 97; London Law Times, July 30, 1881; *Harrington* v. *State,* 36 Ala. 236; *People* v. *Balanger,* 71 Cal. 17, 11 Pac. 799; *State* v. *Brownlee,* 84 Iowa, 473, 51 N. W. 25; *Com.* v. *Baker,* 155 Mass. 287, 29 N. E. 512; *State* v. *Beaucleigh,* 92 Mo. 490, 4 S. W. 666; *State* v. *Douglas,* 26 Nev. 196, 99 Am. St. Rep. 688, 65 Pac. 802; *People* v. *Noelke,* 94 N. Y. 137, 46 Am. Rep. 128; *People* v. *Collins,* 53 Cal. 185.

[16] *Rex* v. *Burdett,* 4 Barn. & Ald. 95, 22 Revised Rep. 539; *Brunswick* v. *Harmer,* 14 Q. B. 185, 19 L. J. Q. B. N. S. 20, 14 Jur. 110; *Swindle* v. *State,* 2 Yerg. 581, 24 Am. Dec. 515.

guised emissary who, by purporting to be a friend of the parties suspected, seeks to draw from them inculpatory information.[17]

But it has been held that where a detective actually assists and encourages the unlawful act, even though the avowed purpose is to prevent its commission, and although he kept the officers informed of the facts, he is nevertheless an accomplice,[18] and where he acts as a decoy his testimony must be rigidly scrutinized.[19]

Where the voluntary co-operation in the commission of the crime is admitted, the court may charge the jury that the witness is an accomplice; but where the evidence is conflicting as to the manner of co-operation, the question as to whether or not the witness is an accomplice should be submitted to the jury, under instructions as to voluntary and real co-operation in the commission of the offense charged.[20]

§ 441. Corroboration of accomplices.—According to the English rule, a conviction on the uncorroborated testi-

[17] *Reg.* v. *Young,* 2 Car. & K. 466, 1 Den. C. C. 194, 2 Cox, C. C. 142; *United States* v. *Bott,* 11 Blatchf. 346, Fed. Cas. No. 14,626; *United States* v. *Whittier,* 5 Dill. 35, Fed. Cas. No. 16,688.

See cases Wharton, Crim. Law, 10th ed. § 149.

[18] *Dever* v. *State,* 37 Tex. Crim. Rep. 396, 30 S. W. 1071.

See *Woodworth* v. *State,* 20 Tex. App. 375.

[19] *Saunders* v. *People,* 38 Mich. 218.

See *Wright* v. *State,* 7 Tex. App. 574, 32 Am. Rep. 599.

[20] *Com.* v. *Elliot,* 110 Mass. 104; *Com.* v. *Ford,* 111 Mass. 394; *Com.* v. *Grover,* 111 Mass. 395; *State* v. *Schlagel,* 19 Iowa, 169; *People* v. *Compton,* 123 Cal. 403, 56 Pac. 44; *People* v. *Bolanger,* 71 Cal. 17, 11 Pac. 799; *Williams* v. *State,* 33 Tex. Crim. Rep. 128, 47 Am. St. Rep. 21, 25 S. W. 629, 28 S. W. 958; *Zollicoffer* v. *State,* 16 Tex. App. 312; *White* v. *State,* 30 Tex. Crim. Rep. 652, 18 S. W. 462; *Childress* v. *State,* 86 Ala. 77, 5 So. 775; *State* v. *Lucas,* 57 Iowa, 501, 10 N. W. 868; *Territory* v. *West,* 14 N. M. 546, 99 Pac 343; *Lightfoot* v. *State,* — Tex. Crim. Rep. —, 78 S. W. 1075; *State* v. *Spotted Hawk,* 22 Mont. 33, 55 Pac. 1026; *State* v. *Kellar,* 8 N. D. 563, 73 Am. St. Rep. 775, 80 N. W.

mony of an accomplice is legal,[1] yet the practice is uniform for the judge, when the question is presented, to advise the jury that unless the accomplice is corroborated in such a way as to show the truth of his story, their duty is to acquit the accused.[2]

In the United States, while there are expressions to the effect that, technically, an accomplice's unsupported testimony will sustain a conviction,[3] the rule is generally adopted that

476; *State* v. *Jansen,* 22 Kan. 498. See *Price* v. *People,* 109 Ill. 109.

[1] See *Rex* v. *Atwood,* 1 Leach, C. L. 464; *Rex* v. *Durham,* 1 Leach, C. L. 478; *Reg.* v. *Farler,* 8 Car. & P. 106; *Rex* v. *Jones,* 2 Campb. 133, 11 Revised Rep. 680; *Rex* v. *Hastings,* 7 Car. & P. 152; *Re Meunier* [1894] 2 Q. B. 415, 63 L. J. Mag. Cas. N. S. 198, 10 Reports, 400, 71 L. T. N. S. 403, 42 Week. Rep. 637, 18 Cox, C. C. 15; *Re Crick,* 7 N. S. W. St. Rep. 576, 593; *Rex* v. *Tate,* [1908] 2 K. B. 680, 77 L. J. K. B. N. S. 1043, 99 L. T. N. S. 620, 72 J. P. 391, 52 Sol. Jo. 699, 21 Cox, C. C. 693, 15 A. & E. Ann. Cas. 698; *Jordaine* v. *Lashbrooke,* 7 T. R. 609; *Reg.* v. *Andrews,* 1 Cox, C. C. 183; *Reg.* v. *Avery,* 1 Cox, C. C. 206; *Reg.* v. *Stubbs,* Dears. C. C. 555, 25 L. J. Mag. Cas. N. S. 16, 1 Jur. N. S. 1115, 4 Week. Rep. 85, 7 Cox, C. C. 48; *Reg.* v. *Boyes,* 1 Best & S. 311, 2 Fost. & F. 157, 30 L. J. Q. B. N. S. 301, 7 Jur. N. S. 1158, 5 L. T. N. S. 147, 9 Week. Rep. 690, 9 Cox, C. C. 32; *Rex* v. *Jarvis,* 2 Moody & R. 40; *Smith's Case,* 1 Leach, C. L. 479; *R.* v. *Barrett,* 1 Crim. App. Rep. 64; Taylor, Ev. 10th ed. § 967.

[2] *Rex* v. *Dawber,* 3 Starkie, 34, note; *Rex* v. *Jones,* 2 Campb. 131, 11 Revised Rep. 680; Dick. Quar. Ses. 9th ed. 504; *Reg.* v. *Farler,* 8 Car. & P. 106; *Rex* v. *Birkett,* Russ. & R. C. C. 252; *Rex* v. *Hastings,* 7 Car. & P. 152; *Reg.* v. *Boyes,* 1 Best & S. 320, 2 Fost. & F. 157, 30 L. J. Q. B. N. S. 301, 7 Jur. N. S. 1158, 5 L. T. N. S. 147, 9 Week. Rep. 690, 9 Cox, C. C. 32; *R.* v. *Fild,* Berks Spring Assizes, 1828; *Rex* v. *Wells,* Moody & M. 326; *Rex* v. *Moores,* 7 Car. & P. 270; *Reg.* v. *Stubbs,* Dears. C. C. 555, 25 L. J. Mag. Cas. N. S. 16, 1 Jur. N. S. 1115, 4 Week. Rep. 85, 7 Cox, C. C. 48; post, § 442; *Rex* v. *Wilkes,* 7 Car. & P. 272; *State* v. *Potter,* 42 Vt. 495; *People* v. *Haynes,* 55 Barb. 450, S. C. 38 How. Pr. 369; *People* v. *Courtney,* 1 N. Y. Crim. Rep. 64; *People* v. *Ryland,* 1 N. Y. Crim. Rep. 123; *Reg.* v. *Dyke,* 8 Car. & P. 261.

See *Reg.* v. *Jellyman,* 8 Car. & P. 604; *Freeman* v. *State,* 11 Tex. App. 92, 40 Am. Rep. 787; supra, § 440; *Reg.* v. *Sparks,* 1 Fost. & F. 388.

[3] *Steinham* v. *United States,* 2 Paine, 168, Fed. Cas. No. 13,355; *Com.* v. *Price,* 10 Gray, 472, 71 Am. Dec. 668; *Com.* v. *Holmes,* 127

when a verdict is rendered exclusively on the testimony of an accomplice, it should be set aside by the court, and that it is the duty of the judge on the trial to instruct the jury not to convict on the evidence of an accomplice who is uncorroborated as to the essential elements of the case,[4] although in the absence of a statute requiring corroboration, a conviction may be sustained on the testimony of the accomplice

Mass. 424, 34 Am. Rep. 391; *State* v. *Stebbins*, 29 Conn. 463, 79 Am. Dec. 223; *People* v. *Costello*, 1 Denio, 53; *People* v. *Davis*, 21 Wend. 309; *Brown* v. *State*, 18 Ohio St. 496; *Stocking* v. *State*, 7 Ind. 326; *Nevill* v. *State*, 60 Ind. 309; *Johnson* v. *State*, 65 Ind. 269; *Ayers* v. *State*, 88 Ind. 275; *Earll* v. *People*, 73 Ill. 329; *Collins* v. *People*, 98 Ill. 584, 38 Am. Rep. 105; *State* v. *Brown*, 3 Strobh. L. 508; *Keithler* v. *State*, 10 Smedes & M. 192; *Dick* v. *State*, 30 Miss. 593; *White* v. *State*, 52 Miss. 216, 2 Am. Crim. Rep. 454; *State* v. *Jones*, 64 Mo. 391; *State* v. *Betsall*, 11 W. Va. 703; *State* v. *Russell*, 33 La. Ann. 135; *Ingalls* v. *State*, 48 Wis. 647, 4 N. W. 785.

See *State* v. *Hyer*, 39 N. J. L. 598. But see *Solander* v. *People*, 2 Colo. 48; *Olive* v. *State*, 11 Neb. 1, 7 N. W. 444; *State* v. *Holland*, 83 N. C. 624, 35 Am. Rep. 587.

[4] *United States* v. *Troax*, 3 McLean, 224, Fed. Cas. No. 16,540; *United States* v. *Goldberg*, 7 Biss. 175, Fed. Cas. No. 15,223; *State* v. *Howord*, 32 Vt. 380; *Com.* v. *Bosworth*, 22 Pick. 397; *Com.* v. *Price*, 10 Gray, 472, 71 Am. Dec. 668; *Com.* v. *Snow*, 111 Mass. 411; *Com.* v. *Scott*, 123 Mass. 222, 25 Am. Rep. 81; *Com.* v. *Grant*, Thacher, Crim. Cas. 438; *State* v. *Wolcott*, 21 Conn. 272; *People* v. *Evans*, 40 N. Y. 1; *People* v. *Haynes*, 55 Barb. 450, s. c. 38 How. Pr. 369; *People* v. *Williams*, 1 N. Y. Crim. Rep. 336; *Carroll* v. *Com.* 84 Pa. 107, 2 Am. Crim. Rep. 290; *Donnelly* v. *Com.* 6 W. N. C. 104; *Stocking* v. *State*, 7 Ind. 326; *State* v. *Willis*, 9 Iowa, 582; *State* v. *Schlagel*, 19 Iowa, 169; *State* v. *Thornton*, 26 Iowa, 79; *State* v. *Moran*, 34 Iowa, 453; *People* v. *Jenness*, 5 Mich. 305; *People* v. *Schweitzer*, 23 Mich. 301; *Stote* v. *Haney*, 19 N. C. (2 Dev. & B. L.) 390; *State* v. *Hardin*, 19 N. C. (2 Dev. & B. L.) 407; *Powers* v. *State*, 44 Ga. 209; *Lumpkin* v. *State*, 68 Ala. 56; *Marler* v. *State*, 68 Ala. 580; *Bowling* v. *Com.* 79 Ky. 604; *George* v. *State*, 39 Miss. 570; *Green* v. *State*, 55 Miss. 454; *Hughes* v. *State*, 58 Miss. 355; *State* v. *Watson*, 31 Mo. 361; *Craft* v. *State*, 3 Kan. 450; *State* v. *Bayonne*, 23 La. Ann. 78; *Irvin* v. *State*, 1 Tex. App. 301.

See *State* v. *Kellerman*, 14 Kan. 135. Under statutes, see *Ettinger* v. *Com.* 98 Pa. 338; *People* v. *Ryland*, 28 Hun, 568; *People* v. *Courtney*, 28 Hun, 589; *Childers* v. *State*, 52 Ga. 106; *State* v. *Davis*, 38 Ark. 581; *Welden* v. *State*, 10 Tex. App. 400; *Com.* v. *Scott*, 123 Mass. 222, 25 Am. Rep. 81.

alone.[5] While there is no presumption of law against the credibility of an accomplice,[6] yet he is to an extent an impeached witness, and at common law the universal practice

[5] Hale, P. C. 303; *Charnock's Case,* 12 How. St. Tr. 1377, 1454; *Rex* v. *Rudd,* Cowp. pt. 1, p. 331, 1 Leach, C. L. 115; *State* v. *Thompson,* 47 La. Ann. 1597, 18 So. 621; *State* v. *Donnelly,* 130 Mo. 642, 32 S. W. 1124; *Lawhead* v. *State,* 46 Neb. 607, 65 N. W. 779; *Bacon* v. *State,* 22 Fla. 51; *State* v. *Harkins,* 100 Mo. 666, 13 S. W. 830; *People* v. *Dyle,* 21 N. Y. 578; *Wisdom* v. *People,* 11 Colo. 170, 17 Pac. 519; *Rountree* v. *State,* 88 Ga. 457, 14 S. E. 712; *Wixson* v. *People,* 5 Park. Crim. Rep. 119, 128; *People* v. *O'Brien,* 60 Mich. 8, 26 N. W. 795; *Lindsay* v. *People,* 63 N. Y. 143, 154; *State* v. *Miller,* 97 N. C. 484, 2 S. E. 363; *Olive* v. *State,* 11 Neb. 1, 7 N. W. 444; *Com.* v. *Holmes,* 127 Mass. 424, 34 Am. Rep. 391; *State* v. *Russell,* 33 La. Ann. 135; *Juretich* v. *People,* 223 Ill. 484, 79 N. E. 181; *State* v. *Kelliher,* 49 Or. 77, 88 Pac. 867; *State* v. *Firmatura,* 121 La. 676, 46 So. 691; *Powell* v. *State,* 50 Tex. Crim. Rep. 592, 99 S. W. 1005; *Criner* v. *State,* 53 Tex. Crim. Rep. 174, 109 S. W. 128; *State* v. *Horner,* 1 Marv. (Del.) 504, 26 Atl. 73, 41 Atl. 139; *Ahearn* v. *United States,* 85 C. C. A. 428, 158 Fed. 606; *Caldwell* v. *State,* 50 Fla. 4, 39 So. 188; *Stone* v. *State,* 118 Ga. 705, 98 Am. St. Rep. 145, 45 S. E. 630; *Crenshaw* v. *State,* 48 Tex. Crim. Rep. 77, 85 S. W. 1147; *State* v. *Wigger,* 196 Mo. 90 93 S. W. 390; *State* v. *Simon,* 71 N. J. L. 142, 58 Atl. 107; *State* v. *Carey,* 76 Conn. 342, 56 Atl. 632; *People* v. *Feinberg,* 237 Ill. 348, 86 N. E. 584; *State* v. *Stewart,* — Del. —, 67 Atl. 786; *Com.* v. *Brennor,* 194 Mass. 17, 79 N. E. 799; *State* v. *Hauser,* 112 La. 313, 36 So. 396; *Cross* v. *People,* 47 Ill. 152, 95 Am. Dec. 474; *State* v. *Litchfield,* 58 Me. 267; *United States* v. *Giuliani,* 147 Fed. 594; *Hanley* v. *United States,* 59 C. C. A. 153, 123 Fed. 849; *State* v. *Perry,* — Iowa, —, 105 N. W. 507; *Weber* v. *Com.* 24 Ky. L. Rep. 1726, 72 S. W. 30; *State* v. *De Hart,* 109 La. 570, 33 So. 605; *State* v. *Shelton,* 223 Mo. 118, 122 S. W. 732; *State* v. *Jones,* 32 Mont. 442, 80 Pac. 1095; *State* v. *Register,* 133 N. C. 746, 46 S. E. 21; *Brenton* v. *Territory,* 15 Okla. 6, 78 Pac. 83, 6 A. & E. Ann. Cas. 769; *United States* v. *Ocampo,* 5 Philippine, 339; *Fruger* v. *State,* 56 Tex. Crim. Rep. 393, 120 S. W. 197; *State* v. *Fetterly,* 33 Wash. 599, 74 Pac. 810; *State* v. *Roller,* 30 Wash. 692, 71 Pac. 718; *Lanphere* v. *State,* 114 Wis. 193, 89 N. W. 128; *Means* v. *State,* 125 Wis. 650, 104 N. W. 815. See *Jahnke* v. *State,* 68 Neb. 154, 94 N. W. 158, 104 N. W. 154.

[6] *State* v. *Wolcott,* 21 Conn. 272; *Craft* v. *State,* 3 Kan. 450; *People* v. *Costello,* 1 Denio, 83; *People* v. *Lee,* 2 Utah, 441; *State* v. *Sassaman,* 214 Mo. 695, 114 S. W. 590.

was to advise the jury to acquit,[7] and so well settled has this practice become, that an omission so to advise the jury has been regarded as an omission of duty on the part of the judge.[8] Such testimony is received only from necessity, and is not favored by courts.[9]

A distinction must be observed in using the expressions "advise the jury" or "instruct the jury." Under the English practice, the judge may aid the jury with his own conclusions from the evidence, and his suggestions to them have not the binding force of an instruction on the law, and it is in this sense that the words "advise the jury" are used, in the absence of a controlling statute on questions of an accomplice's corroboration.

But in this country, where the judge is not allowed to give his opinion on the weight of the evidence, and where the statute requires corroboration, the charge of the court is not merely advisory, but constitutes an instruction, and must be followed.[10]

[7] *Reg.* v. *Farler,* 8 Car. & P. 106; *State* v. *Potter,* 42 Vt. 495; *Collins* v. *People,* 98 Ill. 584, 38 Am. Rep. 105; *Vantreese* v. *State,* — Tex. Crim. Rep. —, 128 S. W. 383. See *State* v. *Shelton,* 223 Mo. 118, 122 S. W. 732; *Rex* v. *Tate* [1908] 2 K. B. 680, 77 L. J. K. B. N. S. 1043, 99 L. T. N. S. 620, 72 J. P. 391, 52 Sol. Jo. 699, 21 Cox, C. C. 693, 15 A. & E. Ann. Cas. 698; *United States* v. *Quiamson,* 5 Philippine, 444; *United States* v. *Padlan,* 7 Philippine, 517; *Stone* v. *State,* 118 Ga. 705, 98 Am. St. Rep. 145, 45 S. E. 630; *State* v. *Sowell,* 85 S. C. 278, 67 S. E. 316.

[8] *Solander* v. *People,* 2 Colo. 48; *Com.* v. *Bosworth,* 22 Pick. 397; *Holmgren* v. *United States,* 217 U. S. 509, 54 L. ed. 861, 30 Sup. Ct. Rep. 588, 19 A. & E. Ann. Cas. 778.

[9] *United States* v. *Lancaster,* 2 McLean, 431, Fed. Cas. No. 15,556; *United States* v. *Henry,* 4 Wash. C. C. 428, Fed. Cas. No. 15,351; *State* v. *Shields,* 45 Conn. 256; *Sinclair* v. *Jackson,* 47 Me. 102, 74 Am. Dec. 476; *People* v. *Whipple,* 9 Cow. 707; *State* v. *Shelton,* 223 Mo. 118, 122 S. W. 732; see *People* v. *Schmitz,* 7 Cal. App. 330, 15 L.R.A.(N.S.) 717, 94 Pac. 407, 419; *Barbe* v. *Territory,* 16 Okla. 562, 86 Pac. 61.

[10] *People* v. *Bonney,* 98 Cal. 278, 33 Pac. 98; *Craft* v. *Com.* 80 Ky. 349. See *People* v. *O'Brien,* 96 Cal. 171, 31 Pac. 45; *Taylor* v. *Com.* 10 Ky. L. Rep. 169, 8 S. W. 461; *Brace*

§ 442. Accomplice; extent of corroboration.—The corroboration requisite to validate the testimony of any alleged accomplice should be to the identity of the person accused. Any other corroboration would be delusive, since, if any corroboration in matters not connecting the accused with the offense were sufficient, the party, on the case against him, having no hope of escape, could, by his mere oath, transfer to another the conviction hanging over himself.[1] "There may be many witnesses, therefore, who give testimony which agrees with that of the accomplice, but which, if it does not serve to identify the accused parties, is no corroboration of the accomplice; the real danger being that the accomplice should relate the circumstances truly, and at the same time attribute a share in the transaction to an innocent person. It may indeed be taken that it is almost the universal opinion that the testimony of the accomplice should be corroborated as to the person of the prisoner against whom he speaks."[2] Where there is corroboration as to a part only of the de-

v. *State*, 43 Tex. Crim. Rep. 48, 62 S. W. 1067; *Fisher* v. *Territory*, 17 Okla. 455, 87 Pac. 301. But see *McKinney* v. *State*, 48 Tex. Crim. Rep. 402, 88 S. W. 1012.

[1] See cases cited, § 441; *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; *Com.* v. *Drake*, 124 Mass. 21; *State* v. *Wolcott*, 21 Conn. 272; *Carroll* v. *Com.* 84 Pa. 107, 2 Am. Crim. Rep. 290; *Watson* v. *State*, 95 Pa. 418; *State* v. *Graff*, 47 Iowa, 384; *State* v. *Hennessy*, 55 Iowa, 299, 7 N. W. 641; *State* v. *Allen*, 57 Iowa, 431, 10 N. W. 805; *State* v. *Lawlor*, 28 Minn. 216, 9 N. W. 698; *State* v. *Hing*, 16 Nev. 307, 4 Am. Crim. Rep. 375; *State* v. *Adams*, 20 Kan. 311; *Childers* v. *State*, 52 Ga. 106; *Middleton* v. *State*, 52 Ga. 527, 1 Am. Crim. Rep. 194; *McCalla* v. *State*, 66 Ga. 346; *State* v. *Smalls*, 11 S. C. 262; *Craft* v. *Com.* 80 Ky. 349; *State* v. *Odell*, 8 Or. 30; *Hoyle* v. *State*, 4 Tex. App. 239. Though see *State* v. *Watson*, 31 Mo. 361.

[2] Roscoe, Crim. Ev. 130; *Rex* v. *Addis*, 6 Car. & P. 388; *Kelsey's Case*, 2 Lewin, C. C. 45; *Rex* v. *Webb*, 6 Car. & P. 595; *Rex* v. *Wilkes*, 7 Car. & P. 272; *Reg.* v. *Farler*, 8 Car. & P. 106. See *Reg.* v. *Stubbs*, 25 L. J. Mag. Cas. N. S. 16, Dears. C. C. 555, 1 Jur. N. S. 1115, 4 Week. Rep. 85, 7 Cox, C. C. 48; *Ettinger* v. *Com.* 98 Pa. 338; *Rex* v. *Birkett*, 8 Car. & P. 732.

fendants, the better practice, as is elsewhere seen more fully, is to direct an acquittal of the defendants to whom the corroboration does not extend.[3] Nor, under a statute precluding conviction on the uncorroborated testimony of accomplices, can a statement by one accomplice be ordinarily regarded as corroboration of the statement by another.[4]

The corroboration need not extend to every part of the accomplice's evidence, because there would be no occasion to offer him as a witness if his testimony could be completely proven by other evidence free from suspicion,[5] corroboration, as here used, meaning independent evidence supporting the testimony of the accomplice.[6]

It is not sufficient to corroborate an accomplice as to the facts of the case generally. He should be corroborated as to

[3] Supra, § 441; *Com.* v. *Scott,* 123 Mass. 222, 25 Am. Rep. 81.

Corroboration by facts as well as witnesses. See *State* v. *Stanley,* 48 Iowa, 221; *Territory* v. *Mahaffey.* 3 Mont. 112; *Jernigan* v. *State,* 10 Tex. App. 546.

Cross-examination discussed. Post, § 444.

[4] *Heath* v. *State,* 7 Tex. App. 464; *Hannahan* v. *State,* 7 Tex. App. 664; *Com.* v. *Elliot,* 110 Mass. 104.

Confessions may form a sufficient corroboration. *People* v. *Cleveland,* 49 Cal. 578; *Partee* v. *State,* 67 Ga. 570; *Reg.* v. *Cramp,* 14 Cox, C. C. 390; *State* v. *Twitty,* 9 N. C. (2 Hawks) 248; *Kinchelow* v. *State,* 5 Humph. 9; *Johnson* v. *State,* 4 G. Greene, 65; *State* v. *Williamson,* 42 Conn. 261; *Porter* v. *Com.* 22 Ky. L. Rep. 1657, 61 S. W. 16; *Howard* v. *Com.* 110 Ky. 356, 61 S. W. 756, 13 Am. Crim. Rep. 533; *Powers* v. *Com.* 110 Ky. 386, 53 L.R.A. 245, 61 S. W. 753, 13 Am. Crim. Rep. 464.

[5] *Rex* v. *Swallow,* 31 How. St. Tr. 971; *State* v. *Allen,* 57 Iowa, 431, 10 N. W. 805; *United States* v. *Howell,* 4 Inters. Com. Rep. 818, 56 Fed. 21; *United States* v. *Ybanez,* 53 Fed. 536, 538, 541; *People* v. *Elliott,* 106 N. Y. 288, 12 N. E. 602; *Com.* v. *Holmes,* 127 Mass. 424, 34 Am. Rep. 391; *Rex* v. *Addis,* 6 Car. & P. 388; *Com.* v. *Brooks,* 9 Gray, 299; *People* v. *Balkwell,* 143 Cal. 259, 76 Pac. 1017; *Cook* v. *State,* 75 Ark. 540, 87 S. W. 1176; *State* v. *Black,* 143 Mo. 166, 44 S. W. 340; *McCrory* v. *State,* 101 Ga. 779, 28 S. E. 921; *Hargrove* v. *State,* 125 Ga. 270, 54 S. E. 164; *Lanasa* v. *State,* 109 Md. 602, 71 Atl. 1058.

[6] *People* v. *Elliott,* 5 N. Y. Crim. Rep. 204; *State* v. *McLain,* 159 Mo. 340, 60 S. W. 736; *Com.* v. *Holmes,* 127 Mass. 424, 34 Am. Rep. 391.

some material fact which tends to prove that the accused was connected with the crime charged. The corroboration that merely raises a suspicion of guilt, because the accused had an opportunity to commit the offense, is not sufficient.[7] The extent of corroboration depends, in a degree, upon the character of the crime; hence the conviction of a misdemeanor might be sustained by a corroboration that would not satisfy the court in the case of a felony.[8] The question as to whether or not the testimony of the accomplice is so corroborated as to establish the guilt of the accused beyond a reasonable doubt is a question for the jury to determine.[9]

§ 443. Accomplice; pardon.—Though an accomplice, when called as a witness by the state, makes a clean breast, and exhibits all the facts in the case, however criminatory, he is not in law entitled to pardon; nor can he plead the fact that his testimony was so invited and so used, in bar of a prosecution against him for the offense he confessed when

[7] *People* v. *Sciaroni,* 4 Cal. App. 698, 89 Pac. 133; *Smith* v. *State,* 5 Ga. App. 833, 63 S. E. 917; *People* v. *Ames,* 39 Cal. 403; *State* v. *Schlagel,* 19 Iowa, 169; *State* v. *Maney,* 54 Conn. 178, 6 Atl. 401, 7 Am. Crim. Rep. 25; *People* v. *Melvane,* 39 Cal. 614; *People* v. *Clough,* 73 Cal. 348, 15 Pac. 5; *People* v. *McLean,* 84 Cal. 480, 24 Pac. 32; *People* v. *Koening,* 99 Cal. 574, 34 Pac. 238; *People* v. *Smith,* 98 Cal. 218, 33 Pac. 58; *People* v. *Plath,* 100 N. Y. 590, 53 Am. Rep. 236, 3 N. E. 790, 6 Am. Crim. Rep. 1; *People* v. *Thompson,* 50 Cal. 481; *Crittenden* v. *State,* 134 Ala. 145, 32 So. 273; *Rawlins* v. *State,* 124 Ga. 31, 52 S. E. 1; *Byrd* v. *State,* 49 Tex. Crim. Rep. 279, 93 S. W. 114; *People* v. *Hoagland,* 138 Cal. 338, 71 Pac. 359, 14 Am. Crim. Rep. 305; *Milner* v. *State,* 7 Ga. App. 82, 66 S. E. 280; *Harrell* v. *State,* 121 Ga. 607, 49 S. E. 703; *State* v. *Spotted Hawk,* 22 Mont. 33, 55 Pa. 1026; *Cooper* v. *Territory,* 19 Okla. 496, 91 Pac. 1032; *People* v. *Bunkers,* 2 Cal. App. 197, 84 Pac. 364, 370; *Vails* v. *State,* — Tex. Crim. Rep. —, 128 S. W. 1117.

[8] *Bell* v. *State,* 73 Ga. 572, 574; *Rex* v. *Jarvis,* 2 Moody & R. 40; *Reg.* v. *Young,* 10 Cox, C. C. 371; *United States* v. *Kessler,* Baldw. 15, 22, Fed. Cas. No. 15,528.

[9] *Com.* v. *Holmes,* 127 Mass. 424, 437, 34 Am. Rep. 391; *People* v. *Everhardt,* 104 N. Y. 591, 594, 11 N. E. 62.

on the witness stand.[1] His claim to pardon depends exclusively on executive discretion.[2] The accomplice, it has been ruled, cannot, when afterwards put on trial, be granted a continuance of the case, so as to enable him to apply for pardon.[3] It is the practice in England, in such cases, where the accomplice appears to have been the dupe, and where his services on the trial were valuable, to grant a pardon; though, even if there be no other objection, the pardon will be withheld if he fenced on trial, or withheld part of the facts.[4] In some jurisdictions this is provided by statute. When the accomplice, after making a confession under promise of pardon, refuses to testify, the confession may be subsequently put in evidence against him.[5] Nor can he, if he disclose part of the facts, withhold the rest. He must tell the whole.[6]

Where the case against the accomplice is withdrawn from

[1] See contra, where there is a stipulation not to prosecute. *Hardin* v. *State,* 12 Tex. App. 186; Wharton, Crim. Pl. & Pr. § 447.

[2] Wharton, Crim. Pl. & Pr. § 536; *Com.* v. *Brown,* 103 Mass. 422; *Com.* v. *Woodside,* 105 Mass. 594; *State* v. *Lyon,* 81 N. C. 600, 31 Am. Rep. 518; 2 Starkie, Ev. 4th Am. ed. 15; Roscoe, Crim. Ev. 9th Am. ed. 597; *Ex parte Wells,* 18 How. 312, 15 L. ed. 424; Clifford, J., *United States* v. *Ford,* 99 U. S. 594, 25 L. ed. 399; *State* v. *Graham,* 41 N. J. L. 15, 32 Am. Rep. 174; 17 Alb. L. J. 420, et seq.; *Rex* v. *Lee,* Russ & R. C. C. 364, 1 Burns, 212; *Rex* v. *Brunton,* Russ. & R. C. C. 454, s. p.; *R.* v. *West,* Phillipps, Ev. 8th ed. 28 (n).

[3] *Com.* v. *Dabney,* 1 Rob. (Va.) 696, 40 Am. Dec. 717. Though see Clifford, J., *United States* v. *Ford,* 99 U. S. 594, 25 L. ed. 399; *United States* v. *Lee,* 4 McLean, 103, Fed. Cas. No. 15,588.

[4] *Garside's Case,* 2 Lewin, C. C. 38; *United States* v. *Lee,* 4 McLean, 103, Fed. Cas. No. 15,588; *Reg.* v. *Hinks,* 2 Car. & K. 464, s. c. 1 Den. C. C. 84; *Wight* v. *Rindskopf,* 43 Wis. 349; *Rex* v. *Rudd,* 1 Leach, C. L. 115, Cowp. pt. 1, p. 331; *People* v. *Whipple,* 9 Cow. 707; *Runnels* v. *State,* 28 Ark. 121; 3 Cent. L. J. 381.

[5] *Com.* v. *Knapp,* 10 Pick. 478, 20 Am. Dec. 534.

See, to same effect, *Moore's Cases,* 2 Lewin, C. C. 37; *Reg.* v. *Gillis,* 11 Cox, C. C. 69.

[6] *Com.* v. *Knapp,* 10 Pick. 478, 20 Am. Dec. 534; *Com.* v. *Price,* 10 Gray, 472, 71 Am. Dec. 668; *Alderman* v. *People,* 4 Mich. 414, 69 Am. Dec. 321; *State* v. *Condry,* 50 N. C. (5 Jones, L.) 418.

See fully post, § 470.

the jury, and he is called as a witness, this operates as a bar to a further prosecution for the same offense.[7] And where an accomplice tells everything candidly and fully on the trial of his confederate, the court, when allowed by statute, may approve the entering of a *nolle prosequi* against him.[8]

§ 444. Latitude on cross-examination of an accomplice.—Great latitude, from the nature of the case, is allowed in the cross-examination of an accomplice, and the most searching questions are permitted in order to test his veracity.[1] He will be compelled to make a full statement of the matter, notwithstanding the fact that it may criminate him,[2] but he is not required to answer as to other crimes.[3]

§ 445. Codefendants at common law not admissible for each other.[1]—At common law, an accomplice not a codefendant is always a competent witness for the defendant on trial.[2] But when indicted jointly with the defendant on trial, although he has pleaded and defended separately, he is not, at common law, a competent witness for his codefendants, un-

[7] *People* v. *Bruzzo*, 24 Cal. 41. See *Lindsay* v. *People*, 63 N. Y. 153; *Ray* v. *State*, 1 G. Greene, 316, 48 Am. Dec. 379.

[8] *Long* v. *State*, 86 Ala. 36, 44, 5 So. 443; *State* v. *Graham*, 41 N. J. L. 15, 16, 20, 32 Am. Rep. 174; *State* v. *Lyon*, 81 N. C. 600, 31 Am. Rep. 518; *United States* v. *Ford*, 99 U. S. 594, 25 L. ed. 399; *Ex parte Irvine*, 74 Fed. 954; *Allen* v. *State*, 10 Ohio St. 287; *People* v. *Langtree*, 64 Cal. 256, 30 Pac. 813; *Tullis* v. *State*, 39 Ohio St. 200.

[1] *Lee* v. *State*, 21 Ohio St. 151; *Marler* v. *State*, 67 Ala. 55, 42 Am. Rep. 95; *Brown* v. *Com.* 11 Leigh, 711.

[2] *Com.* v. *Price*, 10 Gray, 472, 71 Am. Dec. 668; *Alderman* v. *People*, 4 Mich. 414 69 Am. Dec. 321; *Hamilton* v. *People*, 29 Mich. 173, 1 Am. Crim. Rep. 618; infra, § 470; *State* v. *Quarles*, 13 Ark. 307; *Bedgood* v. *State*, 115 Ind. 275, 17 N. E. 621, 623.

[3] *R.* v. *West*, Phillipps, Ev. 8th ed. 28 (n); *Pitcher* v. *People*, 16 Mich. 142.

[1] Supra, § 439.

[2] *Bilmore's Case*, 1 Hale, P. C. 305.

See *Solander* v. *People*, 2 Colo. 48.

less immediately acquitted by a jury, or a *nolle prosequi* be entered; and the same rule applies to accessaries.[3] Whether the trial be joint or several, the rule is said to be the same;[4] and wherever the defendant is not permitted to testify for the others, the wife of such defendant is excluded at common law, although her husband be not then on trial.[5] But there is high authority to the effect that in cases where the trials are separate, and where the acquittal of one defendant does not involve the acquittal of the other, the latter may be examined, if he is willing, for his codefendant.[6]

On a joint trial, when a motion is made by one defendant for a direction to the jury to acquit another defendant, on the ground that there is no evidence against him, so that he can be a witness for the party making the motion, it is for

[3] *Staup* v. *Com.* 74 Pa. 458; *Kehoe* v. *Com.* 85 Pa. 127; *Davis* v. *State,* 38 Md. 15, 46; *Henderson* v. *State,* 70 Ala. 23, 45 Am. Rep. 72; *State* v. *Mooney,* 1 Yerg. 431; *State* v. *Calvin,* R. M. Charlt. (Ga.) 151; *State* v. *Martin,* 74 Mo. 547.

[4] *Winsor* v. *Reg.* L. R. 1 Q. B. 390, 7 Best & S. 490, 35 L. J. Mag. Cas. N. S. 161, 12 Jur. N. S. 561, 14 L. T. N. S. 567, 14 Week. Rep. 695, 10 Cox, C. C. 327; *State* v. *Young,* 39 N. H. 283; *Com.* v. *Marsh,* 10 Pick. 57; *Com.* v. *Eastman,* 1 Cush. 189, 48 Am. Dec. 596; *People* v. *Bill,* 10 Johns. 95; *People* v. *Donnelly,* 2 Park. Crim. Rep. 182; *People* v. *Williams,* 19 Wend. 377; *People* v. *McIntyre,* 1 Park. Crim. Rep. 372, s. c. 9 N. Y. 38; *Shay* v. *Com.* 36 Pa. 305; *Staup* v. *Com.* 74 Pa. 458; *Kehoe* v. *Com.* 85 Pa. 127; *State* v. *Smith,* 24 N. C. (2 Ired. L.) 402; *State* v. *Edwards,* 19 Mo. 677; *Chandler* v. *Com.* 1 Bush, 41; *State* v. *Mooney,* 1 Yerg. 431; *State* v. *Dumphey,* 4 Minn. 438, Gil. 340; *Brown* v. *State,* 24 Ark. 626.

[5] Supra, § 391.

[6] *United State* v. *Henry,* 4 Wash. C. C. 428, Fed. Cas. No. 15,351; *Moffitt* v. *State,* 2 Humph. 99, 36 Am. Dec. 301; *Marshall* v. *State,* 8 Ind. 498; *Hunt* v. *State,* 10 Ind. 69; *Brown* v. *State,* 18 Ohio St. 496; *Laughlin* v. *Com.* 13 Bush, 261; *Christian* v. *Com.* 13 Bush, 264; *Poteete* v. *State,* 9 Baxt. 261, 40 Am. Rep. 90; *McKenzie* v. *State,* 24 Ark. 636; *People* v. *Labra,* 5 Cal. 183; *People* v. *Newberry,* 20 Cal. 439; *Garret* v. *State,* 6 Mo. 1; *State* v. *Stotts,* 26 Mo. 307; *State* v. *Blennerhassett,* Walk. (Miss.) 7; *Moss* v. *State,* 17 Ark. 327, 65 Am. Dec. 433. See *Lazier* v. *Com.* 10 Gratt. 717; *State* v. *Gardner,* 84 N. C. 732.

the court to determine whether sufficient evidence exists.[7] And no exception lies to such refusal.[8]

A codefendant or accomplice, who has pleaded guilty or been convicted, provided he is not thereby rendered infamous, is a competent witness for his codefendants, supposing the case against him to be closed.[9] But as long as the case, as far as he is concerned, continues open, he is at common law disqualified in all cases in which he would have been disqualified if called on trial.[10]

A joinder of defendants, unless the offense be joint, does not work such disability.[11]

Under the statutes removing disability of defendants, one defendant may be a witness for his codefendant, to the same effect as he could be a witness for himself.[12]

The questions of misjoinder of defendants, and of a right to a new trial after acquittal, are discussed elsewhere.[13]

[7] *United States* v. *Gibert,* 2 Sumn. 20, Fed. Cas. No. 15,204; *United States* v. *Wilson,* Baldw. 78, Fed. Cas. No. 16,730; *State* v. *Soper,* 16 Me. 293, 33 Am. Dec. 665; *People* v. *Howell,* 4 Johns. 296; *People* v. *Vermilyea,* 7 Cow. 108; *Com.* v. *Manson,* 2 Ashm. (Pa.) 32; *Bixbe* v. *State,* 6 Ohio, 86; *State* v. *Smith,* 24 N. C. (2 Ired. L.) 402; *State* v. *Wise,* 7 Rich. L. 412; *Brister* v. *State,* 26 Ala. 109.

[8] *United States* v. *Marchant,* 12 Wheat. 480, 6 L. ed. 700; *Com.* v. *Robinson,* 1 Gray, 555.

See *Shay* v. *Com.* 36 Pa. 305.

[9] *Rex* v. *Ford,* 2 Salk. 689; *Reg.* v. *George,* Car. & M. 111; *State* v. *Jones,* 51 Me. 126; *Com.* v. *Smith,* 12 Met. 238; *Carpenter* v. *Crane,* 5 Blackf. 119; *State* v. *Stotts,* 26 Mo. 307; *Delozier* v. *State,* 1 Head, 45; *Ballard* v. *Noaks,* 2 Ark. 45.

See *United States* v. *Clements,* 3 Hughes, 509, Fed. Cas. No. 14,817; *State* v. *Turner,* Houst. Crim. Rep. (Del.) 76.

[10] *State* v. *Young,* 39 N. H. 283; *Kehoe* v. *Com.* 85 Pa. 127.

[11] *Strawhern* v. *State,* 37 Miss. 422.

[12] *State* v. *Gigher,* 23 Iowa, 318; supra, § 427.

[13] Wharton, Crim. Pl. & Pr. §§ 301 et seq., 873, 874.

X. Cross-examination of Witnesses.

§ 446. Exclusion of witnesses.—Previous to a trial all witnesses may, by order of the court on motion of counsel on either side, be sequestered, due ground being shown, in such a way as may prevent those not yet examined from hearing the testimony of witnesses on the stand.[1] This expedient is designed to detect falsehood as well as to prevent any witness from coloring his or her testimony unduly by hearing what is testified to by others.[2] It finds its origin in as early and ancient an authority as the Holy Scriptures, and an interesting anecdote is found in Mr. Wigmore's valuable treatise, relating to this subject.[3]

[1] *Southey* v. *Nash,* 7 Car. & P. 632; *Selfe* v. *Isaacson,* 1 Fost. & F. 194; *People* v. *Duffy,* 1 Wheeler, C. C. 123; *People* v. *Green,* 1 Park. Crim. Rep. 11; *State* v. *Zellers,* 7 N. J. L. 220; *Errissman* v. *Errissman,* 25 Ill. 136; *Johnson* v. *State,* 2 Ind. 652; *Benaway* v. *Conyne,* 3 Chand. (Wis.) 214; *Nelson* v. *State,* 2 Swan, 237; *Thomas* v. *State,* 27 Ga. 287; *Bird* v. *State,* 50 Ga. 585; *State* v. *Sparrow,* 7 N. C. (3 Murph.) 487; *McLean* v. *State,* 16 Ala. 672; *State* v. *Brookshire,* 2 Ala. 303; *State* v. *Fitzsimmons,* 30 Mo. 236; *People* v. *Sprague,* 53 Cal. 422. See Wharton, Crim. Pl. & Pr. § 569; *State* v. *Hopkins,* 50 Vt. 316, 3 Am. Crim. Rep. 357; *People* v. *Garnett,* 29 Cal. 622; *Allen* v. *State,* 61 Miss. 627, 4 Am. Crim. Rep. 252; *Rocks* v. *State,* 65 Ga. 330, 4 Am. Crim. Rep. 483; *State* v. *McGraw,* 35 S. C. 283, 14 S. E. 630; *United States* v. *White,* 5 Cranch, C. C. 38, Fed. Cas. No. 16,675; *Com.* v. *Hersey,* 2 Allen, 173; 2 Best. Ev. § 636; *Hey* v. *Com.* 32 Gratt. 946, 34 Am. Rep. 799; 1 Greenl. Ev. § 432.

Witnesses may, however, listen to the opening statement if separated afterwards. *Hughes* v. *State,* 128 Ga. 19, 57 S. E. 236; *Wilson* v. *State,* 52 Ala. 299.

Where there is no statute on the subject, it is within the discretion of the court to place witnesses "under the rule." 2 Wharton, Crim. Pl. & Pr. § 569; *Binfield* v. *State,* 15 Neb. 484, 19 N. W. 607. See also *Vance* v. *State,* 56 Ark. 402, 19 S. W. 1066; *Zoldoske* v. *State,* 82 Wis. 580, 52 N. W. 778; Abbott, Trial Brief, Crim. p. 303; *Com.* v. *Follansbee,* 155 Mass. 274, 29 N. E. 471; *People* v. *Considine,* 105 Mich. 149, 63 N. W. 196; *Bone* v. *State,* 63 Ala. 185; *Webb* v. *State,* 100 Ala. 47, 14 So. 865.

[2] *Louisville & N. R. Co.* v. *York,* 128 Ala. 305, 30 So. 676; *State* v. *Zellers,* 7 N. J. L. 226; 3 Wigmore, Ev. § 1837.

[3] "Two elders coveted Susanna, a

very fair woman and pure, the wife of Joacim; they tempted her, but she resisted; then they plotted, and charged her with adultery; and she was brought before the assembly, and the elders said: 'As we walked in the garden (of Joacim) alone, this woman came in with two maids, and shut the garden doors, and sent the maids away. Then a young man who there was hid came unto her, and lay with her. Then we that stood in the corner of the garden, seeing this wickedness, ran unto them. And when we saw them together, the man we could not hold, for he was stronger than we, and opened the door and leaped out. But having taken this woman, we asked who the young man was, but she would not tell us. These things do we testify.' Then the assembly believed them, as those that were the elders and judges of the people. . . . But (Daniel), standing in the midst of them, said: . . 'Are ye such fools, ye sons of Israel, that without examination or knowledge of the truth ye have condemned a daughter of Israel?' . . . Then Daniel said unto them, 'Put these two aside, one far from another, and I will examine them,' So when they were put asunder one from another, he called one of them, and said unto him: 'Now, then, if thou hast seen her, tell me, under what tree sawest thou them companying together?' who answered, 'Under a mastick tree.' And Daniel said, 'Very well; thou hast lied against thine own head.' . . So he put him aside, and commanded to bring the other, and said unto him: . . . 'Now, therefore, tell me, under what tree didst thou take them companying together?' who answered, 'Under an holm tree.' Then said Daniel unto him, 'Well, thou hast also lied against thine own head.' . . . With that, all the assembly cried out with a loud voice, and praised God, who saveth them that trust in him. And they arose against the two elders, for Daniel had convicted them of false witness, by their own mouth. . . . From that day forth was Daniel had in great reputation in the sight of the people."

The story of Susanna's vindication, sanctioned as it was by its place in the Scriptures, came to serve as a powerful argument in English courts, after the spread of printing and the popularization of the Bible made the people at large familiar with it. From almost the beginning of our recorded trials, the story is found repeatedly cited, and was a favorite text of invocation for those who hoped in the same way to prove their innocence. Meantime, however, it is clear that the expedient already had in English practice an independent and continuous existence, even in the time of those earlier modes of trial which preceded the jury, and were a part of our inheritance of the common Germanic law. It appears to have been customary to examine separately the secta-witness and the transaction-and covenant-witnesses, as well as other persons from whom a consistent story was expected in order to obtain legal action; and the process seems to have had substantially the same object and probative operation that

Whoever is yet to be examined, though the complaining witness, is subject to such rule.[4] A witness's testimony, it is true, will not be necessarily ruled out because he remains in court, even wilfully, after being ordered to withdraw,[5] but he exposes himself by his disobedience to an attachment for contempt.[6] But where the party calling the witness is to blame for disobedience, then the witness may be excluded.[7] To prevent a witness from being unduly influenced by the knowledge of the line to which his testimony is expected to reach, it has even been held that the court will order his withdrawal during a legal argument in respect to his testimony.[8] But this goes too far, since it would require witnesses to leave the court whenever the counsel calling them states, as he constantly would be compelled to do, what he intends to prove by questions he may put.

we find in it to-day. 3 Wigmore, Ev. § 1837. See also reference to trial of Susanna by Daniel. *Thomas* v. *State*, 27 Ga. 287.

[4] *Reg.* v. *Newman*, 3 Car. & K. 242. See instances from Bracton's Note Book cited in Thayer, Ev. 14; 3 Wigmore, Ev. § 1837, notes 5–7.

[5] *Thomas* v. *David*, 7 Car. & P. 350; *Gregg* v. *State*, 3 W. Va. 705; *Laughlin* v. *State*, 18 Ohio, 99, 51 Am. Dec. 444; *State* v. *Hare*, 74 N. C. 591; *Davenport* v. *Ogg*, 15 Kan. 363; *Sartorious* v. *State*, 24 Miss. 602; *People* v. *Hong Ah Duck*, 61 Cal. 387; *Wilson* v. *State*, 52 Ala. 299 (holding that in such case the examination of the witness is discretionary with the court); *Degg* v. *State*, 150 Ala. 3, 43 So. 484; *Vickers* v. *People*, 31 Colo. 491, 73 Pac. 845, 12 Am. Crim. Rep. 631; *Lassiter* v. *State*, 67 Ga. 739; *Bulliner* v. *People*, 95 Ill. 394; *Grimes* v. *Martin*, 10 Iowa, 347; *Parker* v. *Com.* 21 Ky. L. Rep. 406, 51 S. W. 573; *State* v. *Fannon*, 158 Mo. 149, 59 S. W. 75; *Holder* v. *United States*, 150 U. S. 91, 37 L. ed. 1010, 14 Sup. Ct. Rep. 10; *Parker* v. *State*, 67 Md. 329, 1 Am. St. Rep. 387, 10 Atl. 219; *Hey* v. *Com.* 32 Gratt. 946, 34 Am. Rep. 799.

[6] *Lassiter* v. *State*, 67 Ga. 739; *Chandler* v. *Horne*, 2 Moody & R. 423; *Bulliner* v. *People*, 95 Ill. 394; *Rooks* v. *State*, 65 Ga. 330, 4 Am. Crim. Rep. 483; *Bell* v. *State*, 44 Ala. 393; *People* v. *Boscovitch*, 20 Cal. 436; Wharton, Crim. Pl. & Pr. §§ 948 et seq.

[7] *Dyer* v. *Morris*, 4 Mo. 214; *Bird* v. *State*, 50 Ga. 585; 1 Bishop, Crim. Proc. § 1191; *State* v. *Gesell*, 124 Mo. 531, 27 S. W. 1101.

[8] *Reg.* v. *Murphy*, 8 Car. & P. 307; *Nelson* v. *State*, 2 Swan, 237.

Yet in all cases where there is reason to believe that a willing witness is waiting to catch his instructions from counsel, the witness should be excluded. The rule, however, will be made to bend as far as possible to the convenience of witnesses. Thus, experts and other persons engaged in assisting counsel may be permitted to remain in court until the expert testimony begins;[9] and to attorneys it is especially conceded that they may be excused, when personally required in court, from such withdrawal.[10] And it has also been ruled that a witness whose testimony is sought to be impeached has a right to be in court notwithstanding a rule of general exclusion;[11] and the defendant himself is always, of course, to be permitted to remain if he is a witness, on the ground that he is to be confronted by the witnesses testifying against him.[12]

[9] Alison, Crim. Law Practice, 489; Taylor, Ev. § 1260; *Com.* v. *Hersey*, 2 Allen, 173; *Thomas* v. *State*, 27 Ga. 287.

[10] *Everett* v. *Lowdham*, 5 Car. & P. 91; *Powell* v. *State*, 13 Tex. App. 244.

[11] The different statutes of the states must be consulted on this subject, as governing.

[12] *Sherwood* v. *State*, 42 Tex. 498; *Boatmeyer* v. *State*, 31 Tex. Crim. Rep. 473, 20 S. W. 1102; Underhill, Crim. Ev. 2d ed. § 225.

See also the following cases:

"Respondent's request in a case of homicide that the witnesses may be examined separately, and not in one another's presence, should be granted if seasonably made." *People* v. *Hall*, 48 Mich. 482, 42 Am. Rep. 477, 12 N. W. 665, 4 Am. Crim. Rep. 357.

"It is not error to refuse to put a witness for the state in charge of an officer, in order to prevent him from communicating with other witnesses." *Lambright* v. *State*, 34 Fla. 564, 16 So. 582, 9 Am. Crim. Rep. 388.

"Where the court orders witnesses to be excluded from the court room during the opening statement and the taking of testimony, it is a matter of discretion with the court to allow a witness who has remained through a misunderstanding of the order to testify, and then remain during the rest of the trial." *People* v. *O'Loughlin*, 3 Utah, 133, 1 Pac. 653, 4 Am. Crim. Rep. 542.

"While we think it a sound rule of practice in putting witnesses under the rule, to swear all of them on both sides, and send them out of hearing until called to testify, still we know of no law which renders a witness incompetent because he has

§ 447. Competency tested on voir dire.—Under the old practice, any objection to the competency of a witness was required to be made before he testified in chief and on *voir dire*.[1] Competency is a question of fact to be determined by the trial judge by personal inspection and oral examination, and his decision is not subject to review; and it is further held that such course can result in no hardship to the accused, for the reason that if the judge should err in his conclusion, the jury hold a powerful corrective in their right to pass upon the credibility of the witness as tested on the stand by the usual appliances.[2] But the denial to counsel for the accused of the right so to examine on *voir dire* a witness produced for the purpose of determining such competency, upon the ground that the judge had in another case investigated the

heard some of the testimony on the side opposed to that on which he was called. It might be a ground to attack the witness, but not to exclude him." *Rooks* v. *State,* 65 Ga. 330, 4 Am. Crim. Rep. 483.

"It is not error to permit a witness to testify when he has remained in the court room after a rule excluding witnesses, where he testifies as to matters about which no other witness has testified, and where he is an attorney at law, and hence entitled to be present in court." *State* v. *Ward,* 61 Vt. 163, 17 Atl. 483, 8 Am. Crim. Rep. 207.

"When the defendant is not in fault, it is error to reject one of his witnesses because the witness had been in the court room a few moments in violation of the rule to exclude witnesses." *Vickers* v. *People,* 31 Colo. 491, 73 Pac. 845, 12 Am. Crim. Rep. 631.

"A witness for defendant coming from a distance and arriving at the court room and remaining there without knowledge of rule, and without knowledge of defendant or his counsel, should not be rejected." *Pile* v. *State,* 12 Am. Crim. Rep. 634, and case note, 107 Tenn. 532, 64 S. W. 477, citing *Hoxie* v. *State,* 114 Ga. 19, 39 S. E. 944; *May* v. *State,* 90 Ga. 800, 17 S. E. 108; *Gilbert* v. *Com.* 111 Ky. 793, 64 S. W. 864; *Johnson* v. *Clem,* 82 Ky. 87; *Baker* v. *Com.* 106 Ky. 212, 50 S. W. 54; *Taylor* v. *State,* — Miss. —, 30 So. 657; *Cauthern* v. *State,* — Tex. Crim. Rep. —. 65 S. W. 96.

[1] Wharton, Ev. § 493; Roscoe, Ev. 8th ed. 136.

That the *voir dire* involves a *petitio principii,* see supra, § 362; *State* v. *Secrest,* 80 N. C. 450.

[2] *State* v. *Scanlan,* 58 Mo. 204, 1 Am. Crim. Rep. 185; *State* v. *Hannett,* 54 Vt. 83, 4 Am. Crim. Rep. 38.

question of the qualification of the witness, and found her to be competent, constitutes reversible error.[3] Under the modern practice, however, the competency of such witness can be suggested at any time when incompetency appears, when the testimony already given by the witness may on motion of counsel be stricken from the record.[4] But a failure to object to the testimony after such incompetency appears is a waiver of the right, at least in civil cases.[5]

§ 448. All witnesses to be called.—Although, says Mr. Roscoe,[1] a prosecutor was never in strictness bound to call every witness whose name is on the back of the indictment,[2] yet it is usual so to do in order to afford the prisoner's counsel an opportunity to cross-examine them,[3] and if the prosecutor would not call them, the judge, in his discretion, might.[4] The judges, however, have now laid down a rule that the prosecutor is not bound to call witnesses merely because their

[3] *White* v. *State*, 52 Miss. 216, 2 Am. Crim. Rep. 454. In this case the court remarked that such inquiry was pertinent and proper, because the prisoner was a stranger to the first inquiry, and "the witness may have been *compos mentis* on one day and a lunatic on another. The question is as to the competency at the time she was offered as a witness." Citing *Gebhort* v. *Shindle*, 15 Serg. & R. 235; *Evans* v. *Hettich*, 7 Wheat. 453, 5 L. ed. 496.

[4] 3 Enc. Ev. p. 175.

[5] *Drake* v. *Foster*, 28 Ala. 649; *Lewis* v. *Morse*, 20 Conn. 211; *State* v. *Damery*, 48 Me. 327.

As to the form, necessity, and time of making objections, see "Objections." 9 Enc. Ev. p. 28.

Issue as to competency can be put at any time during trial, after the witness has been sworn in chief. See *Stone* v. *Blaekburn*, 1 Esp. 37; *Jacobs* v. *Layborn*, 11 Mees. & W. 685, 1 Dowl. & L. 352, 12 L. J. Exch. N. S. 427, 7 Jur. 562; *Butler* v. *Tufts*, 13 Me. 302; *Fisher* v. *Willard*, 13 Mass. 379; *Seeley* v. *Engell*, 17 Barb. 530. See, however, *Lewis* v. *Morse*, 20 Conn. 211; *Howser* v. *Com.* 51 Pa. 332, indicating a different practice.

[1] Wharton, Crim. Ev. 8th ed. 136.

[2] *Rex* v. *Simmonds*, 1 Car. & P. 84; *Rex* v. *Whitbread*, 1 Car. & P. 84, note.

[3] *Rex* v. *Simmonds*, supra.

[4] Ibid; *Rex* v. *Taylor*, 1 Carr. & P. 84, note; *Rex* v. *Bodle*, 6 Car. & P. 186.

names are on the back of the indictment, but that the prosecutor ought to have all such witnesses in court, so that they may be called for the defense if they are wanted for that purpose. If, however, they are called for the defense, the person calling them makes them his own witnesses.[5]

The prosecution is usually bound to call all the allowable witnesses to a transaction which is the subject of examination. Thus, on a trial for murder, where the widow and daughter of the deceased were present at the time when the fatal blow was supposed to have been given, and the widow was examined on the part of the prosecution, Patteson, J., directed the daughter to be called also, although her name was not on the indictment, and she had been brought to the assizes by the other side. "Every witness," he said, "who was present at a transaction of this sort ought to be called, and even if they give different accounts, it is fit that the jury should hear their evidence, so as to draw their own conclusion as to the real truth of the matter." [6] But this is not

[5] *Reg.* v. *Woodhead,* 2 Car. & K. 520, per Alderson, B. And see *Reg.* v. *Cassidy,* 1 Fost. & F. 79, from which it appears that Parke, B., and Cresswell, J., and Lord Campbell agree in this ruling. See also *Morrow* v. *State,* 57 Miss. 836.

As to the practice of indorsing witnesses on indictment before presentment to grand jury, see Wharton, Crim. Pl. & Pr. § 358. That the judge will require all the indorsed witnesses to be called only in extreme cases, see *Reg.* v. *Edwards,* 3 Cox, C. C. 82, though see, as holding that the defendant may insist on this, *Reg.* v. *Barley,* 2 Cox, C. C. 191.

Though counsel for the prosecution may content himself with putting into the box a witness whose name is indorsed on the back of the bill, without asking him any questions on the part of the prosecution, yet it is better that he should be examined, whether his evidence is favorable to the prosecution or not, as the only object of the investigation is to discover the truth. *Reg.* v. *Bull,* 9 Car. & P. 22.

[6] *Reg.* v. *Holden,* 8 Car. & P. 609. See also *Reg.* v. *Stroner,* 1 Car. & K. 650.

"And it seems," continues Mr. Roscoe (Crim. Ev. 136) "that the same course should be pursued even when the party is a near relative of the prisoner, as a brother (*Reg.* v. *Chapman,* 8 Car. & P. 559) or a daughter (*Reg.* v. *Orchard,* 8 Car.

necessary when it would produce an oppressive cumulation of proof.[7]

§ 448a. Duty to call all witnesses, continued.—In cases of homicide it is the duty ordinarily of the prosecution to call and examine on behalf of the people all those witnesses who were present at the transaction, or who can give direct evidence on any material branch of it, whether such witnesses be favorable or unfavorable to the prosecution.[1] The manifest reason for these holdings compelling the prosecution to

& P. 559, note)." In *Reg.* v. *Holden,* supra, it appeared that three surgeons had examined the body of the deceased, and that there was a difference of opinion among them. Two of them were called for the prosecution, but the third was not, and, as his name was not on the indictment, the counsel for the prosecution declined calling him. Patteson J., said: "He is a material witness who is not called on the part of the prosecution, and, as he is in court, I shall call him for the furtherance of justice." He was accordingly examined by the learned judge.

That the prosecution should call all persons cognizant of the facts is laid down in *Hurd* v. *People,* 25 Mich. 405; *People* v. *Gordon,* 40 Mich. 716; *State* v. *Smallwood,* 75 N. C. 104. And see Wharton, Crim. Pl. & Pr. § 365; *State* v. *Magoon,* 50 Vt. 338.

But redundant testimony need not be thus called. *Winsett* v. *State,* 57 Ind. 26.

[7] Infra, § 749.

[1] *Wellar* v. *People,* 30 Mich. 16, 1 Am. Crim. Rep. 276.

"The fact that the name of a witness is indorsed on the information does not of itself involve any necessary obligation to do more than have the witness in court ready to be examined. *Rex* v. *Simmonds,* 1 Car. & P. 84; *Rex* v. *Beezley,* 4 Car. & P. 220; *Reg.* v. *Bull,* 9 Car. & P. 22; *Rex* v. *Bodle,* 6 Car. & P. 186; *Reg.* v. *Vincent,* 9 Car. & P. 91; *Rex* v. *Harris,* 7 Car. & P. 581.

"But in cases of homicide and in others where analogous reasons exist, those witnesses who were present at the transaction, or who can give direct evidence on any material branch of it, should always be called, unless possibly when too numerous, . . . and the only objection then will be that he may not be favorable to the prosecution. But this is no answer, any more than it would be if a subscribing witness stood in a similar position." *Wellar* v. *People,* 30 Mich. 16, 1 Am. Crim. Rep. 276. See also to the same conclusion, *Bonker* v. *People,* 37 Mich. 4, 2 Am. Crim. Rep. 79; *People* v. *Gordon,* 40 Mich. 716, 3 Am. Crim. Rep. 26.

call all witnesses is aimed at a suppression of evidence by the prosecution, and they do not decide that all the witnesses to a transaction must be called by the prosecution. The justice of the rule must depend on circumstances, and it would seldom be as manifest in cases of mere misdemeanor as in cases of higher offenses, especially those accomplished by violence.[2]

§ 449. Interpreters to be sworn.—Under the inherent power and authority of the court, sworn interpreters in criminal cases, as in all civil cases, may be appointed by the court, where the witnesses do not understand the English language. It may be added that the accuracy of the interpretation of the sworn interpreter may be impeached, and is ultimately to be determined by the jury.[1] A witness, without being speci-

[2] *Bonker* v. *People,* 37 Mich. 4, 2 Am. Crim. Rep. 79.

It is not error to deny a defendant's motion in a prosecution for murder, after the prosecution has rested, to order the prosecution to call and examine as witnesses certain persons said to have been present at the time of the homicide. *People* v. *Robertson,* 67 Cal. 646, 8 Pac. 600, 6 Am. Crim. Rep. 519.

"No rule of law requires the government, rather than the defendant, to hold or call a witness in a criminal case." *Com.* v. *Haskell,* 140 Mass. 128, 2 N. E. 773, 7 Am. Crim. Rep. 532.

"The state is not required to call and examine as its witnesses all persons whose names are indorsed on the indictment. The most that was ever required in any event was that they be present in court, so that the defendant may call and examine them if he desires." *State* v. *Smith,* 78 Minn. 362, 81 N. W. 17, 13 Am. Crim. Rep. 240.

"One who was not an eyewitness to the transaction, but whose name was indorsed on the information, though present in court, was not examined by the prosecution. Held that as no actual prejudice is shown, there was no error in denying defendant's request to cross-examine such person." *Johnson* v. *State,* 8 Wyo. 494, 58 Pac. 761, 13 Am. Crim. Rep. 374.

[1] *People* v. *Constantino,* 153 N. Y. 24, 47 N. E. 37; *United States* v. *Gibert,* 2 Sumn. 19, Fed. Cas. No. 15,204; *Schnier* v. *People,* 23 Ill. 17.

As to New York practice, see *Leetch* v. *Atlantic Mut. Ins. Co.* 4 Daly, 518; *Skaggs* v. *State,* 108 Ind. 53, 8 N. E. 695.

As to interpretation of Chinese, see *People* v. *Ah Wee,* 48 Cal. 236;

ally sworn, may interpret foreign terms used by himself.[2] When a witness can speak only in a whisper, the court may appoint a suitable person to repeat to the jury what is said by the witness.[3] Interpreters must be sworn like any other witnesses.[4]

§ 450. Witness punishable for contempt in refusing to answer.—A court of record has power to commit for contempt a witness who refuses to answer a question determined by the court to be proper.[1] The same practice exists where

People v. *Wong Ah Bang,* 65 Cal. 305, 4 Pac. 19. See also *Com.* v. *Vose,* 17 L.R.A. 813 and note, 157 Mass. 393, 32 N. E. 355.

Two or more may be named by the court, if required. *United States* v. *Gibert,* 2 Sumn. 19, Fed. Cas. No. 15,204.

[2] *Kuhlman* v. *Medlinka,* 29 Tex. 385.

[3] *Conner* v. *State,* 25 Ga. 515, 71 Am. Dec. 184.

[4] *Com.* v. *Kepper,* 114 Mass. 278; 7 Enc. Ev. p. 657.

Not incompetent to act, although a witness in the case. *People* v. *Ramirez,* 56 Cal. 533, 38 Am. Rep. 73.

Nor if a member of the jury. *People* v. *Thiede,* 11 Utah, 241, 39 Pac. 837.

But receiving in evidence the stenographic report of what the defendant swore to at a prior trial, without producing the interpreter or the person who took the evidence, is error, as in violation of constitutional rights. *People* v. *Lee Fat,* 54 Cal. 527; 7 Enc. Ev. p. 661.

Testimony as to an interpreter's translation is hearsay as to the original statement. *State* v. *Terline,* 23 R. I. 530, 91 Am. St. Rep. 650, 51 Atl. 204; Wigmore, Ev. §§ 668, 1810.

But this rule does not apply where the interpreter acts as the agent of those conversing, as where later one of them becomes a party of the suit, the statements being considered admissions. *Com.* v. *Vose,* 157 Mass. 393, 17 L.R.A. 813, 32 N. E. 355.

In *People* v. *Jailles,* 146 Cal. 301, 79 Pac. 965, statements made by a witness through an interpreter were held admissible to discredit the witness, over the objection that they were hearsay. This case, while in line with a suggestion in *People* v. *Sierp,* 116 Cal. 249, 48 Pac. 88, is not within the above rule, and is directly opposed to earlier discussions of the same court. *People* v. *Lee Fat,* 54 Cal. 527; *People* v. *Ah Yute,* 56 Cal. 119; *People* v. *Lee Ah Yute,* 60 Cal. 95; 5 Current Law, 1330.

[1] The power to punish for contempt is necessarily implied in the establishment of a judicial tribunal. *United States* v. *New Bedford Bridge,* 1 Woodb. & M. 401, Fed.

the witness refuses to be sworn, or misbehaves when giving evidence.[2] Also resistance of the order or process of the

Cas. No. 15,867; *Ex parte Stice,* 70 Cal. 51, 11 Pac. 459; *Re Allen,* 13 Blatchf. 271, Fed. Cas. No. 208; *Ex parte Perkins,* 18 Cal. 60; *Re Gannon,* 69 Cal. 541, 11 Pac. 240; *Wright* v. *People,* 112 Ill. 540; *People* v. *Boscovitch,* 20 Cal. 436; *Gihon* v. *Albert,* 7 Paige, 278; *Dixon* v. *People,* 63 Ill. App. 585; *Whitcomb's Case,* 120 Mass. 118, 21 Am. Rep. 502; *Barnes* v. *Reilly,* 81 Mich. 374, 45 N. W. 1016; *Ex parte Adams,* 25 Miss. 885, 59 Am. Dec. 234; *Wilcox* v. *State,* 46 Neb. 402, 64 N. W. 1072; *People ex rel. Hackley* v. *Kelly,* 24 N. Y. 74; *State ex rel. Welsh* v. *Towle,* 42 N. H. 540; *People ex rel. Mitchell* v. *New York,* 7 Abb. Pr. 96; *People ex rel. Steitz* v. *Rice,* 57 Hun, 62, 10 N. Y. Supp. 270; *People* v. *Hicks,* 15 Barb. 153; *Hale* v. *State,* 55 Ohio St. 210, 36 L.R.A. 254, 60 Am. St. Rep. 691, 45 N. E. 199; *State ex rel. Lanning* v. *Lonsdale,* 48 Wis. 348, 4 N. W. 390.

But if a witness's refusal to answer a question is innocent and justifiable, or only an assertion of a constitutional right, a commitment for contempt is illegal. *People ex rel. Hackley* v. *Kelly,* 24 N. Y. 74; *United States* v. *Church of Jesus Christ of L. D. S.,* 6 Utah, 9, 21 Pac. 503, 524, 8 Am. Crim. Rep. 138.

[2] May, Law & Usage of Parliamentary Practice, 405; 4 Bl. Com. 484.

"A civil contempt may go beyond the statutory enumeration, and include what was usual or permissible at common law; but a public or criminal contempt is precisely defined and barred in by statutory enumeration. *People ex rel. Munsell* v. *Oyer & Terminer Ct.* 101 N. Y. 245, 54 Am. Rep. 691, 4 N. E. 259, 6 Am. Crim. Rep. 163; *State* v. *Knight,* 3 S. D. 509, 44 Am. St. Rep. 809, 54 N. W. 412, 9 Am. Crim. Rep. 221.

Where imprisonment is being suffered, habeas corpus is the usual procedure for inquiry into the question of jurisdiction. But writ of error is the better mode. Citations on page 3 of notes. Rapalje, Contempts, § 105; *Cooper* v. *People,* 13 Colo. 337, 6 L.R.A. 430, 22 Pac. 790; *Thomas* v. *People,* 14 Colo. 254, 9 L.R.A. 569, 23 Pac. 326; *Ex parte Grace,* 12 Iowa, 208, 79 Am. Dec. 529; *Butler* v. *People,* 2 Colo. 295; *Hughes* v. *People,* 5 Colo. 436; *Mullin* v. *People,* 15 Colo. 437, 9 L.R.A. 566, 22 Am. St. Rep. 414, 24 Pac. 880; *Re Stidger,* 37 Colo. 407, 86 Pac. 219; *Wyatt* v. *People,* 17 Colo. 252, 28 Pac. 961; *Smith* v. *People,* 2 Colo. App. 99, 29 Pac. 924; *Shore* v. *People,* 26 Colo. 516, 59 Pac. 49; *Newman* v. *Bullock,* 23 Colo. 217, 47 Pac. 379; *Watson* v. *People,* 11 Colo. 4, 16 Pac. 329; *People ex rel. Dougan* v. *District Ct.* 6 Colo. 534; *Aichele* v. *Johnson,* 30 Colo. 461, 71 Pac. 367; *People ex rel. Atty. Gen.* v. *District Ct.* 26 Colo. 380, 46 L.R.A. 855, 58 Pac. 608; *People ex rel. Miller* v. *District Ct.* 33 Colo. 328, 108 Am. St. Rep. 98, 80 Pac. 888, 3 A. & E. Ann. Cas. 579; *Peo-*

court, when wilful, is punishable as contempt, but it must be a "lawful order or process." Consequently, resistance of an order or warrant for search, void for want of authority in the court to issue it, is not punishable as a contempt.[3]

§ 451. Witness cannot himself judge of the materiality of his testimony.—A witness will not be relieved from the costs and penalties of an attachment, by the allegation that his testimony was irrelevant, and that therefore he did not attend court or did not answer.[1]

But if it appeared on the hearing of the rule that his testimony was irrelevant, especially if he be a public officer whose attendance would be detrimental to other branches of the public service, then the court will refuse the attachment.[2] The question of the relevancy is for the court.[3]

§ 452. Court may examine witnesses.—The trial court, at any stage of the examination, may put questions to the witness for the purpose of eliciting facts bearing on the issue; and a witness may be even recalled for this purpose, or a witness not called by the parties [1] may be called and examined

ple ex rel. Burchinell v. *District Ct.* 22 Colo. 422, 45 Pac. 402.

[3] *State ex rel. Register* v. *McGahey,* 12 N. D. 535, 97 N. W. 865, 1 A. & E. Ann. Cas. 650, 14 Am. Crim. Rep. 283; *Horan* v. *State,* 7 Tex. App. 183; *Johnson* v. *State,* 26 Tex. 117; *United States* v. *Tinklepaugh,* 3 Blatchf. 425, Fed .Cas. No. 16,526; *State* v. *Downer,* 8 Vt. 424, 30 Am. Dec. 482; *State* v. *Carpenter,* 54 Vt. 551, 4 Am. Crim. Rep. 559; *State* v. *Phipps,* 34 Mo. App. 400.

[1] *Scholes* v. *Hilton,* 10 Mees. & W. 16, 2 Dowl. P. C. N. S. 229, 11 L. J. Exch. N. S. 332; *Chapman* v. *Davis,* 3 Mann. & G. 609, 4 Scott, N. R. 319, 1 Dowl. P. C. N. S. 239, 11 L. J. C. P. N. S. 51.

[2] *Dicas* v. *Lawson,* 1 Cromp. M. & R. 934, 3 Dowl. P. C. 427, 5 Tyrw. 235, 4 L. J. Exch. N. S. 80; *Reg.* v. *Russell,* 7 Dowl. P. C. 693, 3 Jur. 604; supra, § 350.

[3] *Tippins* v. *Coates,* 6 Hare, 16, 11 Jur. 1075.

[1] *State* v. *Lee,* 80 N. C. 483.

by the court;[2] nor is the court, as to evidence, bound by the rule excluding questions.[3] But an answer not in itself evidence, brought out by a question from the court, may be ground for reversal.[4]

§ 453. Answers of witnesses privileged.—A witness examined as such in a court of justice is so far privileged that he is not liable to suit for words spoken by him in answer to questions put by counsel, with the allowance, express or implied, of the court.[1] And in England, this protection has been extended to volunteer explanations which out of court would have been libelous.[2] This protection is said to be a necessary incident to the administration of justice, and exists independently of statutory authority, the same as the protec-

[2] *Reg.* v. *Halden,* 8 Car. & P. 609; *Upton* v. *State,* 48 Tex. Crim. Rep. 289, 88 S. W. 212.

[3] Wharton, Ev. § 281; *Rex* v. *Watson,* 6 Car. & P. 653; *Middleton* v. *Barned,* 4 Exch. 243, 18 L. J. Exch. N. S. 433; *Com.* v. *Galavan,* 9 Allen, 271; *Palmer* v. *White,* 10 Cush. 321; *Epps* v. *State,* 19 Ga. 102.

The questions, however, must grow out of the facts of the case. *Sparks* v. *State,* 59 Ala. 82.

[4] *People ex rel. Lauchantin* v. *Lacoste,* 37 N. Y. 192.

"It should also be mentioned that during the progress of the trial the judge may question the witnesses, and that, even though the counsel for the prosecution has closed his case, and the counsel for the defendant has taken an objection to the evidence, the judge may make any further inquiries that he thinks fit in order to answer the objection. *Rex* v. *Remnant,* Russ. & R. C. C. 136.

Where, after examination of witnesses to facts on behalf of a prisoner, the judge (there being no counsel for the prosecution) called back and examined a witness for the prosecution, it was held that the prisoner's counsel had a right to cross-examine again, if he thought it material." *Rex* v. *Watson,* 6 Car. & P. 653; Archbold's Crim. Pl. 17th ed. 296.

[1] *Revis* v. *Smith,* 18 C. B. 126, 25 L. J. C. P. N. S. 195, 2 Jur. N. S. 614, 4 Week. Rep. 506; *Henderson* v. *Broomhead,* 4 Hurlst. & N. 569, 28 L. J. Exch. N. S. 360, 5 Jur. N. S. 1175, 7 Week. Rep. 492; *Kennedy* v. *Hilliard,* 10 Ir. C. L. Rep. 195, 1 L. T. N. S. 578.

[2] *Seaman* v. *Netherclift,* L. R. 1 C. P. Div. 540.

tion extended to the witness while in attendance on the court as such.

§ 454. Examination governed by certain rules.—The rules governing the examination and cross-examination of witnesses are found discussed fully in §§ 506 et seq. of Wharton on Evidence, to which have been added topics believed to be valuable to the practitioner.[1]

[1] The court has discretion as to cumulation of witnesses and examination. Wharton, Ev. § 505; *Burroughs* v. *State*, 17 Fla. 643.

Cross-examination.—

Great latitude should always be allowed in cross-examination, especially in capital cases, and the court should never interpose except where there is a manifest abuse of that right. *Ritzman* v. *People*, 110 Ill. 362, 4 Am. Crim. Rep. 403.

Leading questions.—

Where new matter is brought out on cross-examination, as to such matter leading questions may be put on re-examination. *State* v. *Hopkins*, 50 Vt. 316, 3 Am. Crim. Rep. 357; *Davison* v. *People*, 90 Ill. 222.

Where an arrest was made under circumstances indicating an understanding between the police and a confederate of the arrested person, that the confederate should go free if he decoyed the other into the hands of the police, full latitude should be allowed in cross-examining the police, to disclose such an arrangement. *People* v. *Gordon*, 40 Mich. 716, 3 Am. Crim. Rep. 26.

A witness who has testified that he thought the man he saw at a certain place was the defendant may be asked on cross-examination if there was any doubt existing in his mind that the man seen was defendant. *People* v. *Wallin*, 55 Mich. 497, 22 N. W. 15, 6 Am. Crim. Rep. 212.

Cross-examination not entirely foreign to the testimony in chief, and having any tendency to impair its credibility, is not ground for a reversal. *State* v. *Neimeier*, 66 Iowa, 634, 24 N. W. 247, 6 Am. Crim. Rep. 249.

The right of reasonable cross-examination by leading questions is absolute. The denial of it is the denial of a valuable right, and, if prejudicial, constitutes reversible error. *Hempton* v. *State*, 111 Wis. 127, 86 N. W. 596, 12 Am. Crim. Rep. 657.

Where an impeaching question is asked on cross-examination, the witness should be allowed an opportunity to explain. *Powers* v. *Com.* 110 Ky. 386, 61 S. W. 735, 53 L.R.A. 245, 13 Am. Crim. Rep. 464.

Where witnesses testified as to the previous good character of the accused, it is proper to ask them on cross-examination whether they knew of a divorce granted to accused's wife on account of cruelty.

§ 454a. Leading questions.—While as a rule leading questions are excluded, exceptions are recognized where wit-

People v. *Elliott,* 163 N. Y. 11, 57 N. E. 104, 15 Am. Crim. Rep. 41.

A witness who has testified in a criminal case, that the general reputation of the accused as to being a peaceable and law-abiding man was good, cannot be asked on cross-examination whether he has heard rumors of the accused having been connected with former criminal acts. *Aiken* v. *People,* 183 Ill. 215, 55 N. E. 695, 15 Am. Crim. Rep. 46; *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.

Defendant as a witness.—

As to the extent to which a defendant may be cross-examined as a witness, see *State* v. *Clinton,* 67 Mo. 380, 29 Am. Rep. 506, 3 Am. Crim. Rep. 132; *People* v. *Clark,* 106 Cal. 32, 39 Pac. 53, 9 Am. Crim. Rep. 596; *State* v. *Carson,* 2 Am. Crim. Rep. 58, and note, 66 Me. 116; *State* v. *Banks,* 7 Am. Crim. Rep. 526, and note, 78 Me. 490, 7 Atl. 269.

Collateral fact binds the party asking. *Crittenden* v. *Com.* 82 Ky. 164, 6 Am. Crim. Rep. 200; Starkie, Ev. 200; *Kennedy* v. *Com.* 14 Bush, 357.

Incompetent confession as a basis for cross-examination. *State* v. *Davis,* 125 N. C. 612, 34 S. E. 198, 12 Am. Crim. Rep. 59; *Smith* v. *State,* 13 Am. Crim. Rep. 410, and note, 137 Ala. 22, 34 So. 396.

Not compelled to answer questions that would tend to subject him to a criminal prosecution; but that privilege does not extend to those questions wihch merely tend to disgrace him. *Howard* v. *Com.* 110 Ky. 356, 61 S. W. 756, 13 Am. Crim. Rep. 533.

Right of witness to refuse to answer such questions. *Ex parte Buskett,* 9 Am. Crim. Rep. 754, and note, 106 Mo. 602, 14 L.R.A. 407, 27 Am. St. Rep. 378, 17 S. W. 753; *Evans* v. *State,* 11 Am. Crim. Rep. 695, and note, 106 Ga. 519, 71 Am. St. Rep. 276, 32 S. E. 659. See also *McGorray* v. *Sutter,* 80 Ohio St. 400, 24 L.R.A.(N.S.) 165, 131 Am. St. Rep. 715, 89 N. E. 10; *People* v. *Cahill,* 193 N. Y. 232, 20 L.R.A.(N. S.) 1084, 86 N. E. 39.

Waiver of this right. *State* v. *Duncan,* 4 L.R.A.(N.S.) 1144, and note, 78 Vt. 369, 112 Am. St. Rep. 922, 63 Atl. 225, 6 A. & E. Ann. Cas. 602.

Jury.—

Good character may sometimes create a doubt, when without it none would exist, and the court should so instruct. *People* v. *Elliott,* 163 N. Y. 11, 57 N. E. 104, 15 Am. Crim. Rep. 41; *Cancemi* v. *People,* 16 N. Y. 501; *Stephens* v. *People,* 4 Park. Crim. Rep. 396; *Com.* v. *Webster,* 5 Cush. 295, 52 Am. Dec. 711; *Remsen* v. *People,* 43 N. Y. 9.

Affidavit of jurors cannot be used to impeach verdict, but conduct outside court room may be shown by their own affidavits for such purpose. *Hempton* v. *State,* 111 Wis.

nesses are hostile, when they are weak of memory, where called to contradict, and where such a mode of questioning is

127, 86 N. W. 596, 12 Am. Crim. Rep. 657; *McBean* v. *State,* 83 Wis. 206, 53 N. W. 497; *Harris* v. *State,* 24 Neb. 803, 40 N. W. 317; *Mattox* v. *United States,* 146 U. S. 140, 36 L. ed. 917, 13 Sup. Ct. Rep. 50; 2 Thomp. Trials, § 2619.

Inconsistent statements by witness.—

Where a witness called for the state testifies in contradiction of statements previously made by him and in favor of the defendant, it is error to allow that state to prove statements previously made by him tending to establish the defendant's guilt. *State* v. *Jackson,* 7 S. C. 283, 24 Am. Rep. 476, 3 Am. Crim. Rep. 50.

Contradiction of witnesses.—

The defendant has a right on cross-examination of a witness for the prosecution, to draw out from him evidence which tends to contradict material evidence which has been given by another witness for the prosecution. *Hamilton* v. *People,* 29 Mich. 173, 1 Am. Crim. Rep. 618.

So his statements when sworn can be shown false and without foundation. *Turner* v. *State,* 102 Ind. 425, 1 N. E. 869, 5 Am. Crim. Rep. 360.

Mode and tone of examination Wharton, Ev. § 506.

A witness cannot be asked as to conclusion of law. Wharton, Ev. § 507; post, § 455.

Opinion of witness not admissible. Wharton, Ev. § 509.

A witness may give substance of conversation or writing. Wharton, Ev. § 514.

Vague impressions inadmissible. Wharton, Ev. § 515.

May refresh memory by memorandum. Wharton, Ev. § 516; *Harvey* v. *State,* 40 Ind. 516; *Chute* v. *State,* 19 Minn. 271, Gil. 230.

Memorandum inadmissible if unnecessary. Wharton, Ev. § 517.

Not fatal that witness has no recollection independent of notes. Wharton, Ev. § 518.

Not necessary that notes should be independently admissible. Wharton, Ev. § 519.

Memorandum must be primary and relevant. Wharton, Ev. § 520.

Not necessary that it should be in writing of witness. Wharton, Ev. § 522.

Inadmissible if subsequently concocted. Wharton, Ev. § 523.

Depositions may be used to refresh the memory of witness. Wharton, Ev. § 524.

Opposite party not entitled to inspect notes which fail to refresh memory of witness. Wharton, Ev. § 525.

If used, the opposite party must put whole of notes in evidence. Wharton, Ev. § 526.

Counsel for defendant can see a paper put into hands of prosecuting witness to refresh memory, represented to be a statement made before the grand jury. *Green* v. *State,* 22 L.R.A.(N.S.) 706, and note, 53 Tex. Crim. Rep. 490, 110 S. W. 920.

logically consistent with a fair and honest development of the case.[1] There are peculiar reasons why these distinctions

A witness can usually be cross-examined on the subject of his examination in chief. Wharton, Ev. § 529.

Witness's memory may be probed by pertinent written instruments. Wharton, Ev. § 531.

Collateral points cannot be introduced to test memory. Wharton, Ev. § 532; Archbold, Crim. Pl. 17th ed. 296.

Making adversary's witness one's own.—

A party makes his adversary's witness his own as to all matters outside the examination in chief, about which he interrogates such witness. *Lambert* v. *Armentrout*, 65 W. Va. 375, 22 L.R.A.(N.S.) 556, 64 S. E. 260.

To discredit witness.—

"Where upon trial of one for murdering a girl, the defense is that she committed suicide, her father, who has testified that she was always cheerful and happy, may be asked on cross-examination if a physician had not told him that she had previously attempted suicide, and must be watched." *Sanders* v. *State*, 54 Tex. Crim. Rep. 101, 22 L.R.A.(N.S.) 243, 112 S. W. 68.

Cross-examination of accused.—

A prisoner who takes the witness stand in his own behalf waives his constitutional privilege of silence, and the prosecution has the right to cross-examine him upon his evidence in chief with the same latitude as would be exercised in the case of an ordinary witness, as to the circumstances connected with the crime. *Harrold* v. *Territory*, 18 Okla. 395, 10 L.R.A.(N.S.) 604, 89 Pac. 202; *Pittman* v. *State*, 51 Fla. 94, 8 L.R.A.(N.S.) 509, 41 So. 385, 11 A. & E. Ann. Cas. 818; *State* v. *Buffington*, 71 Kan. 804, 4 L.R.A.(N.S.) 154, 81 Pac. 465.

One accused of murder does not, by offering himself as a witness, subject himself to impeachment by evidence as to his character for violence or turbulence. *State* v. *Becker*, 194 Mo. 281, 3 L.R.A.(N.S.) 535, 91 S. W. 892.

Nor is a witness to be discredited because of a discrepancy as to a wholly immaterial matter. *Mann* v. *State*, 124 Ga. 760, 4 L.R.A.(N.S.) 934, 53 S. E. 324.

The mere making of contradictory statements on cross-examination does not justify the admission of evidence of prior statements, to support the witness by corroborating the testimony given on direct examination, although the contradiction consisted of the admission of the making of prior statements in conflict with the testimony given, so that it may be contended that the testimony is a matter of recent contrivance. *Com.* v. *Tucker*, 189 Mass. 457, 7 L.R.A.(N.S.) 1056, 76 N. E. 127.

[1] Wharton, Ev. §§ 498 et seq.; *Sylvester* v. *State*, 46 Fla. 166, 35 So. 142; *Com.* v. *Melley*, 14 Gray, 39; *Turney* v. *State*, 8 Smedes & M. 104, 47 Am. Dec. 74; *State* v. *Peterson*,

should be kept in mind in criminal cases. In such trials, while there are undoubtedly willing witnesses, and while there may be occasionally witnesses so stupid or so corrupt as to be ready at once to adopt any statements suggested in the questions of counsel, the main difficulty in the way of a fair and full development of the facts arises from the anxiety of conscientious and humane witnesses not to say anything where life and liberty are at stake, which they are not required to tell. In the nervous tension and physical discomfort, also, so often attendant on criminal trials, even the coolest witness, supposing his testimony, as with the highest order of witnesses is often the case, not to have been previously arranged with the assistance of counsel, may forget at the moment of examination some material incidents; and even when his testimony has been prearranged, his memory at the critical moment may fail. It would be a perversion of justice to hold that in such cases counsel are to be precluded from suggesting to witnesses associations which may bring out the facts still undetailed. We have already noticed how dependent memory is on association,[2] and there are few cases in which association, essential as it is to the grouping of incidents, is so apt to be paralyzed as those in which conscientious and intelligent witnesses, in the heat and confusion of a crowded court room, with a consciousness that on their testimony depends the fate of a fellow being on the one side, and the due maintenance of public justice on the other side, are called upon, upon the solemnity of an oath, to tell what they know about a particular transaction. They have no test which enables them to decide what part of their recollections may be admissible and what is inadmissible. They know that they cannot tell everything, for even to their minds "everything"

110 Iowa, 647, 82 N. W. 329; *People* v. *Harlan,* 133 Cal. 16, 65 Pac. 9; *State* v. *Watson,* 81 Iowa, 380; 46 N. W. 868; *State* v. *Fontenat,* 48 La. Ann. 220, 19 So. 112.

[2] Supra, § 373, 378.

includes a great deal that is irrelevant and immaterial. They have to select the material facts in their own knowledge, bearing on the contested issue; but when they undertake to marshal these facts their memory falters, and needs to be prompted by the suggestion of the proper associations. Cases of this kind are readily distinguishable from those of the ready and corrupt witness, to prevent the prompting of whom the rule before us was made.[3] Ordinarily, the allowance of leading questions is at the discretion of the court. At the same time, when it appears that by undue liberty in this respect justice has suffered, and a conviction unjustly obtained, a new trial will be granted.[4]

§ 455. Witnesses cannot be asked as to conclusion of law.—A witness is not permitted to testify as to a con-

[3] "It is a general rule that in a direct examination of a witness, he shall not be asked leading questions, or in other words questions framed in such a manner as to suggest to the witness the answers required of his. To this rule, however, there are a few exceptions. To identify a person whom the witness has already described, the person may be pointed out to him, and he may be asked in direct terms if that be the person he meant." *Rex* v. *Watson,* 2 Starkie, 116; *Rex* v. *De Berenger,* 3 Maule & S. 67, 15 Revised Rep. 415, 1 Starkie, Ev. 125.

Where a witness swears to a certain fact, and another witness is called for the purpose of contradicting him, the latter may be asked in direct terms whether that fact ever took place. *Courteen* v. *Touse,* 1 Campb. 43, 10 Revised Rep. 627.

Again, if the witness appear evidently hostile to the party who has called him, the counsel may put leading questions to him, having first obtained permission of the court to do so. Peak, Ev. 198, 2 Phillipps, Ev. 462; *Clarke* v. *Saffery,* Ryan & M. 126, 27 Revised Rep. 736. And see *Barton* v. *Carew,* Ryan & M. 127; *Reg.* v. *Chapman,* 8 Car. & P. 558; *Reg.* v. *Ball,* 8 Car. & P. 745.

And, lastly, questions which are merely introductory to others that are material are, in general, allowed to be asked in direct terms without objection." Archibold, Crim. Pl. 17th ed. p. 396. And see *United States* v. *Angell,* 11 Fed. 34; Wharton, Ev. §§ 498 et seq.

[4] *Coon* v. *People,* 99 Ill. 368, 39 Am. Rep. 28. Though see *Green* v. *Gould,* 3 Allen, 466.

clusion of law. Sometimes this is so far pressed as to involve the assumption that a witness cannot be asked as to conclusion of fact. The error of this assumption will be seen when we remember that there are few statements of fact that are not conclusions of fact.[1] It is otherwise as to conclusions of law, which, when relating to domestic law, are for the court to draw, and not for the witnesses.[2] Among such conclusions of law legal responsibility is one of the most conspicuous. A witness, no matter how skilful, is not to be permitted to testify as to whether or not a party is responsible to the law,[3] or whether certain facts constitute in law an agency.[4]

Law in the sense here used embraces whatever conclusions belong properly to the court. Thus, it is inadmissible for a witness to give conclusions as to documents which it is the province of the court to interpret.[5]

§ 456. Conclusions as to motive inadmissible.—Motive, so far as concerns the action of another, is to be inferred from facts. The facts from which the inferences are to be drawn are to be detailed by the witnesses, while the jury draw the conclusions,[1] even though the testimony offered relates to the action of a person in a dying condition, incapable of

[1] See supra, §§ 7 et seq. *State* v. *Brundige,* 118 Iowa, 92, 91 N. W. 920, 14 Am. Crim. Rep. 164; Abbott, Trial Ev. 2d ed.

[2] Wharton, Ev. § 507.

[3] *Reg.* v. *Richards,* 1 Fost. & F. 87; *Joyce* v. *Maine Ins. Co.* 45 Me. 168, 71 Am. Dec. 536; *Peterson* v. *State,* 47 Ga. 524; *State* v. *Klinger,* 46 Mo. 224. And see supra, §§ 417 et seq.

[4] *Providence Tool Co.* v. *United States Mfg. Co.* 120 Mass. 35; *Fairchild* v. *Bascomb,* 35 Vt. 398.

[5] Wharton, Ev. § 507; *Whizenant* v. *State,* 71 Ala. 383.

[1] *Zantzinger* v. *Weightman,* 2 Cranch, C. C. 478, Fed. Cas. No. 18,202; *Whitman* v. *Freese,* 23 Me. 185; *State* v. *Mairs,* 1 N. J. L. 453; *Ballard* v. *Lockwood,* 1 Daly, 158; *Shepherd* v. *Willis,* 19 Ohio, 142; *Gilman* v. *Riopelle,* 18 Mich. 145; *State* v. *Garvey,* 11 Minn. 154, Gil. 95; *Hawkins* v. *State,* 95 Ga. 207, 71 Am. Dec. 166; *Peake* v. *Stout,* 8 Ala. 647; *Clement* v. *Cureton,* 36 Ala. 120.

fully expressing himself.[2] Yet where a party is examined as to his own conduct, he may be asked as to his motive or condition of mind, his testimony as to such motive being based not on inference, but on consciousness.[3] Direct evidence of the conduct of the defendant before the commission of the crime charged, from which it is sought to infer motive for the crime, is not indispensable, but such conduct may be shown by circumstantial evidence.[4]

§ 457. Opinion of witness cannot ordinarily be asked.—That a witness's opinion is admissible is a settled rule, though much difficulty exists as to the meaning of the term. What is opinion? "Did A shoot B?" C, a bystander, answers, "My opinion is that he did; I saw the pistol aimed; I heard the report; I saw the flash; I saw B fall down, as I supposed dead; from all this I infer that A shoot B."

This is all inference on the part of the witness, yet it is

[2] *Griggs* v. *State,* 59 Ga. 738.

[3] Supra, § 431; Wharton, Ev. §§ 482, 508; *Dill* v. *State,* 6 Tex. App. 113.

"Proof of motive or inducement to the criminal act is resorted to for the purpose of explaining evidence which might otherwise remain in doubt. The motive cannot be based upon imagination any more than any other fact, but must be based upon evidence. While it is proper to prove a motive, it must have some logical and legal relation to the criminal act charged. *People* v. *Fitzgerald,* 156 N. Y. 253, 50 N. E. 846, 11 Am. Crim. Rep. 700; *People* v. *Bennett,* 49 N. Y. 137; *People* v. *Owens,* 148 N. Y. 648, 43 N. E. 71; 1 Greenl. Ev. § 13; *Wohlford* v. *People,* 148 Ill. 296, 35 N. E. 107; *State* v. *Ferguson,* 71 Conn. 227, 41 Atl. 769; *Com.* v. *Damon,* 136 Mass. 441; *Greer* v. *State,* 53 Ind. 420; *Blake* v. *People,* 73 N. Y. 586; *State* v. *Wright,* 40 La. Ann. 589, 4 So. 486; *Mack* v. *State,* 48 Wis. 271, 4 N. W. 449; *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; *Boddy* v. *Henry,* 113 Iowa, 462, 53 L.R.A. 769, 85 N. W. 771; *Kerrains* v. *People,* 60 N. Y. 221, 19 Am. Rep. 159; *Cannon* v. *State,* 60 Ark. 564, 31 S. W. 150, 32 S. W. 128.

But the opinion or conclusion of a witness as to the motive or intent of another is inadmissible. 7 Enc. Ev. p. 601.

[4] *State* v. *Smith,* 102 Iowa, 565, 72 N. W. 279.

admissible.[1] On the other hand, it has been held inadmissible to ask a witness his opinion as to whether a defendant who was alleged to have acted in self-defense was at the time in imminent danger;[2] or as to whether the deceased would have been likely to use weapons in a difficulty;[3] or as to whether a certain physician had acted honorably toward a professional brother;[4] or as to what is a reasonable load for a horse;[5] or as to the effect of particular charges in an account;[6] or as to the effect of certain acts on the credit of a firm;[7] or as to the probable effect of certain acts in saving a burning house;[8] or as to the religious sense of a dying declarant;[9] or as to the conjectural losses of certain business operations;[10] or as to whether or not the condition of a third person indicates disease.[11] Nor can a witness be asked whether or not he did not exercise great care in the discharge of a certain duty;[12] as to whether or not a particular alteration of machinery was technically a repair;[13] as to whether or not a certain person acted fairly;[14] as to whether or not a certain person could have left a room when the witness was asleep

[1] See supra, §§ 7–18.

[2] *State* v. *Rhoades,* 29 Ohio St. 171. See *Haynie* v. *Baylor,* 18 Tex. 498.

[3] *Bingham* v. *State,* 6 Tex. App. 169.

[4] *Ramadge* v. *Ryan,* 9 Bing. 333, 2 Moore & S. 421, 2 L. J. C. P. N. S. 7. Though see *Greville* v. *Chapman,* 5 Q. B. 731, Dav. & M. 553, 13 L. J. Q. B. N. S. 172, 8 Jur. 189, a case of doubtful authority.

[5] *Oakes* v. *Weston,* 45 Vt. 430.

[6] *United States* v. *Willard,* 1 Paine, 539, Fed. Cas. No. 16,698.

[7] *Donnell* v. *Jones,* 13 Ala. 490, 48 Am. Dec. 59; *Thomas* v. *Islett,* 1 G. Greene, 470.

[8] *Gibson* v. *Hatchett,* 24 Ala. 201.

[9] *State* v. *Brunetto,* 13 La. Ann. 45.

[10] *Rider* v. *Ocean Ins. Co.* 20 Pick. 259.

[11] *Ashland* v. *Marlborough,* 99 Mass. 47. See also cases cited to § 459, post.

In *Parker* v. *Metropolitan R. Co.* 109 Mass. 506, it was held that a nonexpert could testify as to another's probable health.

[12] *Bryant* v. *Glidden,* 39 Me. 458,

[13] *Bigelow* v. *Collamore,* 5 Cush. 226.

[14] *Zantzinger* v. *Weightman,* 2 Cranch, C. C. 478, Fed. Cas. No. 18,202.

in it;[15] as to whether or not a certain person looked "excited";[16] as to whether or not the deceased showed an intention to kill the prisoner;[17] as to whether or not a certain person looked "downcast;"[18] as to whether or not an engine appeared capable of drawing a train;[19] as to whether or not a certain bridge was safe;[20] as to whether or not certain conduct indicated adultery,[21] or recent sexual intercourse;[22] as to whether or not a certain disorderly house was a nuisance;[23] as to how long it would take to gather a certain number of cattle within an inclosure;[24] as to whether or not a certain house was a bawdyhouse;[25] as to whether or not a certain person's conduct would have a particular effect;[26] as to what certain cries indicated;[27] as to whether or not certain language would have particular effects;[28] as to whether or not certain conduct was negligent or otherwise;[29] as to whether or not certain conduct was honest;[30] as to whether or not wind would have certain effects in extending a fire;[31] as to whether or not

[15] *Bennett* v. *State,* 52 Ala. 370, 1 Am. Crim. Rep. 188; supra, § 382. See *Com.* v. *Cooley,* 6 Gray, 350.

[16] *Gossenheimer* v. *State,* 52 Ala. 314. See *Ames* v. *Snider,* 69 Ill. 376.

[17] *Hawkins* v. *State,* 25 Ga. 207, 71 Am. Dec. 166.

[18] *McAdory* v. *State,* 59 Ala. 92. But see *Culver* v. *Dwight,* 6 Gray, 444; *State* v. *Hudson,* 50 Iowa, 157, and cases cited post, § 460.

[19] *Sisson* v. *Cleveland & T. R. Co.* 14 Mich. 489, 90 Am. Dec. 252.

[20] *Crane* v. *Northfield,* 33 Vt. 124.

[21] *Cameron* v. *State,* 14 Ala. 546, 48 Am. Dec. 111; *Cox* v. *Whitfield,* 18 Ala. 738.

[22] *McKnight* v. *State,* 6 Tex. App. 158.

[23] *Smith* v. *Com.* 6 B. Mon. 21.

[24] *Tyler* v. *State,* 11 Tex. App. 388.

[25] See on this topic fully, Wharton, Crim. Law, 8th ed. § 1451.

[26] *Richards* v. *Richards,* 37 Pa. 225.

[27] *Messner* v. *People,* 45 N. Y. 1. But see post, § 459.

[28] *Johnson* v. *Ballew,* 2 Port. (Ala.) 29.

[29] *Lynch* v. *Smith,* 104 Mass. 53, 6 Am. Rep. 188; *Tuttle* v. *Lawrence,* 119 Mass. 276; *Crofut* v. *Brooklyn Ferry Co.* 36 Barb. 201; *Teall* v. *Barton,* 40 Barb. 137; *Taylor* v. *Monnot,* 4 Duer, 116; *Livingston* v. *Cox,* 8 Watts & S. 61; *Otis* v. *Thom,* 23 Ala. 469, 58 Am. Dec. 303. See *Pennsylvania R. Co.* v. *Henderson,* 51 Pa. 315.

[30] *Johnson* v. *State,* 35 Ala. 370.

[31] *State* v. *Watson,* 65 Me. 74.

in a particular case there was danger to life;[32] as to whether or not a gate of a drawbridge should be shut at night;[33] as to whether or not certain injuries could have been avoided;[34] as to whether or not a party was so intoxicated as to be incapable of forming an intent;[35] as to whether or not hair came from the head of a certain person, this statement not being based on comparison.[36] Where any material facts are stated by the witness, as warranting the inference that he has sufficient knowledge to form an opinion, it is relevant,[36a] but such conclusion must arise from the witness's own personal observation of the facts.[37]

[32] *State* v. *Rhoads,* 29 Ohio St. 171.

[33] *Nowell* v. *Wright,* 3 Allen, 166, 80 Am. Dec. 62.

[34] *Winters* v. *Hannibal & St. J. Co.* 39 Mo. 468. See *Patterson* v. *Colebrook,* 29 N. H. 94.

[35] *Armor* v. *State,* 63 Ala. 173.

[36] *Knoll* v. *State,* 55 Wis. 249, 42 Am. Rep. 704, 12 N. W. 369. See post, §§ 779, 804. See also *Bennett* v. *State,* 52 Ala. 370, 1 Am. Crim. Rep. 188; *State* v. *Garvey,* 11 Minn. 163, Gil. 95; *Crane* v. *Northfield,* 33 Vt. 124; *Com.* v. *Cooley,* 6 Gray, 355; *Pelamourges* v. *Clark,* 9 Iowa, 16; *Walker* v. *Walker,* 34 Ala. 473.

[36a] *Goodwin* v. *State,* 96 Ind. 550. See *Berry* v. *State,* 10 Ga. 511.

[37] *Stephenson* v. *State,* 110 Ind. 358, 59 Am. Rep. 216, 11 N. E. 360; *State* v. *Gorham,* 67 Vt. 365, 31 Atl. 845, 10 Am. Crim. Rep. 25.

A witness may be permitted to state the grounds of an opinion to which he has testified; and such statement is not objectionable as being necessarily argumentative. *People* v. *Bird,* 124 Cal. 32, 56 Pac. 639, 11 Am. Crim. Rep. 442.

"The wife of Blanchard, being a witness for defendant, was asked (referring to the room where the tobacco was found): 'Who occupied the upstairs of that house?' and the answer was excluded on the objection of the state that the question called for a conclusion. The objection should have been overruled. While the answer called for is in some sense a conclusion, it is one of those conclusions which so far partake of the nature of fact as to be admissible in evidence. To hold such evidence incompetent would "limit and hamper the introduction of evidence in a manner not contemplated by any rule of law of which we have any knowledge." *State* v. *Brundidge,* 118 Iowa, 92, 91 N. W. 920, 14 Am. Crim. Rep. 164.

Opinions also held inadmissible.

Attorneys. *Hirsh & Co.* v. *Beverly,* 125 Ga. 657, 54 S. E. 678.

Physicians. *State* v. *Heffernan,* 28 R. I. 20, 65 Atl. 284; *Federal Betterment Co.* v. *Reeves,* 73 Kan. 107, 4 L.R.A.(N.S.) 460, 84 Pac. 560

§ 458. Otherwise when opinion is merely substance of the facts.—The true line of distinction is this: an inference necessarily involving certain facts may be stated without the facts, the inference being an equivalent to a specification of the facts; but when the facts are not necessarily involved in the inference (*e. g.*, when the inference may be sustained upon any one of several distinct phases of fact, none of which is necessarily involved), then the facts must be stated.[1] In other words, when the opinion is the mere shorthand rendering or crystalization of the facts, then the opinion can be given, subject to cross-examination, as to the facts on which it is based.[2]

As to speed of automobiles. *Wright* v. *Crane*, 142 Mich. 508, 106 N. W. 71.

As to possession of realty title. *McCreary* v. *Jackson Lumber Co.* 148 Ala. 247, 41 So. 822.

Land covered by deed. *Ball* v. *Loughridge*, 30 Ky. L. Rep. 1123, 100 S. W. 275.

Incompetency of mine boss. *Purkey* v. *Southern Coal & Transp. Co.* 57 W. Va. 595, 50 S. E. 755.

Care in handling engine. *Birmingham R. L. & P. Co.* v. *Martin*, 148 Ala. 8, 42 So. 618.

That a crossing is dangerous. *Louisville & N. R. Co.* v. *Molloy*, 122 Ky. 219, 91 S. W. 685.

Opinion on facts testified to by other witnesses. *Gracy* v. *Atlantic Coast Line R. Co.* 53 Fla. 350, 42 So. 903.

Res ipsa loquitur. *Illinois C. R. Co.* v. *Emerson*, 91 Miss. 230, 44 So. 928. See 5 Am. & Eng. Enc. Law, 2d ed. Supp. p. 421. See also *American Soda Fountain Co.* v. *Hogue*, 17 N. D. 375, 17 L.R.A.(N.S.) 1113, 116 N. W. 339; *Indianapolis Traction & Terminal Co.* v. *Kidd*, 167 Ind. 402, 7 L.R.A.(N.S.) 143, 79 N. E. 347, 10 A. & E. Ann. Cas. 942; *Fowler* v. *Delaplain*, 79 Ohio St. 279, 21 L.R.A.(N.S.) 100, 87 N. E. 260; *Dunn* v. *Chicago, R. I. & P. R. Co.* 130 Iowa, 580, 8 A. & E. Ann. Cas. 226, 6 L.R.A.(N.S.) 452, 107 N. W. 616; *Smart* v. *Kansas City*, 208 Mo. 162, 14 L.R.A.(N.S.) 565, 123 Am. St. Rep. 415, 105 S. W. 709, 13 A. & E. Ann. Cas. 932.

[1] See cases given in Wharton, Ev. § 510. And see also *State* v. *Hopkins*, 50 Vt. 316, 3 Am. Crim. Rep. 357; *McKnight* v. *State*, 6 Tex. App. 158; *Brinkley* v. *State*, 89 Ala. 34, 18 Am. St. Rep. 87, 8 So. 22.

[2] *Carpenter* v. *Corinth*, 58 Vt. 214, 2 Atl. 170; *Taylor* v. *Grand Trunk R. Co.* 48 N. H. 304, 2 Am. Rep. 229; *Sherman* v. *Blodgett*, 28 Vt. 149; *Parsons* v. *Manufacturers' Ins. Co.* 16 Gray, 463; *Clearwater* v. *Brill*, 61 N. Y. 625; *Cofer* v. *Scroggins*, 98 Ala. 342, 39 Am. St. Rep. 54, 13 So. 115; *Ardesco Oil*

§ 459. So as to noises, odors, and identifications.—Opinion, so far as it consists of a statement of an effect produced on the mind, becomes primary evidence, and hence admissible whenever a condition of things is such that it cannot be reproduced and made palpable in the concrete to the jury.[1] Eminently is this the case with regard to noises [2] and smells;[3] to

Co. v. *Gilson,* 63 Pa. 146, 10 Mor. Min. Rep. 669; *Sorg* v. *First German E. St. P. Congregation,* 63 Pa. 156; *King* v. *Fitch,* 2 Abb. App. Dec. 508; *Mann* v. *State,* 23 Fla. 610, 3 So. 207; *Selden* v. *Bank of Commerce,* 3 Minn. 166, Gil. 108; *State* v. *Miller,* 53 Iowa, 84, 4 N. W. 838; *Montgomery* v. *Scott,* 34 Wis. 338; *Moon* v. *State,* 68 Ga. 687; *Caleb* v. *State,* 39 Miss. 721; *Lewis* v. *State,* 49 Ala. 1; *Avary* v. *Searcy,* 50 Ala. 54; *Ray* v. *State,* 50 Ala. 104; *Sparr* v. *Wellman,* 11 Mo. 230; *Seyfarth* v. *St. Louis & I. M. R. Co.* 52 Mo. 449; *Bluman* v. *State,* 33 Tex. Crim. Rep. 43, 21 S. W. 1027, 26 S. W. 75; *State* v. *Folwell,* 14 Kan. 110; *State* v. *Harrington,* 12 Nev. 125; *State* v. *Mims,* 36 Or. 315, 61 Pac. 888. See *Chicago* v. *Greer,* 9 Wall. 726, 19 L. ed. 769; *State* v. *Moelchen,* 53 Iowa, 310; *State* v. *Stackhouse,* 24 Kan. 445; *State* v. *Donnelly,* 69 Iowa, 705, 58 Am. Rep. 234, 27 N. W. 369.

Statement of witnesses that the deceased "appeared to be despondent," "had a fever," are classed within the well-recognized class of matters of mixed fact and conclusion, which may properly be testified to by the ordinary observer. *State* v. *McKnight,* 119 Iowa, 79, 93 N. W. 63, 12 Am. Crim. Rep. 252; *Will* v. *Mendon,* 108 Mich. 251, 66 N. W. 58; *People* v. *Lavelle,* 71 Cal. 351, 12 Pac. 226.

[1] *Com.* v. *Sturtivant,* 117 Mass. 122, 19 Am. Rep. 401; *Safford* v. *Grout,* 120 Mass. 20; *Com.* v. *Piper,* 120 Mass. 186; *Kearney* v. *Farrell,* 28 Conn. 317, 73 Am. Dec. 677; *People* v. *Eastwood,* 14 N. Y. 562; *Townsend* v. *Brundage,* 6 Thomp. & C. 527; *Dubois* v. *Baker,* 40 Barb. 556; *Brennan* v. *People,* 15 Ill. 511; *State* v. *Langford,* 44 N. C. (Busbee, L.) 436; *Woodward* v. *Gates,* 38 Ga. 205; *Patrick* v. *The J. Q. Adams,* 19 Mo. 73; *Eyerman* v. *Sheehan,* 52 Mo. 221; *Albright* v. *Corley,* 40 Tex. 105; *Underwood* v. *Waldron,* 33 Mich. 232.

One who saw an injured person at the time of accident may state that the expression of her face was that of a person in great pain. *Morris* v. *St. Paul City R. Co.* 105 Minn. 276, 17 L.R.A.(N.S.) 598, 117 N. W. 500.

One experienced may testify that a birth was premature. *Bessemer Coal, Iron & Land Co.* v. *Doak,* 152 Ala. 166, 12 L.R.A.(N.S.) 389, 44 So. 627.

[2] *State* v. *Shinborn,* 46 N. H. 497, 88 Am. Dec. 224; *Leonard* v. *Allen,* 11 Cush. 241, where the meaning

questions of identification, where a witness is allowed to speak as to his opinion or belief;[4] and to the question whether or

of tones of voice and gestures was asked. But see *Messner* v. *People*, 45 N. Y. 1, cited supra, § 457.

In *Hardenburg* v. *Cockroft*, 5 Daly, 79, it was said a witness could not be asked as to how far a voice could be heard.

"It has been said," remarks Mr. Starkie, that a witness must not be examined in chief as to his belief or persuasion, but only as to his knowledge of the fact, since judgment must be given *secumdum allegata et probata;* and a man cannot be indicted for perjury who swears as to his persuasion or belief. As far as regards mere belief or persuasion which does not rest upon a sufficient and legal foundation, this position is correct, as where a man believes a fact to be true merely because he has heard it said to be so; but with respect to persuasion or belief as founded on facts within the actual knowledge of the witness, the position is not true. On questions of identity of persons and handwriting, it is every day's practice for witnesses to swear that they believe the person to be the same, or the handwriting to be that of a particular individual, although they will not swear positively; and the degree of credit to be attached to the evidence is a question for the jury. With regard to the second objection, it has been decided that a man who swears falsely that he thinks or believes may be indicted for perjury." 1 Starkie, Ev. 153.

In *Underwood* v. *Waldron*, 33 Mich. 232, it was said by Cooley, J., that "in many cases it is difficult to separate a description of the indications from an opinion on them; nor is a witness always expected to do so. If a man were to come upon the track of a recent rain or snow storm, he would hardly be stopped in giving an account of it as a witness, if he were to say, among other things, that the storm appeared to have come from a particular direction, because such a storm, as everyone knows, must usually, for a time, leave behind some very conclusive indications of the direction it had taken. See, to the same general effect, *Stewart* v. *State*, 19 Ohio, 302, 53 Am. Dec. 426.

[3] *Kearney* v. *Farrell*, 28 Conn. 317, 73 Am. Dec. 677; *Conner* v. *State*, 6 Tex. App. 455. See Max Müller's Lectures on Language, vol. 2, lecture, I.

Thus, a witness may say that a smell was that of chloroform. *Conner* v. *State*, 6 Tex. App. 455.

[4] *Fryer* v. *Gathercole*, 13 Jur. 542, 4 Exch. 262, 18 L. J. Exch. N. S. 389; *Tichborne Case*, Pamph; *Com.* v. *Pope*, 103 Mass. 440; *State* v. *Pike*, 49 N. H. 398, 6 Am. Dec. 533; *Com.* v. *Williams*, 105 Mass. 63; *State* v. *Babb*, 76 Mo. 501; *Woodward* v. *State*, 4 Baxt. 322; *Cooper* v. *State*, 23 Tex. 331; *People* v. *Rolfe*, 61 Cal. 540; Powell, Ev. 4th ed. 102; supra, § 13; post, § 802.

That a mere impression is not an opinion, see *People* v. *Williams*, 29 Hun, 520; post, § 462.

not a party believed himself at the time to be in great danger of death or bodily harm.[5]

§ 460. So as to facts which cannot be expressed in the concrete.—This is also the case as to matters with which the witness is specially acquainted, but which cannot be specifically described.[1] Thus, a witness has been permitted to testify that certain parties were attached to each other;[2] that a grasp by one person of another was friendly;[3] that a culvert "was steep right down, a culvert that I thought was a dangerous place;"[4] that an engine was running at an estimated speed;[5] that a third person was sick or disabled;[6] that the defendant (or the deceased in cases of homicide) was of

As to age, see 3 Wharton & S. Med. Jur. 4th ed. § 65; supra, §§ 236, 311.

As to identification of hairs, see post, § 804.

That opinion as to correspondence of footprints with shoes is admissible, see *State* v. *Reitz,* 83 N. C. 634, post, § 796.

"It was not error to permit witness to testify that certain tracks at one place indicated walking, and at another place running; such testimony being descriptive of facts, and not of opinion merely. *Smith* v. *State,* 137 Ala. 22, 34 So. 396, 13 Am. Crim. Rep. 410.

But the same court, in *Livingston* v. *State,* 105 Ala. 127, 16 So. 801, held it was error to allow a witness to testify that tracks found near the scene of the crime corresponded in his opinion with the tracks of defendant.

[5] Supra, § 431; *Dill* v. *State,* 6 Tex. App. 113.

[1] *Kearney* v. *Farrell,* 28 Conn. 317, 73 Am. Dec. 677; *Bennett* v. *Fail,* 26 Ala. 605; *Cole* v. *Varner,* 31 Ala. 244; *Innis* v. *The Senator,* 4 Cal. 5, 60 Am. Dec. 577. See *State* v. *Stickley,* 41 Iowa, 232; *Polk* v. *State,* 62 Ala. 237.

[2] *Trelawney* v. *Coleman,* 2 Starkie, 192, 1 Barn. & Ald. 90, 18 Revised Rep. 438; *Robertson* v. *Stark,* 15 N. H. 114; *M'Kee* v. *Nelson,* 4 Cow. 355, 15 Am. Dec. 384.

[3] *Blake* v. *People,* 73 N. Y. 586.

[4] *Lund* v. *Tyngsborough,* 9 Cush. 36.

[5] *Detroit & M. R. Co.* v. *Van Steinburg,* 17 Mich. 99.

[6] *State* v. *Knapp,* 45 N. H. 148; *Whittier* v. *Franklin,* 46 N. H. 23, 88 Am. Dec. 185; *Com.* v. *Sturtivant,* 117 Mass. 132, 19 Am. Rep. 401; *Thompson* v. *Stevens,* 71 Pa. 161; *Norton* v. *Moore,* 3 Head, 480; *Milton* v. *Rowland,* 11 Ala. 732; *Barker* v. *Coleman,* 35 Ala. 221; *Stone* v. *Watson,* 37 Ala. 279; *Elliott* v. *Van Buren,* 33 Mich. 49, 20 Am. Rep. 668.

a fierce temper and great strength;[7] that a particular wagon made certain marks which were in question;[8] that a horse appeared unwell or unsound, or was or was not diseased;[9] that a cow was in good condition;[10] that a dog had a bad temper;[11] that certain pictures were good likenesses;[12] that the witness did all in his power to effect a particular result;[13] that

[7] Supra, § 69; *State* v. *Knapp*, 45 N. H. 148.

[8] *State* v. *Folwell*, 14 Kan. 105.

[9] *Willis* v. *Quimby*, 31 N. H. 485; *Spear* v. *Richardson*, 34 N. H. 428; *State* v. *Avery*, 44 N. H. 392; *Johnson* v. *State*, 37 Ala. 457. See these cases approved in *State* v. *Pike*, 49 N. H. 426, 6 Am. Rep. 533.

[10] *Joy* v. *Hopkins*, 5 Denio, 84.

[11] *Mattison* v. *State*, 55 Ala. 224.

[12] *Barnes* v. *Ingalls*, 39 Ala. 193.

[13] *Brink* v. *Hanover F. Ins. Co.* 80 N. Y. 108. In this case Church, Ch. J., said: "It is urged that it is not competent for a witness to testify to the very conclusion of fact which the jury are to pass upon. But there are questions of this character which the trial judge may allow without committing a legal error. In general, facts should be stated, and inferences left to the jury. But here it might be difficult to draw a correct conclusion from the facts stated, or rather the fact of diligence might be left uncertain from the facts stated. In such a case, it is not legal error to allow such a question. Whether a person transacted a specified business as soon as he could is a fact peculiarly within his own knowledge. A person is to walk a mile as soon as he can. From the fact that it occupied half an hour, a jury would be puzzled to determine whether he did it as soon as he could or not. Besides, the question was not whether the proofs of loss were presented as soon as possible, which was the question for the jury, but whether the witness individually did all he could to have them presented. The question held incompetent in *Carpenter* v. *Eastern Transp. Co.* 71 N. Y. 580, was quite different. There the question was whether another person, in the opinion of the witness, omitted or neglected any duty in respect to a certain matter. In the case at bar it was sought to prove a fact, not an opinion, within the knowledge of the witness. While it would not have been a legal error to have sustained the objection, I am of opinion, under the circumstances of this case, that it was not legal error to overrule it.

The object of all examinations in judicial tribunals is to elicit truth; and there are many cases where the form of the questions and manner of examination must be left to the discretion of the trial judge. No injustice could have been done, because the answer would not be likely to prevail against facts which might be drawn out on cross-examination, or proved by other witnesses, inconsistent with it."

certain hairs on a club appeared to the naked eye human, and to resemble the hair of the deceased;[14] that a certain substance was hard pan;[15] that certain distances or weights were to be estimated in a particular way;[16] that certain persons were insane,[17] or drunk,[18] or otherwise; that certain obviously dangerous wounds caused death;[19] that a liquor looked like whisky;[20] that a color was of a certain hue;[21] that a certain person "acted as if she felt very sad;"[22] that a certain person "appeared to be in fear;"[23] that on being held to answer, "he looked as if he felt badly;"[24] that the appearance of a blood stain indicated the spurt came from below, though the witness had never experimented with blood or other fluid in this relation.[25] And as a general rule, "duration, distance, dimen-

[14] *Com.* v. *Dorsey,* 103 Mass. 413.

[15] *Currier* v. *Boston & M. R. Co.* 34 N. H. 498.

[16] *Hackett* v. *Boston, C. & M. R. Co.* 35 N. H. 390; *Eastman* v. *Amoskeag Mfg. Co.* 44 N. H. 143, 82 Am. Dec. 201; *Fulsome* v. *Concord,* 46 Vt. 135; *Campbell* v. *State,* 23 Ala. 44; *Rawles* v. *James,* 49 Ala. 183.

[17] See supra, § 417; *Gahagan* v. *Boston & M. R. Co.* 1 Allen, 187, 79 Am. Dec. 724; *People* v. *Eastwood,* 14 N. Y. 562; *Stanley* v. *State,* 26 Ala. 26.

[18] Ibid; *Aurora* v. *Hillman,* 90 Ill. 61; *Choice* v. *State,* 31 Ga. 424; *Pierce* v. *State,* 53 Ga. 365.

[19] *State* v. *Smith,* 22 La. Ann. 468; *Everett* v. *State,* 62 Ga. 65. And so, that certain wounds could not have been self-inflicted. Ibid. But see contra, *Rash* v. *State,* 61 Ala. 89.

[20] *Com.* v. *Dowdican,* 114 Mass. 257. See *Carson* v. *State,* 69 Ala. 235.

[21] *Com.* v. *Owens,* 114 Mass. 252.

[22] *Culver* v. *Dwight,* 6 Gray, 444. But see *Johnson* v. *State,* 17 Ala. 618; *McAdory* v. *State,* 59 Ala. 92.

[23] In *Brownell* v. *People,* 38 Mich. 736, Campbell, Ch. J., said: "There is no doubt that evidence of the opinions of witnesses, that Brownell (the defendant in a homicide case) appeared to be in fear, should not have been shut out. The case of *People* v. *Lilly,* 38 Mich. 270, decided since the trial below, covers so much of this case as to make it useless to enlarge on this point and some others."

[24] *State* v. *Hudson,* 50 Iowa, 157. But see *McAdory* v. *State,* 59 Ala. 92.

[25] *Com.* v. *Sturtivant,* 117 Mass. 122, 19 Am. Rep. 401, where the question is ably discussed by Endicott, J.; *Greenfield* v. *People,* 85 N. Y. 75, 39 Am. Rep. 636; *Richardson* v. *State,* 7 Tex. App. 487.

So it may be shown that certain spots on the defendant's horse, a

sion, velocity, etc., are often to be proved only by the opinion of witnesses, depending as they do upon many minute circumstances which cannot be fully detailed;[26] and it is not necessary for a witness to be an expert to enable him to give his opinion as to a matter depending upon special knowledge, when he states the facts on which he bases his opinion.[27] It is otherwise as to matters concerning which the jury can

short time after the murder, were blood, though no chemical examination was made. *Dillard* v. *State*, 58 Miss. 368.

[26] Kingman, Ch. J., *State* v. *Folwell*, 14 Kan. 110, citing *Poole* v. *Richardson*, 3 Mass. 330. See also *Com.* v. *Malone*, 114 Mass. 295.

[27] *Currier* v. *Boston & M. R. Co.* 34 N. H. 498; *Richardson* v. *Hitchcock*, 28 Vt. 757; *Sherman* v. *Blodgett*, 28 Vt. 149; *O'Neill* v. *Lowell*, 6 Allen, 110; *Browning* v. *Long Island R. Co.* 2 Daly, 117; *Iselin* v. *Peck*, 2 Robt. 629; *Pennsylvania R. Co.* v. *Henderson*, 51 Pa. 315; *Dailey* v. *Grimes*, 27 Md. 440; *Panton* v. *Norton*, 18 Ill. 496; *Thomas* v. *White*, 11 Ind. 132; *Indianapolis* v. *Huffer*, 30 Ind. 235; *Detroit & M. R. Co.* v. *Van Steinburg*, 17 Mich. 99; *Sowers* v. *Dukes*, 8 Minn. 23, Gil. 6; *Brackett* v. *Edgerton*, 14 Minn. 174, Gil. 134, 100 Am. Dec. 211; *Cochran* v. *Miller*, 13 Iowa, 128; *Barker* v. *Coleman*, 35 Ala. 221; *Blackman* v. *Johnson*, 35 Ala. 252; *Alabama & F. R. Co.* v. *Burkett*, 42 Ala. 83; *People* v. *Sanford*, 43 Cal. 29.

In *Com.* v. *O'Brien*, 134 Mass. 198, which was a complaint for selling intoxicating liquors to a minor, it was held that a witness who testifies to the fact of the sale, and the general appearance of the person to whom the sale was made, may give his opinion as to the age of such person. "After carefully describing," says Devens, J., "the appearance, dress, and manner of the girl to whom the sale was testified by him to have been made, the witness who thus testified was permitted to give his opinion as to her age. This inquiry came fully within the exception to the general rule that witnesses cannot give opinions, by which they have been permitted to express opinions on question of identity, as applied to persons, things, or handwriting, and to give their judgment as to the size, weight, or color of objects, or their estimate of time or distance. As there is much that cannot be reproduced or made palpable to a jury, the witness in such matters, in the words of Mr. Justice Endicott in *Com.* v. *Sturtivant*, 117 Mass. 122, 133, 19 Am. Rep. 401, is permitted to give the "conclusion of fact to which his judgment, observation, and common knowledge has led him in regard to a subject-matter which requires no special learning or experiment, but which is within the knowledge of men in general."

themselves form opinions, in which case witnesses cannot state opinions which do not themselves involve the facts from which they are drawn.[28]

§ 461. Witness may give substance of conversation or writings.—It is sufficient when the spoken words of another are to be testified to, to give their substance, the witness swearing to material accuracy and completeness of the substance.[1] A witness, however, cannot be permitted to say what is the impression left on him by a conversation, unless he swears to such impressions as recollections, and not inferences.[2] But what a witness did in consequence of a conversation, he may be allowed to prove.[3]

§ 462. Vague impressions inadmissible.—The same distinction applies to other objects. The limitedness both of human observation and of human expression forbids the reproduction of any fact exactly;[1] it is enough if a witness swears to events and objects according to the best of his recollection and belief.[2] But it is no objection to the admissibility of such evidence that the witness uses the term "impression,"

[28] *Cannell* v. *Phœnix Ins. Co.* 59 Me. 582; *Morris* v. *East Haven*, 41 Conn. 252; *Messner* v. *People*, 45 N. Y. 1; *Ames* v. *Snider*, 69 Ill. 376; *Bissell* v. *Wert*, 35 Ind. 54; *Eaton* v. *Woolly*, 28 Wis. 628; *State* v. *Thorp*, 72 N. C. 186; *Gavisk* v. *Pacific R. Co.* 49 Mo. 274; *Shepherd* v. *Hamilton County*, 8 Heisk. 380; *Largan* v. *Central R. Co.* 40 Cal. 272; *Sturla* v. *Freccia*, 40 L. T. N. S. 861, s. c. 43 L. T. N. S. 209, L. R. 5 App. Cas. 623, 29 Week. Rep. 217, 44 J. P. 812.

[1] *United States* v. *White*, 5 Cranch, C. C. 457, Fed. Cas. No. 16,679; *United States* v. *Macomb*, 5 McLean, 286, Fed. Cas. No. 15,702; *Brown* v. *Com.* 73 Pa. 321, 13 Am. Rep. 740; *Summons* v. *State*, 5 Ohio St. 325, and other cases cited; Wharton, Ev. § 461.

[2] *Morris* v. *Stokes*, 21 Ga. 552; *Lockett* v. *Minns*, 27 Ga. 207; *Bell* v. *Troy*, 35 Ala. 184; *Crews* v. *Threadgill*, 35 Ala. 334; *Helm* v. *Cantrell*, 59 Ill. 528; *Yost* v. *Devoult*, 9 Iowa, 60.

[3] *Whaley* v. *State*, 11 Ga. 123.

[1] Supra, § 378.

[2] Wharton, Ev. § 462.

if he testifies to what he believes, however distrustful he may be as to perfect accuracy.[3] It is for the jury to determine how far such "impressions" are reliable.[4] So a witness is allowed to state why certain facts are impressed on his memory, if such reasons are not for other grounds inadmissible.[5] Impressions, however, which are conjectural and uncertain cannot be detailed.[6] The distinction is this: Impressions which are primary, and for which no substituted proof is conceivable, can be put in evidence, whereas an impression which is merely a secondary idea of that of which a more accurate idea is obtainable cannot be received.

§ 463. Witness not compelled to criminate himself.— A witness will not be compelled to answer any question the reply to which would supply evidence by which he could be convicted of a criminal offense.[1] In a number of the early cases, it was declared that a witness might be compelled to testify, notwithstanding the constitutional guaranty against self-incrimination, where the subsequent use of his testimony in any case against him was prohibited.[2] The privilege as

[3] Ibid.; *McLean* v. *Clark*, 47 Ga. 24.

[4] *Duvall* v. *Darby*, 38 Pa. 56; *Crowell* v. *Western Reserve Bank*, 3 Ohio St. 406; *McRae* v. *Morrison*, 35 N. C. (13 Ired. L.) 46; *Beverly* v. *Williams*, 20 N. C. 378 (4 Dev. & B. L. 236).

[5] *Thomas* v. *State*, 27 Ga. 287; *Bell* v. *Troy*, 35 Ala. 194.

[6] *Clark* v. *Bigelow*, 16 Me. 246; *Lewis* v. *Brown*, 41 Me. 448; *Humphries* v. *Parker*, 52 Me. 502; *Tibbetts* v. *Flanders*, 18 N. H. 284; *Wheeler* v. *Blandin*, 24 N. H. 168; *State* v. *Flanders*, 38 N. H. 324; *Ives* v. *Hamlin*, 5 Cush. 534; *Wiggins* v. *Holley*, 11 Ind. 2; *State* v. *Thorp*, 72 N. C. 186; *Woodward* v. *State*, 4 Baxt. 322; *Wells* v. *Shipp*, Walk. (Miss.) 358; *People* v. *Wreden*, 59 Cal. 392; *McKnight* v. *State*, 6 Tex. App. 159, cited supra, §§ 457, 458.

[1] Starkie, Ev. 165, 166; *Rex* v. *Pegler*, 5 Car. & P. 521; *United States* v. *Moses*, 1 Cranch, C. C. 170, Fed. Cas. No. 15,824; *United States* v. *McCarthy*, 21 Blatchf. 469, 18 Fed. 87; *State* v. *Blake*, 25 Me. 350; *Com.* v. *Kimball*, 24 Pick. 366; *People* v. *Rector*, 19 Wend. 569; *Pleasant* v. *State*, 15 Ark. 624; *State* v. *Marshall*, 36 Mo. 400.

[2] *Ex parte Buskett*, 106 Mo. 603, 14 L.R.A. 407, 27 Am. St. Rep.

378, 17 S. W. 753, 9 Am. Crim. Rep. 754; *La Fontaine* v. *Southern Underwriters Asso.* 83 N. C. 132; *Higdon* v. *Heard,* 14 Ga. 255; *Ex parte Rowe,* 7 Cal. 184; *State* v. *Quarles,* 13 Ark. 307; *Wilkins* v. *Malone,* 14 Ind. 153.

People ex rel. Hackley v. *Kelly,* 24 N. Y. 74, even went so far as to decide that the constitutional provision that no person should "be compelled in any criminal case to be a witness against himself" applied only in a criminal case in which the person sought to be made a witness was also a party defendant; and that therefore a statute making the giving of testimony compulsory, but providing that the testimony so given should not be used in any prosecution or proceeding, civil or criminal, against the witness, was sufficient protection. But this was overruled in *People ex rel. Lewisohn* v. *O'Brien,* 176 N. Y. 253, 68 N. E. 353, 15 Am. Crim. Rep. 97.

In other cases it was held that before the constitutional privilege of silence could be taken away by the legislature, there must be absolute immunity provided; that nothing short of a complete amnesty to the witness—an absolute wiping out of the offense, so that he could no longer be prosecuted for it—would furnish that immunity and that a provision merely that the testimony of a witness should not be used in evidence against him did not secure such absolute immunity. *Cullen* v. *Com.* 24 Gratt. 624; *Emery's Case,* 107 Mass. 172, 9 Am. Rep. 22; *State* v. *Nowell,* 58 N. H. 314.

The rule declared in these cases was reinforced by the decision in *Counselman* v. *Hitchcock,* 142 U. S. 547, 35 L. ed. 1110, 3 Inters. Com. Rep. 816, 12 Sup. Ct. Rep. 195, where, after an extensive review of the earlier authorities, it was decided that nothing short of absolute immunity from prosecution could satisfy the constitutional guaranty, and that a statute declaring that no evidence obtained from a witness should be given in evidence, or in any manner used against him or his property or estate, in any court of the United States, in any criminal proceeding or for the enforcement of any penalty or forfeiture, did not supply a complete protection from all the perils which the constitutional guaranty was designed to guard, since it would not prevent the use of his testimony to search out other testimony to be used against him or his property.

This ruling is, of course, binding on the Federal courts, which have since followed it. *Re Scott,* 95 Fed. 815; *Re Rosser,* 96 Fed. 305; *Re Feldstein,* 103 Fed. 269; *Re Walsh,* 140 Fed. 518; *Foot* v. *Buchanan,* 113 Fed. 156; *Re Shera,* 114 Fed. 207; *Re Nachman,* 114 Fed. 995, except in the case of *Mackel* v. *Rochester,* 42 C. C. A. 427, 102 Fed. 314, where it was held that the provision of § 7 of the bankruptcy act of July 1, 1898, that no testimony given by a witness should be offered in evidence against him in any criminal proceeding, was sufficient to satisfy the constitutional guaranty against self-incrimination. But this decision seems to be based on a mis-

thus stated extends to inculpatory documents[3] and to marital relations, and hence neither husband nor wife is compelled to answer questions involving the other's criminality,[4] and, should answers to guilt be extorted, these answers, as will hereafter be seen, cannot be used against the party thus compelled to answer.[5]

§ 463a. Exemption from prosecution satisfies the guaranty against self-incrimination.—Even where absolute immunity from punishment is provided, it has been held that a witness cannot be deprived of the protection of the 5th Amendment to the Federal Constitution, the court declaring that the privilege conferred by that Amendment was intended to make the secrets of memory, so far as they brought one's former acts within the definition of crime, inviolate against judicial probe or disclosure.[1] But this case was subsequently overthrown by the ruling in a later one, where it was held that exempting a witness from any prosecution or any penalty or forfeiture, on account of any transaction to which he may testify, sufficiently satisfies the guaranty against self-incrimination. The court said that the fact that a witness cannot be shielded from the personal disgrace attaching

conception of the case of *Brown* v. *Walker*, 161 U. S. 591, 40 L. ed. 819, 5 Inters. Com. Rep. 369, 16 Sup. Ct. Rep. 644.

The rule laid down in *Counselman* v. *Hitchcock*, 142 U. S. 547, 35 L. ed. 1110, 3 Inters. Com. Rep. 816, 12 Sup. Ct. Rep. 195, was also adopted in *Ex parte Carter*, 166 Mo. 604, 57 L.R.A. 654, 66 S. W. 540; *Lamson* v. *Boyden*, 160 Ill. 613, 43 N. E. 781; *People ex rel. Akin* v. *Butler Street Foundry & Iron Co.* 201 Ill. 236, 66 N. E. 349; *Ex parte Clarke*, 103 Cal. 352, 37 Pac. 230; and *People ex rel. Lewisohn* v. *O'Brien*, 176 N. Y. 253, 63 N. E. 353, 15 Am. Crim. Rep. 97.

[3] See Wharton, Ev. § 751; *Byass* v. *Sullivan*, 21 How. Pr. 50.

[4] *Cartwright* v. *Green*, 8 Ves. Jr. 405, 7 Revised Rep. 99; *Rex* v. *All Saints*, 6 Maule & S. 200. See supra, § 402.

[5] Post, § 665.

[1] *United States* v. *James*, 26 L.R.A. 418, 5 Inters. Com. Rep. 578, 60 Fed. 257.

to the exposure of his crime does not render a statute exempting him from prosecution therefor unconstitutional.[2]

§ 464. Constitutional privilege not violated by incriminating witness on prosecution of another.—The constitutional provision referred to, against compelling a person to be a witness against himself in a criminal action, is not violated by requiring him to give testimony against another which may show that he has himself been guilty of a crime, where a statute declares that he shall not be liable to indictment or presentment by information, nor to prosecution or punishment, "for an offense with reference to which his testimony was given." [1] And a witness who is exempted by

[2] *Brown* v. *Walker*, 161 U. S. 591, 40 L. ed. 819, 5 Inters. Com. Rep. 369, 16 Sup. Ct. Rep. 644.

In *People ex rel. Lewisohn* v. *O'Brien*, 176 N. Y. 253, 68 N. E. 353, 15 Am. Crim. Rep. 97, which was a proceeding for contempt in refusing to answer certain questions as a witness in proceedings against another as a common gambler, § 342 of the Penal Code, which provided that no person should be excused from giving testimony upon any investigation or proceeding for a violation of the chapter (relating to gambling), upon the ground that such testimony should not be received against him upon any criminal investigation or proceeding,—was held not to afford the witness the protection contemplated by New York Const. art. 1, § 6, as to self-incrimination. The court disapproved of the ruling in *People ex rel. Hackley* v. *Kelly*, 24 N. Y. 74, and followed *Counselman* v. *Hitchcock*, 142 U. S. 547, 35 L. ed. 1110, 3 Inters. Com. Rep. 816, 12 Sup. Ct. Rep. 195. Subsequently, the Code provision was amended to provide that no person so testifying should be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction concerning which he might testify or produce evidence, and that no evidence so given or produced should be received against him upon any criminal investigation or proceeding. And in *People ex rel. Lewisohn* v. *Court of General Sessions*, 96 App. Div. 201, 89 N. Y. Supp. 364, affirmed without opinion in 179 N. Y. 594, 72 N. E. 1148, this provision was held to satisfy the constitutional guaranty against self-incrimination. See also *State* v. *Jack*, 69 Kan. 387, 1 L.R.A.(N.S.) 167, 76 Pac. 911, 2 A. & E. Ann. Cas. 171; *People* v. *Sharp*, 107 N. Y. 427, 1 Am. St. Rep. 851, 14 N. E. 319.

[1] *Ex parte Cohen*, 104 Cal. 524, 26 L.R.A. 423, 43 Am. St. Rep. 127, 38 Pac. 364.

such a statute, from all liability for any offense of which he is compelled to give evidence, cannot invoke the constitutional privilege of silence.[2]

[2] *State* v. *Morgan,* 133 N. C. 743, 45 S. E. 1033; *Floyd* v. *State,* 7 Tex. 215; *State* v. *Talbott,* 73 Mo. 357; *People* v. *Sharp,* 107 N. Y. 427, 1 Am. St. Rep. 851, 14 N. E. 319; *State* v. *Pugsley,* 75 Iowa, 744, 38 N. W. 498, 8 Am. Crim. Rep. 100; *United States* v. *McCarthy,* 21 Blatchf. 469, 18 Fed. 89; *People ex rel. Hackley* v. *Kelly,* 24 N. Y. 75; *Ward* v. *State,* 2 Mo. 120, 22 Am. Dec. 449. Contra, *Minters* v. *People,* 139 Ill. 363, 29 N. E. 45; *Kendrick* v. *Com.* 78 Va. 493; *Cullen* v. *Com.* 24 Gratt. 624; *Emery's Case,* 107 Mass. 172, 9 Am. Rep. 22. See also *State* v. *Quarles,* 13 Ark. 307; *Higdon* v. *Heard,* 14 Ga. 255; *Kneeland* v. *State,* 62 Ga. 395; *Frazee* v. *State,* 58 Ind. 8; *People ex rel. Hackley* v. *Kelly,* 24 N. Y. 74; *Bedgood* v. *State,* 115 Ind. 275, 17 N. E 621; 1 Burr's Trial, 245; *Howard* v. *Com.* 110 Ky. 356, 61 S. W. 756, 13 Am. Crim. Rep. 533; *Evans* v. *State,* 106 Ga. 519, 71 Am. St. Rep. 276, 32 S. E. 659, 11 Am. Crim. Rep. 695.

See the late ruling of the Federal Supreme Court contained in *Interstate Commerce Commission* v. *Baird,* 194 U. S. 25, 45 L. ed. 860, 24 Sup. Ct. Rep. 563, following case of *Brown* v. *Walker,* 161 U. S. 591, 40 L. ed. 819, 5 Inters. Com. Rep. 369, 16 Sup. Ct. Rep. 644, declaring that the immunity extended by the interstate commerce act, from prosecution or forfeiture of estate because of testimony given in pursuance of the requirements of the law, satisfies the guaranty of the 5th Amendment.

"It was the intention of the legislature by § 10 of the act to afford the witness complete immunity against criminal prosecution, fines, imprisonment, penalties, and forfeitures, for any violation of the act about which the witness might give evidence upon a proceeding or investigation by the state to acquire information as to violations of the act; and also to afford the witness complete immunity against such testimony's being used against him in any proceeding of a criminal nature. The immunity offered by the act is coextensive with the constitutional privilege. A statute providing such immunity is sufficient; a witness thus protected cannot invoke the constitutional privilege of silence." *State* v. *Jack,* 69 Kan. 387, 1 L.R.A. (N.S.) 167, 76 Pac. 911, 2 A. & E. Ann. Cas. 171; *Bradley* v. *Clark,* 133 Cal. 196, 65 Pac. 395. See *Counselman* v. *Hitchcock,* 142 U. S. 547, 35 L. ed. 1110, 3 Inters. Com. Rep. 816, 12 Sup. Ct. Rep. 195, reversing *Re Counselman,* 3 Inters. Com. Rep. 326, 44 Fed. 268, and overruling *United States* v. *McCarthy,* 21 Blatchf. 469, 18 Fed. 87; *United States* v. *Brown,* 1 Sawy. 531, Fed. Cas. No. 14,671; *United States* v. *Three Tons of Coal,* 6 Biss. 379, Fed. Cas. No. 16,515.

§ 465. Privilege must be claimed by witness.—This privilege can never be interposed by a party to the issue for the witness. It must be claimed by the witness in order to be available,[1] and as will be seen,[2] the witness if he discloses part of a transaction in which he was criminally concerned, cannot hold back the rest.[3] The judge is not bound to notify

[1] *State* v. *Wentworth,* 65 Me. 234, 20 Am. Rep. 688; *State* v. *Foster,* 23 N. H. 348, 55 Am. Dec. 191; *Com.* v. *Shaw,* 4 Cush. 594, 50 Am. Dec. 813; *Ward* v. *People,* 6 Hill, 144; *Hanoff* v. *State,* 37 Ohio St. 178, 41 Am. Rep. 496; *State* v. *Bilansky,* 3 Minn. 246, Gil. 169; *State* v. *Patterson,* 24 N. C. (2 Ired. L.) 346, 38 Am. Dec. 699; *Newcomb* v. *State,* 37 Miss. 383; *White* v. *State,* 52 Miss. 216, 2 Am. Crim. Rep. 454; *Rex ex rel. Fane* v. *Adey,* 1 Moody & R. 94; *Thomas* v. *Newton,* Moody & M. 48, note; *Fisher* v. *Ronalds,* 12 C. B. 764, 22 L. J. C. P. N. S. 62, 17 Jur. 393, 1 Week. Rep. 54; *Marston* v. *Downes,* 1 Ad. & El. 34, 3 Nev. & M. 861, 6 Car. & P. 381, 3 L. J. K. B. N. S. 158; *Sodusky* v. *McGee,* 5 J. J. Marsh. 621; *Clark* v. *Reese,* 35 Cal. 89.

That witness may waive his privilege, see *People* v. *Arnold,* 40 Mich. 710, 3 Am. Crim. Rep. 73.

As to privilege of party, see supra, § 432.

In *Reg.* v. *Garbett,* 1 Den. C. C. 236, 2 Car. & K. 474, 2 Cox, C. C. 448, it was held that a witness is not compellable to answer a question if the court be of the opinion that the answer might tend to criminate him. It was also held in the same case that the court may compel a witness to answer any such question; but that, if the answer be subsequently used against the witness in a criminal proceeding, and a conviction obtained, judgment will be respited and the conviction reversed. See post, § 470.

It is settled that it is no ground for a witness to refuse to go into the box, that the question will criminate him, and that he will refuse to answer it. The privilege can be claimed only by the witness himself after he has been sworn, and the objectionable question put to him. *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.

And the witness must state under oath that he believes the answer will tend to criminate him. Powell, Ev. 4th ed. 109.

See also, as to necessity of witness claiming privilege, note in 4 L.R.A.(N.S.) 1144.

[2] Post, § 470.

[3] *People* v. *Freshour,* 55 Cal. 375; supra, § 432.

the witness of his privilege in this relation,[4] though he may in his discretion give an intimation to this effect.[5]

§ 466. Danger of prosecution must be real and present.—We have several rulings that a witness cannot be compelled to give a link to a chain of evidence by which his conviction of a criminal offense can be furthered.[1] This

[4] *Atty. Gen.* v. *Radloff*, 10 Exch. 88, 2 C. L. R. 1116, 23 L. J. Exch. N. S. 240, 18 Jur. 555, 2 Week. Rep. 566.

[5] *Fisher* v. *Ronalds*, 12 C. B. 766, 22 L. J. C. P. N. S. 62, 17 Jur. 393, 1 Week. Rep. 54; *Reg.* v. *Boyes*, 2 Fost. & F. 158, 1 Best & S. 311, 30 L. J. Q. B. N. S. 301, 7 Jur. N. S. 1158, 5 L. T. N. S. 147, 9 Week. Rep. 690, 9 Cox, C. C. 32; *Com.* v. *Price*, 10 Gray, 472, 71 Am. Dec. 668; *Mayo* v. *Mayo*, 119 Mass. 292.

[1] *People* v. *Mather*, 4 Wend. 229, 21 Am. Dec. 122; *King* v. *King*, 2 Rob. Eccl. Rep. 153; *Janvrin* v. *Scammon*, 29 N. H. 280; *People ex rel. Taylor* v. *Forbes*, 143 N. Y. 219, 38 N. E. 303; *Adams* v. *Lloyd*, 3 Hurlst. & N. 363, 27 L. J. Exch. N. S. 499, 4 Jur. N. S. 590, 6 Week. Rep. 752; *Ex parte Buskett*, 106 Mo. 602, 14 L.R.A. 407 27 Am. St. Rep. 378, 17 S. W. 753, 9 Am. Crim. Rep. 754.

The question arose on *Burr's Trial* (1 Burr's Trial, 424) in the following form: A paper being produced to the court in cipher, a witness, Mr. Willie, was asked, "Did you copy this paper?" He objected, that if any paper he had written would have any effect on any other person, it would as much affect himself. Mr. Wirt insisted that, as the witness had sworn in a previous deposition, that he did not understand the cipher, the mere act of copying could not implicate him. Willie was then asked, "Do you understand its contents?" It was admitted by the witness that the question *per se* might be innocent, but should he answer, the prosecution might go on gradually, until, at last, it obtained matter enough to criminate him. The counsel for the prosecution admitted that, if they had followed with a question as to what were the contents of the letter, the objection might be valid. But they as yet had not. If he answered that he did understand the letter, his answers to the other question might amount to self-crimination; but if he did not understand it, it could not criminate him. "Do you know this letter to be written by Aaron Burr, or anyone under his authority?" Marshall, Ch. J., said that was a proper question. The witness still refused to answer as it might criminate him. The question was then argued, when the chief justice remarked that the proposition contended for on the part of the witness, that he was to

proposition, however, cannot be maintained to its full extent, since there is no answer which a witness could give, which might not become part of a supposable concatenation of incidents from which criminality of some kind might be inferred. To protect the witness from answering, it must appear from the nature of the evidence which the witness is called to give, that there is reasonable ground to apprehend that, should he answer, he would be exposed to a criminal prosecution.[2] The witness, as will presently be seen, is not the exclusive judge as to whether he is entitled on this ground to refuse to answer.[3] The question is for the discretion of the judge, and, in exercising this discretion, he must be governed as much by his personal perception of the peculiarities of the case, as by the facts actually in evidence. But in any view the danger to be apprehended must be real, with reference to the probable operation of law in the ordinary course of things, and not merely speculative, having reference to some remote and unlikely contingency.[4]

be the sole judge of the effect of his answer, was too broad; while that on the other side, that a witness can never refuse unless the answer will *per se* convict him of a crime, was too narrow. He is not compellable to disclose a single link in the chain of proof against him. If the letter contained evidence of a treason, a question determinable on other testimony, by his acquaintance with it when written, he might probably be guilty of misprision of treason; and the court ought not to compel his answer. If it relate to the misdemeanor (setting on foot an unlawful military expedition against Mexico), the court were not apprised that such knowledge would affect the witness. The conclusion was that the question which respected the present knowledge of the cipher, as it would not affect him in any view, must be answered.

[2] *Ex parte Wilson*, 39 Tex. Crim. Rep. 630, 47 S. W. 996; *Wilson* v. *State*, 41 Tex. Crim. Rep. 115, 51 S. W. 916; *State* v. *Faulkner*, 175 Mo. 546, 75 S. W. 116; *State* v. *Comer*, 157 Ind. 611, 62 N. E. 452.

[3] Post, § 469.

[4] *Reg.* v. *Boyes*, 1 Best & S. 311, 9 Cox, C. C. 32, 2 Post. & F. 157, 30 L. J. Q. B. N. S. 301, 7 Jur. N. S. 1158, 5 L. T. N. S. 147, 9 Week. Rep. 690; *People ex rel. Hackley* v. *Kelly*, 24 N. Y. 74; *Wroe* v. *State*, 20 Ohio St. 460; and cases cited supra, § 465; *Langhorne* v. *Com.* 76 Va. 1012; *People* v. *Rector*,

§ 467. Exposure to civil liability no excuse.—A witness cannot excuse himself on the ground that his answer would expose him to civil liability,[1] as this privilege has no application to such a case; and a witness can at all times be called and examined where his answers do not expose him to a prosecution for a crime, or subject him to a fine or forfeiture of his estate, although such answers may establish, or tend to establish, that he owes a debt or is otherwise subject to civil suit.[2]

§ 468. Police liability, or as a vendee of liquor, not sufficient to excuse.—This privilege also cannot be claimed when the question touches acts to which, from their slight and remote culpability, public prosecutions are not directed, especially when the answer is one which public policy requires to be made. This is peculiarly the case with prosecutions under the liquor laws. Thus, a witness will be compelled to an-

19 Wend. 569; *Robson* v. *Doyle,* 191 Ill. 566, 61 N. E. 435; *Nelson* v. *United States,* 201 U. S. 92, 50 L. ed. 673, 26 Sup. Ct. Rep. 358; *Jack* v. *Kansas,* 199 U. S. 372, 50 L. ed. 234, 26 Sup. Ct. Rep. 73, 4 A. & E. Ann. Cas. 689; *State* v. *Thomas,* 98 N. C. 599, 2 Am. St. Rep. 351, 4 S. E. 518; *Brown* v. *Walker,* 161 U. S. 591, 40 L. ed. 981, 5 Inters. Com. Rep. 369, 16 Sup. Ct. Rep. 644.

In *Hale* v. *Henkel,* 201 U. S. 43, 50 L. ed. 652, 26 Sup. Ct. Rep. 370, Justice Brown said: "The interdiction of the 5th Amendment operates only where a witness is asked to incriminate himself, in other words, to give testimony which may possibly expose him to a criminal charge. But if the criminality has already been taken away, the amendment ceases to apply. The criminality provided against is a present, not a past, criminality, which lingers only as a memory, and involves no present danger of prosecution." See also *McAllister* v. *Henkel,* 201 U. S. 90, 50 L. ed. 671, 26 Sup. Ct. Rep. 385.

As to privilege of witnesses, see notes to *Cooper* v. *State,* 4 L.R.A. 766; *Rice* v. *Rice,* 11 L.R.A. 591; *Re Buskett,* 14 L.R.A. 407. Also *State* v. *Duncan,* 4 L.R.A.(N.S.) 1144; *McGorray* v. *Sutter,* 24 L.R.A. (N.S.) 165; *People* v. *Cahill,* 20 L.R.A.(N.S.) 1084.

[1] See cases in Wharton, Ev. § 537; *Bull* v. *Loveland,* 10 Pick. 9; *Alexander* v. *Knox,* 7 Ala. 503; *Stevens* v. *Whitcomb,* 16 Vt. 121.

[2] 14 Enc. Ev. p. 634.

swer whether or not he purchased liquor of a man charged with selling it by small measures; nor can he shelter himself from the question by the position that, by buying the liquor he became an accessory to the misdemeanor of selling it, and thereby a principal.[1] The question in such cases is, Would the witness's answer that he purchased liquor or other contraband article expose him to a prosecution? If not, he may be compelled to answer when the question is material.[2]

§ 469. Court determines question.—The witness is not the sole judge of his liability. The liability must appear reasonable to the court, or the witness will be compelled to answer.[1] Thus, a witness may be compelled to answer as to conditions which he shares with many others (*e. g.*, whether he was in the neighborhood of a homicide on a particular day, when such neighborhood indicates a city), though not as to conditions which would bring the crime in inculpatory nearness to himself.[2] But in order to claim the protection of the

[1] *Com.* v. *Willard,* 22 Pick. 476; *State* v. *Rand,* 51 N. H. 361, 12 Am. Rep. 127; *Com.* v. *Downing,* 4 Gray, 29; *State* v. *Wright,* 49 N. C. (4 Jones, L.) 308. Though see *Re Doran,* 2 Pars. Sel. Eq. Cas. 467, and *State* v. *Bonner,* 2 Head, 135, under statutes.

[2] As to the characteristics of police offenses, see Wharton, Crim. Law, 10th ed. § 23a.

[1] *People* v. *Mather,* 4 Wend. 229, 21 Am. Dec. 122; *Real* v. *People,* 42 N. Y. 270; *Ward* v. *State,* 2 Mo. 120, 22 Am. Dec. 449; *Territory* v. *Nugent,* 1 Mart. (La.) 114; *Richmon* v. *State,* 2 G. Greene, 532; *Kirschner* v. *State,* 9 Wis. 140; *State ex rel. Lanning* v. *Lonsdale,* 48 Wis. 348, 4 N. W. 390; *Floyd* v. *State,* 7 Tex. 215; *Temple* v. *Com.* 75 Va. 892; *State* v. *Edwards,* 2 Nott & M'C. 13, 10 Am. Dec. 557.

[2] *Reg.* v. *Boyes,* 1 Best & S. 311, 9 Cox, C. C. 22, 2 Fost. & F. 157, 30 L. J. Q. B. N. S. 301, 7 Jur. N. S. 1158, 5 L. T. N. S. 147, 9 Week. Rep. 900; *Wroe* v. *State,* 20 Ohio St. 460; supra, § 466.

Roscoe, Crim. Ev. 8th ed. 148: "In *Reg.* v. *Boyes,* 1 Best & S. 311, the court of Queen's bench, after consideration, held that 'to entitle a party called as a witness to the privilege of silence, the court must see from the circumstances of the case and the nature of the evidence, that there is reasonable ground to apprehend danger to the witness from his be-

court, the witness is not required to disclose all the facts, as this would defeat the object for which he claims protection.[3] It is not, indeed, enough for the witness to say that the answer will criminate him.[4] It must appear to the court, from all the circumstances, that there is real danger, though this the judge, as we have seen, is allowed to gather from the whole case, as well as from his general conception of the relations of the witness.[5] Upon the facts thus developed, it is the province of the court to determine whether a direct answer to a question may criminate or not.[6]

ing compelled to answer.' It will be seen that in all cases where the point has directly arisen, it has been held that the bare oath of the witness that he is endangered by being compelled to answer is not necessarily sufficient; but that the judge is to use his discretion whether he will grant the privilege or not. Of course, the witness must always pledge his oath that he will incur risk, and there are innumerable cases in which a judge would be properly satisfied with this without further inquiry; but if he is not satisfied, he is not precluded from further investigations."

[3] *Reg.* v. *Garbett,* 2 Car. & K. 495, 1 Den. C. C. 236, 2 Cox, C. C. 448; *Fisher* v. *Ronalds,* 12 C. B. 762, 22 L. J. C. P. N. S. 62, 17 Jur. 393, 1 Week. Rep. 54; *Ex parte Mexican & S. A. Co.* 4 De G. & J. 320, 27 Beav. 474, 28 L. J. Ch. N. S. 631, 5 Jur. N. S. 779.

[4] *Reg.* v. *Boyes,* 9 Cox, C. C. 32, 1 Best & S. 311, 2 Fost. & F. 157, 30 L. J. Q. B. N. S. 301, 7 Jur. N. S. 1158, 5 L. T. N. S. 147, 9 Week. Rep. 900; *Osborn* v. *London Dock Co.* 10 Exch. 701, 3 C. L. R. 313, 24 L. J. Exch. N. S. 140, 1 Jur. N. S. 93; *Ex parte Fernandez,* 10 C. B. N. S. 3, 30 L. J. C. P. N. S. 321, 7 Jur. N. S. 571, 4 L. T. N. S. 324, 9 Week. Rep. 832. See, however, contra, *Warner* v. *Lucas,* 10 Ohio, 336; *Poole* v. *Perritt,* 1 Speers, L. 128.

[5] *Valliant* v. *Dodemede,* 2 Atk. 546; *Reg.* v. *Boyes,* 1 Best & S. 311, 9 Cox, C. C. 32, 2 Fost. & F. 157, 30 L. J. Q. B. N. S. 301, 7 Jur. N. S. 1158, 5 L. T. N. S. 147, 9 Week. Rep. 900.

[6] *Grannis* v. *Branden,* 5 Day, 260, 5 Am. Dec. 143; *Jackson ex dem. Wyckoff* v. *Humphrey,* 1 Johns. 498; *People* v. *Mather,* 4 Wend. 229, 21 Am. Dec. 122; *Real* v. *People,* 42 N. Y. 270; *Vaughn* v. *Perine,* 3 N. J. L. 728, 4 Am. Dec. 411; *Galbreath* v. *Eichelberger,* 3 Yeates, 515.

"To entitle a witness to the privilege of not answering a question as tending to criminate him, the court must see from the circumstances of the case and the nature of the evidence which the witness is called to give, that there is reasonable ground to apprehend danger

§ 470. Waiver of part waives all.—A witness who voluntarily and intentionally opens an account of a transaction exposing him to criminal prosecution is ordinarily obliged to complete the narrative. He cannot, for instance, state a fact, and afterwards refuse to give the details.[1] Even a party who becomes a witness cannot, after waiving his rights, decline a cross-examination on the ground that it exposes a criminality which he has already discovered.[2] But there is high au-

to the witness from his being compelled to answer. If the fact of the witness being in danger is once made to appear, great latitude should be allowed to him in judging of the effect of any particular question. The danger to be apprehended must be real and appreciable with reference to the ordinary operation of law, in the ordinary course of things, and not a danger of an imaginary character having reference to some barely possible contingency." *Reg.* v. *Boyes,* 1 Best & S. 311, 9 Cox, C. C. 32, 2 Fost. & F. 157, 30 L. J. Q. B. N. S. 301, 7 Jur. N. S. 1158, 5 L. T. N. S. 147, 9 Week. Rep. 900.

The witness may claim the protection of the court at any stage of the inquiry, although he may already have answered without objection some questions tending to criminate him. *Reg.* v. *Garbett,* 2 Car. & K. 474, 1 Den. C. C. 236, 2 Cox, C. C. 448.

The witness himself is not the sole judge; the judge must see, from the circumstances of the case and the nature of the evidence, whether there really is reasonable ground to apprehend danger to him from his being compelled to answer. *Osborn* v. *London Dock Co.* 10 Exch. 698, 24 L. J. Exch. N. S. 140, 3 C. L. R. 313, 1 Jur. N. S. 93; *Sidebottom* v. *Adkins,* 27 L. J. Ch. N. S. 152; *Reg.* v. *Boyes,* 1 Best & S. 311, 30 L. J. Q. B. N. S. 301, 9 Cox, C. C. 32, 2 Fost. & F. 157, 7 Jur. N. S. 1158, 5 L. T. N. S. 147, 9 Week. Rep. 900; *Ex parte Fernandez,* 10 C. B. N. S. 3, 39, 40, 30 L. J. C. P. N. S. 321, 7 Jur. N. S. 571, 4 L. T. N. S. 324, 9 Week. Rep. 832. See *Wroe* v. *State,* 20 Ohio St. 460.

[1] *Supra,* § 443; *East* v. *Chapman,* Moody & M. 46, 2 Car. & P. 573; *Low* v. *Mitchell,* 18 Me. 372; *State* v. *K.* 4 N. H. 562; *State* v. *Foster,* 23 N. H. 348, 55 Am. Dec. 191; *Com.* v. *Knapp,* 10 Pick. 478, 20 Am. Dec. 534; *Com.* v. *Price,* 10 Gray, 472, 77 Am. Dec. 668; *Com.* v. *Howe,* 13 Gray, 26; *Com.* v. *Pratt,* 126 Mass. 462; *Norfolk* v. *Gaylord,* 28 Conn. 309; *People* v. *Carroll,* 3 Park. Crim. Rep. 73; *People* v. *Lohman,* 2 Barb. 216; *Alderman* v. *People,* 4 Mich. 414, 69 Am. Dec. 321; *People* v. *Freshour,* 55 Cal. 375.

As to accomplices, see supra, § 444.

[2] *State* v. *Ober,* 52 N. H. 459, 13 Am. Rep. 88; *Com.* v. *Lannan,* 13

thority to hold that a witness may at any time avail himself of the protection of the court, and refuse further answers, unless he has previously waived his privilege by a partial answer.[3]

§ 471. Pardon destroys protection.—If there be a pardon issued by the proper authorities, so as to relieve the witness from any penal responsibility for the offense as to which he is asked, he will be compelled to answer,[1] and so where the statute of limitations has interposed a bar.[2] Statutes of in-

Allen, 563; *Com.* v. *Mullen*, 97 Mass. 545; *Com.* v. *Morgan*, 107 Mass. 199; *McGarry* v. *People*, 2 Lans. 227; *Burdick* v. *People*, 58 Barb. 51; *Fralich* v. *People*, 65 Barb. 48; *Connors* v. *People*, 50 N. Y. 240; *Barber* v. *State*, 13 Fla. 675; Wharton, Ev. § 483; supra, §§ 429, 430.

[3] *Reg.* v. *Garbett*, 2 Car. & K. 274, s. c. 1 Den. C. C. 236, 2 Cox, C. C. 448, overruling *Dixon* v. *Vale*, 1 Car. & P. 278; *East* v. *Chapman*, 2 Car. & P. 572, Moody & M. 47; *Ewing* v. *Osbaldiston*, 6 Sim. 808. As according with *Reg.* v. *Garbett*, may be cited *Ex parte Cossens*, Buck, Bankr. 531. See supra, § 465.

The fact that the witness testified before the grand jury will not prevent him from asserting the privilege. *Temple* v. *Com.* 75 Va. 892.

[1] *Reg.* v. *Boyes*, 2 Fost. & F. 157, s. c. 9 Cox, C. C. 32, 1 Best & S. 311, 30 L. J. Q. B. N. S. 301, 7 Jur. N. S. 1158, 5 L. T. N. S. 147, 9 Week. Rep. 690; *Reg.* v. *Maloney*, 9 Cox, C. C. 26; *Reg.* v. *Charlesworth*, 2 Fost. & F. 326. See also note in 1 L.R.A.(N.S.) 167.

[2] *Lamson* v. *Boyden*, 160 Ill. 618, 43 N. E. 781; *Roberts* v. *Allatt*, Moody & M. 192; *Parkhurst* v. *Lowton*, 1 Meriv. 400, 15 Revised Rep. 359; *Williams* v. *Farrington*, 2 Cox, Ch. Cas. 202, 3 Bro. Ch. 38; *Davis* v. *Reid*, 5 Sim. 443; *People* v. *Mather*, 4 Wend. 229, 21 Am. Dec. 122; *Close* v. *Olney*, 1 Denio, 319; *Moloney* v. *Dows*, 2 Hilt. 247; *United States* v. *Smith*, 4 Day, 121; *Weldon* v. *Burch*, 12 Ill. 374; *Floyd* v. *State*, 7 Tex. 215.

As to the constituents of a pardon, see Wharton, Crim. Pl. & Pr. § 520; *Eggers* v. *Fox*, 177 Ill. 185, 52 N. E. 269. See also *Com.* v. *Trider*, 143 Mass. 180, 9 N. E. 510; *Stevens* v. *State*, 50 Kan. 712, 32 Pac. 350; *Minters* v. *People*, 139 Ill. 363, 29 N. E. 45; Underhill, Crim. Ev. 2d ed. § 247; *Mackin* v. *People*, 115 Ill. 321, 56 Am. Rep. 167, 3 N. E. 222, 6 Am. Crim. Rep. 556; *State* v. *Kent* (*State* v. *Poncoast*) 5 N. D. 516, 35 L.R.A. 518, 67 N. W. 1052; *State ex rel. Hopkins* v. *Olin*, 23 Wis. 309; *Temple* v. *Com.* 75 Va. 892; *People ex rel. Smith* v. *Pease*, 27 N. Y. 45, 84 Am. Dec. 242; *People* v. *Botkin*,

demnity and special amnesty have the same effect when they do not conflict with local Constitutions.[3] In Massachusetts, however, where the Constitution provides that no person "shall be compelled to accuse or furnish evidence against himself," a statute which is not coextensive with the constitutional provision does not devest the witness of his common-law rights.[4]

§ 472. Answers imputing disgrace will not be compelled to discredit witness.—We must again notice the important distinction between questions in chief, whose object is to bring out facts important to the maintenance of public justice, and questions in cross-examination, whose object is merely to harass a witness. A crime has been committed, for instance, and a person who may have been lurking in the neighborhood for an immoral purpose in no way connected with that crime is called as a witness. He is asked where he was at the period in question; and he declines to answer on the ground that his answer would expose him, not, indeed, to prosecution, but to disgrace, as where the effect would be to show his presence at the time in a house of bad repute. He could not be excused from answering on this ground, but

9 Cal. App. 244, 98 Pac. 861; *People ex rel. Boyer* v. *Teague,* 106 N. C. 574, 11 S. E. 330; *Sorenson* v. *Sorenson,* 189 Ill. 179, 59 N. E. 555; *State ex rel. Health* v. *Kraft,* 18 Or. 550; *Lamson* v. *Boyden,* 160 Ill. 613, 43 N. E. 781; 3 Wigmore, Ev. § 2250; 1 Greenl. Ev. §§ 451–454; *Boyle* v. *Smithman,* 146 Pa. 255, 23 Atl. 397; *Bolen* v. *People,* 184 Ill. 339, 56 N. E. 408; *Weldon* v. *Burch,* 12 Ill. 375.

[3] *Re Strahan,* 7 Cox, C. C. 65; *Reg.* v. *Skeen,* 8 Cox, C. C. 143, Bell, C. C. 97, 28 L. J. Mag. Cas. N. S. 91, 5 Jur. N. S. 151, 7 Week. Rep. 255; *Reg.* v. *Buttle,* 11 Cox, C. C. 566, 39 L. J. Mag. Cas. N. S. 115, L. R. 1 C. C. 248, 22 L. T. N. S. 728, 18 Week. Rep. 956; *Wilkins* v. *Malone,* 14 Ind. 153; *Frazee* v. *State,* 58 Ind. 8; *Douglass* v. *Wood,* 1 Swan, 393; *State* v. *Henderson,* 47 Ind. 127, 1 Am. Crim. Rep. 233; *Kendrick* v. *Com.* 78 Va. 490; *Clark* v. *Reese,* 35 Cal. 89; *State* v. *Height,* 117 Iowa, 650, 59 L.R.A. 437, 94 Am. St. Rep. 323, 91 N. W. 935.

[4] *Emery's Case,* 107 Mass. 172, 9 Am. Rep. 22.

See Wharton, Ev. § 547; post, § 479.

he would be excused from answering this or similar questions, when collateral to the issue, put to him on cross-examination for the mere purpose of wounding his feelings or bringing him into disgrace.[1] And the reason is that every man is entitled to such a measure of oblivion for the past as will protect him from having it ransacked by mere volunteers; and aside from this general sanction, if witnesses were to be compelled to answer fishing questions as to any scandals in their past lives, the witness box would become itself a scandal which no civilized community would tolerate. Allow unqualified liberty in this respect, and no witness, no matter how respectable, could be sworn without being required, if it should please the opposing party, to have even the most remote passages of his past life explored, and without being himself compelled to narrate any events in that life which were discreditable; no matter for how long a time such discredit had been atoned for by penitence, by reformation, and by correction of the wrong. Such inquisitions, however, the courts have refused to permit; and it has hence been held, not only as we shall see, that parties are bound by collateral answers they wring from a witness as to his history; but that the witness will not be compelled to answer such questions when they are introduced only in order to discredit him, and are not essential to the merits of the case of the party asking them.[2] The policy of the law being that a witness cannot

[1] See cases post, § 475.

[2] *Rex* v. *Hodgson,* Russ. & R. C. C. 211; *Dodd* v. *Norris,* 3 Campb. 519, 14 Revised Rep. 832; *United States* v. *Dickinson,* 2 McLean, 325, Fed. Cas. No. 14,958; *State* v. *Staples,* 47 N. H. 113, 90 Am. Dec. 565; *State* v. *Ward,* 49 Conn. 429; *People* v. *Herrick,* 13 Johns. 82, 7 Am. Dec. 364; *Com.* v. *Shaw,* 4 Cush. 593; *Cannon* v. *People,* 141 Ill. 278, 30 N. E. 1027; *Com.* v. *Sacket,* 22 Pick. 394; *State* v. Rogers, 31 Mont. 1, 77 Pac. 293; *State* v. *Hull,* 18 R. I. 207, 20 L.R.A. 609, 26 Atl. 191, 10 Am. Crim. Rep. 427; Underhill, Crim. Ev. 2d ed. § 244; *Howser* v. *Com.* 51 Pa. 332;

be examined on matters purely irrelevant, only to afford an opportunity subsequently to discredit him, and in this way prejudice the jury against him.

§ 473. Witness not compelled to answer questions not responsive to the issue, and imputing disgrace only.—The authorities are conflicting on the question whether, upon cross-examination, a witness can avoid answering a question material to the issue, on the ground that it imputes disgrace to himself, if such disgrace does not amount to crimination. Mr. Roscoe says the doubt exists only where the questions put are not relevant to the matter in issue, but are propounded merely for the purpose of throwing light on the witness's character; for if the transactions as to which the witness is interrogated form any part of the issue, he will be obliged to give evidence, however strongly it may reflect upon his character.[1]

Leach v. *People,* 53 Ill. 311; *Hayward* v. *People,* 96 Ill. 492; *Johnson* v. *State,* 61 Ga. 305; *Saunders* v. *People,* 38 Mich. 218; *Campbell* v. *State,* 23 Ala. 44.

[1] Roscoe, Crim. Ev. pp. 133–135; 1 Phillipps, Ev. 265; *State* v. *Robinson,* 13 Am. Crim. Rep. 357, and note, 52 La. Ann. 541, 27 So. 129.

This distinguished writer, Mr. Roscoe, further says on this subject: "The first point to be considered is whether questions not relevant to the matter in issue, and tending to degrade the character of the witness, are allowed to be put. There does not appear to be any authority in the earlier cases for the position that the questions themselves are inadmissible upon cross-examination." In *Cook's Trial,* 13 How. St. Tr. 334, Treby, Ch. J., appears to admit the legality of the practice, adding that the witnesses have not been obliged to answer. In *Sir John Friend's Trial,* 13 How. St. Tr. 31, the court held that a witness could not be asked whether he was a Roman Catholic, because he might by his answer subject himself to severe penalties. In *Layer's Trial,* 16 How. St. Tr. 121, a question tending to degrade the witness was proposed to be asked on the *voir dire,* and Pratt, Ch. J., said: "It is an objection to his credit, and if it goes to his credit, must he not be sworn, and his credit go to the jury?" These, therefore, are authorities only to show a witness will not be compelled to answer such questions. Many later decisions show that such questions are admissible though the witness cannot be called upon to answer them.

The conclusion, however, seems irresistible that the modern doctrine is that, if such questions are permitted at all, the

Thus, on an application to bail a prisoner, the court allowed the counsel for the prosecution to ask one of the bail, whether he had stood in the pillory for perjury. The court said there was no objection to the question, as the answer could not subject the bail to punishment. *Rex* v. *Edwards,* 4 T. R. 440, 2 Revised Rep. 427. On *Wilson's Case* for high treason, such questions were frequently asked, "and it may be inferred," says Mr. Phillips, "from the opinion of the judges on an argument in that case, that such questions are regular." Gurney's Report of *Watson's Trial,* 288–91, 1 Phillipps, Ev. 269 (n). See also *Lord Cochran's Trial,* 419, by Gurney; *Hardy's Trial,* 24 How. St. Tr. 726, 1 East, P. C. 114. So it is stated by Mr. Phillips that Lord Ellenborough continually permitted such questions to be asked without the slightest disapprobation. In the following case, Best, Ch. J., laid down the same rule in these words: "The rule I shall always act on is to protect witnesses from questions, the answers to which would expose them to punishment; if they are protected beyond this, from questions which tend to degrade them, many an innocent man may suffer." *Cundell* v. *Pratt,* Moody & M. 108.

There are, however, one or two decisions condemning the opinion that questions tending to degrade the character of a witness shall not be allowed to be put. Upon an indictment for an assault, a common informer, and a man of suspicious character, having been called, was asked, on cross-examination, whether he had not been in the house of correction. Upon this Lord Ellenborough interposed, and said that the question should not be asked. That it had formerly been settled by the judges, among whom were Chief Justice Treby and Mr. Justice Powell, both very great lawyers, that a witness was not bound to answer any question, the object of which was to degrade or render him infamous. He added that he thought that the rule ought to be adhered to, as it would be an injury to the administration of justice if persons who came to do their duty to the public might be subjected to improper investigation. *Rex* v. *Lewis,* 4 Esp. 225. Upon this case, it may be observed that the authorities referred to by Lord Ellenborough do not go to the length of excluding the question, but merely decide that the witness is not bound to answer. As already stated, also, Lord Ellenborough was in the frequent habit of allowing such questions to be put, supra, and on these grounds Mr. Phillips is disposed to think that the question had already been put and answered, and being repeated, his Lordship thought it necessary to interpose for the protection of the witness. 1 Phillipps, Ev. 269.

In another case, where a witness was asked on cross-examination whether she lived in a state of

witness cannot be compelled to answer them, if asked only for the purpose of degrading the witness; and in the opinion of the author, such questions should never be permitted.

concubinage with the plaintiff, Lord Alvanley interposed, and gave the following opinion on the subject of such questions: "He thought questions as to general conduct might be asked, but not such as went immediately to degrade the witness. He would therefore allow it to be asked whether she was married to the plaintiff. But, having said she was not, he would not allow it to be asked had she slept with him?" He added: "I do not go so far as others may. I do not say that a witness may not be asked as to what may tend to disparage him,—that would prevent an investigation into the character of the witness, which may often be of importance to ascertain. I think those questions only should not be put which have a direct effect to disgrace or disparage the witness." *Macbride* v. *Macbride*, 4 Esp. 242.

Upon an indictment for rape, the prosecutrix on cross-examination was asked "whether she had not before had connection with other persons, and whether not with a particular person (named)." This question was objected to, and the point was reserved for the opinion of the judge, who held the objection good. *Rex* v. *Hodgson*, Russ. & R. C. C. 211.

As to compelling a witness to answer questions tending to degrade him only, see the interesting discussion in *State* v. *Robinson*, reported in 13 Am. Crim. Rep. at page 357 and note, 52 La. Ann. 541, 27 So. 129, where it is very fully commented upon as a doctrine warranted only by a blind following of precedent, where principle seems to be overruled by it, and where the absurdity of such blind devotion to precedent is pointedly emphasized by one of the minor poets in the poem entitled, "The People v. The Calf." See also *Bartholomew* v. *People*, 104 Ill. 601, 44 Am. Rep. 97; *Simons* v. *People*, 150 Ill. 66, 36 N. E. 1019. Contra, *Real* v. *People*, 42 N. Y. 270; *Com.* v. *Bonner*, 97 Mass. 587; *State* v. *Miller*, 100 Mo. 606, 13 S. W. 832, 1051; Chamberlayne's Best, Ev. p. 602, Am. Notes 2; 1 Bishop, Crim. Proc. 1185.

In Iowa, a statute provides that when the matter sought to be elicited is such as would tend to render the witness criminally liable, or subject him to public ignominy, he is not compelled to answer. Rev. Stat. §§ 3988, 3989.

In *State* v. *Bilansky*, 3 Minn. 246, Gil. 169, the court said: "From a careful examination of the authorities no absolute rule can be laid down and the power over it must rest in the discretion of the court."

See also Underhill, Crim. Ev. 2d ed. p. 635.

§ 474. Witness may be asked whether he has been in prison.—When the inquiry of the witness upon cross-examination is as to whether he has been convicted and of what, a different rule may perhaps apply, and such questions are usually permitted as affecting the credibility of the witness; but the conclusion is forced and unnatural that even in such a case the witness could not tell the truth. But a conviction, if of an infamous crime, must be shown by the record, and not by parol.[1]

[1]*Newcomb* v. *Griswold,* 24 N. Y. 298; *Re Real,* 55 Barb. 186; supra, § 153. See to effect that witness is not compelled to answer: *People* v. *Abbot,* 19 Wend. 192; *Lohman* v. *People,* 1 N. Y. 379, s. c. 2 Barb. 216; *People* v. *Blakeley,* 4 Park. Crim. Rep. 177; *Johnson* v. *State,* 48 Ga. 116. Also *State* v. *Boyd,* 178 Mo. 2, 76 S. W. 979; *Clement* v. *Brooks,* 13 N. H. 92; *Com.* v. *Quin,* 5 Gray, 478; *Miller* v. *Com.* — Ky.—, 113 S. W. 518; *Stout* v. *Rassel,* 2 Yeates, 334; *People* v. *Reinhart,* 39 Cal. 44; supra, § 153; *Ex parte Von Vetsera,* 7 Cal. App. 136, 93 Pac. 1036; *Com.* v. *Walsh,* 196 Mass. 369, 124 Am. St. Rep. 559, 82 N. E. 19, 13 A. & E. Ann. Cas. 642; *State* v. *Lashus,* 79 Me. 504, 11 Atl. 180; *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. *Kent* (*State* v. *Pancoast*) 5 N. D. 516, 35 L.R.A. 518, 67 N. W. 1052; *Zanone* v. *State* 97 Tenn. 101, 35 L.R.A. 556, 36 S. W. 711.

Proof of particular facts and crimes.

In a prosecution for larceny from a store, the merchant, who was the complaining witnesses, was asked on cross-examination the following question: "Did you not, while a member of that firm, extract from an envelop securities which were left in your vault for safe-keeping, and use the proceeds for stock speculations in New York?" Held that, though the witness might refuse to criminate himself, the question should have been allowed. *People* v. *Arnold,* 40 Mich. 710, 3 Am. Crim. Rep. 73.

It is not proper to ask a witness whether he has at some previous time committed a crime. *State* v. *Abley,* 109 Iowa, 61, 46 L.R.A. 862, 77 Am. St. Rep. 520, 80 N. W. 225, 12 Am. Crim. Rep. 279.

A witness for the prosecution cannot be impeached by proof that he has been guilty of crime. *Powers* v. *Com.* 114 Ky. 237, 70 S. W. 644, 1050, 71 S. W. 494, 13 Am. Crim. Rep. 512–528.

It is improper to inquire of a witness in regard to particular criminal matters, as a basis for impeachment. *Howard* v. *Com.* 110 Ky. 356, 61 S. W. 756, 13 Am. Crim. Rep. 533.

On cross-examination of a wit-

§ 475. Cross-examination must be limited within the limits of a sound judicial discretion.—It has been held uniformly that on cross-examination the previous life and character of the witness, especially when he is a party, may be inquired into to such an extent as the court, in the exercise of a sound discretion, may deem proper.[1] It is likewise well settled that there is no fixed rule by which the exercise of this discretionary power can be determined, and that while the range is necessarily broad, yet there is a limit beyond which it cannot go, and that that limit is clearly reached and passed when questions are asked manifestly for the sole purpose of creating prejudice in the minds of the jurors, or the examination is carried to such an extent and in such a manner as to become oppressive, and is not warranted by anything in the case. Questions relating to mere criminal charges or acts which might be the foundation for criminal prosecutions should not be permitted, unless there are circumstances in the case suggested that justice will or may be promoted thereby; and it would be a clear abuse of judicial discretion to permit such questions where the indications are plain that the purpose is not to bring out the truth in regard to the witness's life and character, and to thereby discredit his testimony, but for the purpose of discrediting the witness, regardless of whether there is any warrant for the questions or not, and if he be a party, in that way to influence the minds of the jurors against him.[2]

ness for defendant, it is error to ask him whether he (witness) had not beaten his wife. *People* v. *Gotshall*, 123 Mich. 474, 82 N. W. 274, 13 Am. Crim. Rep. 630.

[1] *Bradley* v. *Gorham*, 77 Conn. 211, 66 L.R.A. 934, 58 Atl. 698.

An accomplice may be asked on cross-examination in a murder case if he expects to be hung. *State* v. *Kent*, 4 N. D. 577, 27 L.R.A. 686, 62 N. W. 631.

[2] *Buel* v. *State*, 104 Wis. 132, 80 N. W. 78, 15 Am. Crim. Rep. 175.

"The administration of justice requires that trial courts shall not have their discretionary powers circumscribed by any very narrow limits, but does require that such limit shall be placed upon them as

§ 476. Questions proper, testing memory, veracity, and res gestæ.—A witness will ordinarily be compelled to answer any questions which would probe the accuracy of his memory.[1] Answers also may be compelled to any questions as to the witness's corrupt or interested leanings in the case,[2] or as to his means of information;[3] and as to matters connected with the *res gestæ*, a witness may be compelled to answer questions, no matter how much charged with disgrace.[4] And so as to questions probing veracity.[5] But if a criminal conviction is put in evidence to discredit a witness, he may be asked as to the collateral incidents of such conviction.[6]

§ 477. Witness may be cross-examined as to bias.—A witness may also be compelled to answer questions concerning his relationship to the prosecution or the defense, his in-

will prevent any mere prejudice to be built up in the course of a trial; especially in an important case like this, which will tend to influence a jury to determine the facts otherwise than from the legitimate evidence produced in court. It seems clear that such limit was passed in allowing the cross-examination in question to the extent to which it was carried. It is one thing to honestly ask questions on cross-examination for the purpose of discrediting a witness, and quite another to ask question of a witness who is a party, especially in a serious criminal case, for the purpose of injuring his cause in the eyes of the jury, and leading them to believe he was likely, because of his bad character, to have committed the offense charged." Ibid.

[1] Supra, § 376; *People* v. *Morrigan*, 29 Mich. 5; *McFarlin* v. *State*, 41 Tex. 23. And see post, § 485; *Yarbrough* v. *State*, 71 Ala. 376.

[2] *State* v. *Dee*, 14 Minn. 35, Gil. 27; *Scott* v. *State*, 64 Ind. 400.

This has been pushed to a great extent by Best, J., in *Cundell* v. *Pratt*, Moody & M. 108, and by Lord Tenterden in *Roberts* v. *Allatt*, Moody & M. 192. See post, § 477; *State* v. *Tosney*, 26 Minn. 262, 3 N. W. 345.

[3] *Pannell* v. *Com.* 86 Pa. 260.

[4] Supra, § 472; post, § 485; *United States* v. *White*, 5 Cranch, C. C. 38, Fed. Cas. No. 16,675; *People* v. *Mather*, 4 Wend. 250–254, 21 Am. Dec. 122; *Hill* v. *State*, 4 Ind. 112; *Foster* v. *People*, 18 Mich. 266.

[5] *Ordway* v. *Haynes*, 50 N. H. 159; *Boles* v. *State*, 46 Ala. 204.

[6] Supra, § 474; post, §§ 489, 596a.

terest in the suit, his capacity of discernment and expression, his motives and his prejudices, so far as concerns the parties in the litigation or the question involved.[1] He may be thus required to explain whatever would show bias on his part, or incapacity to testify accurately.[2] He may be asked, for instance, whether he did not belong to a secret society whose object was to suppress a sect to which the defendant belonged, the defendant being on trial for a riot in which sectarian prejudice was involved.[3] And as to the character of his relations to the defendant, he may always be asked.[4] But he cannot, unless for the purpose of contradicting him on cross-examination, be inquired of as to the details of such relations.[5]

§ 478. Inferences against witness may be drawn from refusal to answer.—The inferences which arise from the

[1] *Chicago City R. Co.* v. *Smith*, 226 Ill. 178, 80 N. E. 716; *State* v. *Glynn*, 51 Vt. 577; *People* v. *Noelke*, 1 N. Y. Crim. Rep. 252; *Patman* v. *State*, 61 Ga. 379; *Sylvester* v. *State*, 71 Ala. 17; *Miller* v. *Territory*, 79 C. C. A. 268, 149 Fed. 330, 9 A. & E. Ann. Cas. 389; *State* v. *Miles*, 199 Mo. 530, 98 S. W. 25; *Heninburg* v. *State*, 151 Ala. 26, 43 So. 959; *State* v. *Baird*, 79 Vt. 257, 65 Atl. 101.

[2] See supra, § 376. For cases see Wharton, Ev. § 545; *Fincher* v. *State*, 58 Ala. 215; *Saunders* v. *People*, 38 Mich. 218; *Ryan* v. *People*, 79 N. Y. 593; *State* v. *Pugh*, 75 Kan. 792, 90 Pac. 242.

That in such case he is entitled to explain, see *Beasley* v. *People*, 89 Ill. 571.

[3] *People* v. *Christie*, 2 Park. Crim. Rep. 579.

[4] See cases post, § 485; *Langhorne* v. *Com.* 76 Va. 1012; *Scott* v. *State*, 64 Ind. 400; *Daffin* v. *State*, 11 Tex. App. 76. But see *Blunt* v. *State*, 9 Tex. App. 234.

In *Mayer* v. *People*, 80 N. Y. 364, 21 Alb. L. J. 336, F., an uncle and former employer of defendant, gave evidence tending to show the innocence of defendant, and also testified to a fact which, if true, would naturally induce the uncle to believe him innocent. On cross-examination he was asked if he had not said to anybody that defendant and his partner "had been guilty of a great wrong," that "they had acted as thieves," etc. It was ruled by the court of appeals (Church, Ch. J., and Danforth, J., dissenting) that the questions were proper on cross-examination.

[5] *Butler* v. *State*, 34 Ark. 480.

refusal by a witness to answer questions involving alleged crimination are exclusively inferences of fact,[1] having no support in technical jurisprudence.[2] On the one hand, a pure man of great sensitiveness may indignantly refuse to tolerate such a question; but if, on the other hand, the witness is not known to be a pure man of great sensitiveness, his refusal to answer will be naturally presumed to arise from the fact that, if he answered, the answer would be discreditable.[3]

§ 479. Certain answers to questions conclusive.—A witness's answers to questions relating to his previous conduct are regarded as so far collateral that they cannot be contradicted by the party cross-examining, unless they go to matter which the law permits to be shown for the purpose of impairing credibility.[1] Even a party, when cross-examined as a witness as to previous misconduct similar to that under trial,

[1] Where a witness, says Mr. Roscoe (Crim. Ev. 8th ed. 158), is entitled to decline answering a question, and does decline, the rule is said by Holroyd, J., to be that his not answering ought not to have any effect with the jury. *Rex* v. *Watson*, 2 Starkie, 157.

So, where a witness demurred to answer a question, on the ground that he had been threatened with a prosecution respecting the matter, and the counsel in his address to the jury remarked upon the refusal, Abbott, Ch. J., interposed, and said that no inference was to be drawn from such refusal. *Rose* v. *Blackmore*, Ryan & M. 384.

A similar opinion was expressed by Lord Eldon in *Lloyd* v. *Passingham*, 16 Ves. Jr. 64. See the note in Ryan & M. 385. And it was said by Bayley, J., in *Rex* v. *Watson*, 2 Starkie, 135; "If the witness refuse to answer, it is not without its effect with the jury. If you ask a witness whether he has committed a particular crime, it would perhaps be going to far to say that you may discredit him if he refuse to answer; it is for the jury to draw what inferences they may."

[2] See Taylor, Ev. § 1321; *Andrews* v. *Fry*, 104 Mass. 234.

[3] See post, § 749.

"Were you convicted for hanging on this same murder once?" Held erroneous, to permit the question to be answered. *State* v. *Robinson*, 52 La. Ann. 541, 27 So. 129, 13 Am. Crim. Rep. 357.

[1] Wharton, Ev. § 479; *State* v. *Parish*, 83 N. C. 613.

concludes the party cross-examining him by his answers, unless such misconduct would be itself relevant as a part of the case of the cross-examining party.[2] And when a witness, being asked whether she had not when in service taken things not belonging to her, answered "No," this was held irrebuttable.[3] But this principle applies only to the witness's answers. Whether the questions can be put is elsewhere discussed.[4]

[2] *Tolman* v. *Johnstone*, 2 Fost. & F. 66; *Stokes* v. *People*, 53 N. Y. 164, 13 Am. Rep. 492.

[3] *Stokes* v. *People*, 53 N. Y. 164, 13 Am. Rep. 492.

[4] Wharton, Ev. §§ 533, 559. See *Shepard* v. *Parker*, 36 N. Y. 517; *People* v. *Webb*, 70 Cal. 120, 11 Pac. 509; *Crittenden* v. *Com.* 82 Ky. 164, 6 Am. Crim. Rep. 200; *State* v. *Benner*, 64 Me. 267; *State* v. *Downs*, 91 Mo. 19, 3 S. W. 219; Starkie, Ev. 200; *State* v. *Elliott*, 68 N. C. 124; *Kennedy* v. *Com.* 14 Bush, 357; *State* v. *Davis*, 87 N. C. 514; *People* v. *Durrant*, 116 Cal. 179, 48 Pac. 75, 10 Am. Crim. Rep. 499; *State* v. *Kent* (*State* v. *Pancoast*), 5 N. D. 516, 35 L.R.A. 518, 67 N. W. 1052; *Welch* v. *State*, 104 Ind. 347, 3 N. E. 850, 5 Am. Crim. Rep. 450; *Seller* v. *Jenkins*, 97 Ind. 430; *Com.* v. *Buzzell*, 16 Pick. 153; *People* v. *Stackhouse*, 49 Mich. 76, 13 N. W. 364; *State* v. *Patterson*, 74 N. C. 157; *State* v. *Gleim*, 17 Mont. 17, 31 L.R.A. 294, 52 Am. St. Rep. 655, 41 Pac. 998, 10 Am. Crim. Rep. 46; *People* v. *Dye*, 75 Cal. 108, 16 Pac. 537; *People* v. *Un Dong*, 106 Cal. 83, 39 Pac. 12; *Jordan* v. *McKinney*, 144 Mass. 438, 11 N. E. 702; *State* v. *Hull*, 18 R. I. 207, 20 L.R.A. 609, 26 Atl. 191, 10 Am. Crim. Rep. 427; *Driscoll* v. *People*, 47 Mich. 413, 11 N. W. 221; *People* v. *Brown*, 72 N. Y. 571, 28 Am. Rep. 183; *People* v. *Hillhouse*, 80 Mich. 580, 45 N. W. 484; *State* v. *Carson*, 66 Me. 116, 2 Am. Crim. Rep. 58; *People* v. *Schuyler*, 106 N. Y. 298, 12 N. E. 783; *Clarke* v. *State*, 78 Ala. 474, 56 Am. Rep. 45, 6 Am. Crim. Rep. 525; *State* v. *Teasdale*, 120 Mo. App. 692, 97 S. W. 995; *State* v. *Whitley*, 141 N. C. 823, 53 S. E. 820; *State* v. *Sweeney*, 75 Kan. 265, 88 Pac. 1078; *Dalton* v. *People*, 224 Ill. 333, 79 N. E. 669.

As to the extent of cross-examination permitted to affect credibility, see *State* v. *Quirk*, 101 Minn. 334, 112 N. W. 409.

Testimony not admissible to impeach credibility. *Miller* v. *Territory*, 79 C. C. A. 268, 149 Fed. 330, 9 A. & E. Ann. Cas. 389; *State* v. *Stewart*, — Del. —, 67 Atl. 786; *James* v. *United States*, 7 Ind. Terr. 250, 104 S. W. 607.

Testimony admissible to impeach credibility: On cross-examination of the accused, who had been sworn as a witness, it was held permissible for the state to prove specific acts tending to discredit him or impeach his moral character. *People* v. *Gluck*, 117 App. Div. 432, 102 N. Y. Supp. 758.

On cross-examination of accused

§ 480. Wife of defendant cannot be cross-examined on matter not germane.—Nor, where defendant's wife was introduced as a witness for certain purposes, was it proper to allow the prosecution to cross-examine her as to matters not germane to her examination in chief. It was not allowable thus to draw out matters prejudicial to the defendant, or to lay a foundation to impeach her evidence. It was also held to be the use of the wife as a witness against the husband, and for this reason not admissible.[1]

How far a compelled answer can be used against a witness in another suit will be discussed later.[2]

XI. Impeaching and Sustaining Witnesses.

§ 481. General rules as to impeachment.—The rules relative to impeaching and sustaining witnesses are equally applicable to civil and criminal practice, and are discussed more fully in another work,[1] and we notice here only those rules

in a prosecution for robbery, it was held proper for the state to prove that the defendant had murdered his wife. *Williams* v. *State*, 51 Tex. Crim. Rep. 361, 123 Am. St. Rep. 884, 102 S. W. 1134.

[1] *Merritt* v. *State*, 39 Tex. Crim. Rep. 70, 45 S. W. 21, 11 Am. Crim. Rep. 518; *Jones* v. *State*, 38 Tex. Crim. Rep. 87, 70 Am. St. Rep. 719, 40 S. W. 807, 41 S. W. 638; *Gaines* v. *State*, 38 Tex. Crim. Rep. 202, 42 S. W. 385.

[2] Post, § 664.

[1] See Wharton, Ev. §§ 549 et seq.

The following references to Wharton's Evidence should be consulted.

§ 549. A party cannot generally discredit his own witness.

550. A party's witnesses are those whom he voluntarily examines in chief.

555. But usually must be first asked as to statements.

559. Witness cannot be contradicted on matters collateral.

560. By old practice, conflicting witnesses could be confronted.

561. Witness's answers as to motives may be contradicted.

562. His character for truth and veracity may be attacked.

563. Questions to be confined to this issue.

566. Bias of witness may be shown.

567. Infamous conviction may be proved as affecting credibility.

as are of more frequent application in the practice in criminal courts.

§ 482. Impeachment of witness by inconsistent statements or acts.—A witness called by the opposing party can be impeached by proving that on a former occasion he made a statement inconsistent with his statement made on trial, provided such statement is material to the issue;[1] but where a witness has testified as to incriminating facts, he cannot be asked whether or not he had previously stated that, in his opinion, the defendant was not guilty, for the purpose of impeachment, as a witness cannot be impeached on an immaterial matter.[2] The statement upon which it is intended to contradict must involve facts in evidence, and the varying statements sought to be shown must be relevant to the issues.[3]

568. Impeaching witness may be attacked and sustained.
569. Impeached witness may be sustained.
570. But not ordinarily by proof of former consistent statement.
571. May be corroborated at discretion of court.

[1] Wharton, Ev. § 551; *State* v. *Lawlor,* 28 Minn. 216, 9 N. W. 698; See *Cannon* v. *State,* 57 Miss. 147; *Reyes* v. *State,* 10 Tex. App. 1; *Sherrod* v. *State,* 90 Miss. 856, 44 So. 813; *Ridgell* v. *State,* 156 Ala. 10, 47 So. 71; *Jones* v. *State,* 141 Ala. 55, 37 So. 390; *State* v. *Lockhart,* 188 Mo. 427, 87 S. W. 457; *Richards* v. *Com.* 107 Va. 881, 59 S. E. 1104; *Smith* v. *State,* 52 Tex. Crim. Rep. 27, 105 S. W. 182; *People* v. *Ye Foo,* 4 Cal. App. 730, 89 Pac. 450; *People* v. *Fainberg,* 237 Ill. 348, 86 N. E. 584; *State* v. *Lewis,* 44 La. Ann. 958, 11 So. 572; *Lanasa* v. *State,* 109 Md. 602, 71 Atl. 1058; *People* v. *Row,* 135 Mich. 505, 98 N. W. 13; *People* v. *Tice,* 115 Mich. 219, 69 Am. St. Rep. 560, 73 N. W. 108; *State* v. *Darling,* 202 Mo. 150, 100 S. W. 631; *Scott* v. *State,* 52 Tex. Crim. Rep. 164, 105 S. W. 796; *State* v. *Burns,* 148 Mo. 167, 71 Am. St. Rep. 588, 49 S. W. 1005; *Wilson* v. *United States,* 5 Ind. Terr. 610, 82 S. W. 924.

[2] *State* v. *Maxwell,* 42 Iowa, 208; *Com.* v. *Mooney,* 110 Mass. 99.

[3] *State* v. *Callahan,* 18 S. D. 145, 99 N. W. 1099; *Bracegirdle* v. *Bailey,* 1 Fost. & F. 536; *Tourtelotte* v. *Brown,* 4 Colo. App. 377, 36 Pac. 73; *People* v. *Creeks,* 141 Cal. 529, 75 Pac. 101; *State* v. *Cox,* 151 N. C. 698, 66 S. E. 128.

See *Ausmus* v. *People,* 47 Colo. 167, 107 Pac. 204, 19 A. & E. Ann. Cas. 491; *Llewellin* v. *Pace,* 1 Week.

If confined to opinion, when opinion is not at issue, or to other irrelevant matters, the cross-examining party is bound by the answer.[4] A statement of opinion, however, that goes

Rep. 28; *United States* v. *Hughes*, 34 Fed. 732; *United States* v. *White*, 5 Cranch, C. C. 38, Fed. Cas. No. 16,675; *Parnell* v. *State*, 129 Ala. 6, 29 So. 860; *Ragland* v. *State*, 125 Ala. 12, 27 So. 983; *Dillard* v. *United States*, 72 C. C. A. 451, 141 Fed. 303; *Sellers* v. *State*, 93 Ark. 313, 124 S. W. 770; *Hinson* v. *State*, 76 Ark. 366, 88 S. W. 947; *People* v. *Gray*, 148 Cal. 507, 83 Pac. 707; *People* v. *Cyty*, 11 Cal. App. 702, 106 Pac. 257; *People* v. *Dice*, 120 Cal. 189, 52 Pac. 477; *Askew* v. *People*, 23 Colo. 446, 48 Pac. 524; *Torris* v. *People*, 19 Colo. 438, 36 Pac. 153; *State* v. *Pucca*, 4 Penn. (Del.) 71, 55 Atl. 831; *Myers* v. *State*, 43 Fla. 500, 31 So. 275; *Evans* v. *State*, 95 Ga. 468, 22 S. E. 298; *State* v. *Anthony*, 6 Idaho, 383, 55 Pac. 884; *Hinkle* v. *State*, 157 Ind. 237, 61 N. E. 196; *State* v. *Maxwell*, 42 Iowa, 208; *State* v. *Keefe*, 54 Kan. 197, 38 Pac. 302; *State* v. *Ray*, 54 Kan. 160, 37 Pac. 996; *Mullins* v. *Com.* 23 Ky. L. Rep. 2433, 67 S. W. 824; *State* v. *Haab*, 105 La. 230, 29 So. 725; *State* v. *Kingsbury*, 58 Me. 238; *Davis* v. *State*, 38 Md. 15, 50; *Com.* v. *Smith*, 163 Mass. 411, 426, 40 N. E. 189; *People* v. *Wolcott*, 51 Mich. 612, 17 N. W. 78; *State* v. *King*, 88 Minn. 175, 92 N. W. 965; *State* v. *Downs*, 91 Mo. 19, 3 S. W. 219; *State* v. *Pugh*, 16 Mont. 343, 40 Pac. 861; *Tatum* v. *State*, 61 Neb. 229, 85 N. W. 40; *Territory* v. *Chavez*, 8 N. M. 528, 45 Pac. 1107; *State* v. *Crane*, 110 N. C. 530, 15 S. E. 231; *Com.* v. *Craig*, 19 Pa. Super. Ct. 81; *State* v. *Davidson*, 9 S. D. 564, 70 N. W. 879; *Henderson* v. *State*, 1 Tex. App. 432; *Fox* v. *State*, — Tex. Crim. Rep. —, 87 S. W. 157; *State* v. *Sheppard*, 49 W. Va. 582, 39 S. E. 676; *State* v. *Murphy*, 201 Mo. 691, 100 S. W. 414; *State* v. *Dunn*, 53 Or. 304, 99 Pac. 278, 100 Pac. 258; *Barbee* v. *State*, 50 Tex. Crim. Rep. 429, 97 S. W. 1058.

See *Schwantes* v. *State*, 127 Wis. 160, 106 N. W. 237.

[4] Greenl. Ev. 449; *United States* v. *Holmes*, 1 Cliff. 98, Fed. Cas. No. 15,382; *Forde* v. *Com.* 16 Gratt. 547; *Kennedy* v. *Com.* 14 Bush, 341; *Patten* v. *People*, 18 Mich. 314, 100 Am. Dec. 173; *Lewis* v. *State*, 4 Kan. 296; *State* v. *Lawlor*, 28 Minn. 216, 9 N. W. 698; *Carter* v. *State*, 133 Ala. 160, 32 So. 231; *State* v. *Marler*, 2 Ala. 43, 36 Am. Dec. 398; *Tamborino* v. *Territory*, 7 Ariz. 194, 62 Pac. 693, 7 Ariz. 240, 64 Pac. 492; *Smith* v. *State*, 9 Ala. 990; *Stalcup* v. *State*, 146 Ind. 270, 45 N. E. 334; *Garrett* v. *State*, 6 Mo. 1; *Com.* v. *Bright*, 23 Ky. L. Rep. 1921, 66 S. W. 604; *People* v. *Devine*, 44 Cal. 452; *Ferguson* v. *State*, 72 Neb. 350, 100 N. W. 800.

See *State* v. *Reed*, 60 Me. 550; *People* v. *Ryan*, 55 Hun, 214, 8 N. Y. Supp. 241; *Munshower* v. *State*, 55 Md. 19, 39 Am. Rep. 414; *State* v. *Hughes*, 71 Mo. 633; *Griffith* v. *State*, 37 Ark. 324.

to show bias, is so far relevant that denial of its expression is admissible,[5] and the opinion of an expert, when material, may be impeached by proof of contradictory opinions.[6] The right of impeachment is not limited to matters arising in chief, but extends to those originating in cross-examination, and where such matters are material, impeachment is permissible.[7] Thus, a prosecutrix, on trial of an indictment for indecent assault on her while driving, was asked on cross-examination whether or not she had said to the defendant, subsequent to the event, that she would kiss him if he would take her driving, and, having denied the statement, it was held that she could be contradicted by calling a witness to prove that she had made such a statement.[8] A witness may also be contradicted by proof of prior contradictory statements before a grand jury,[9] or by proof that he now states facts omitted on a former trial.[10] And, generally, when it was his duty to state the whole truth on a former occasion, it is admissible to show that he now states facts omitted by him on the former occasion.[11] He may be contradicted by his acts as well as by his statements. Thus, where a witness testifies to facts, his acts, showing his belief in a different state of facts, may

[5] *Gaines* v. *Com.* 50 Pa. 319; supra, §§ 457–460. But see *Sharp* v. *Hall,* 86 Ala. 110, 11 Am. St. Rep. 23, 5 So. 497; *Ross* v. *Com.* 21 Ky. L. Rep. 1344, 55 S. W. 4, 13 Am. Crim. Rep. 294; *Williams* v. *Spencer,* 150 Mass. 346, 5 L.R.A. 790, 15 Am. St. Rep. 206, 23 N. E. 105; *People* v. *Stackhouse,* 49 Mich. 76, 13 N. W. 364; *State* v. *Matheson,* 130 Iowa, 440, 114 Am. St. Rep. 427, 103 N. W. 137, 8 A. & E. Ann. Cas. 430. See *Mayer* v. *People,* 80 N. Y. 364.

[6] *Sanderson* v. *Nashua,* 44 N. H 492.

[7] *Hogan* v. *Cregan,* 6 Robt. 138.

[8] *Com.* v. *Bean,* 111 Mass. 438. See *Fries* v. *Brugler,* 12 N. J. L. 79, 21 Am. Dec. 52; *State* v. *Patterson,* 24 N. C. (2 Ired. L.) 346, 38 Am. Dec. 699; *Dunn* v. *Dunn,* 11 Mich. 284.

[9] Post, § 510; *Burdick* v. *Hunt,* 43 Ind. 381.

[10] *Nye* v. *Merriom,* 35 Vt. 438; *People* v. *Morine,* 61 Cal. 367.

[11] Wharton, Ev. § 554; *Hayden* v. *Stone,* 112 Mass. 346; *Perry* v. *Breed,* 117 Mass. 165.

be shown,[12] and he may be cross-examined as to these acts;[13] and where he does not admit the acts, they may be proved to contradict him.[14]

§ 483. Foundation for impeachment.—As a basis for introducing impeaching evidence, it is proper to ask the witness on cross-examination as to contradictory statements. The dictates of justice and fairness require that the preliminary question should be specific as to (a) time, (b) place, (c) person, and (d) circumstances, so that the witness's attention may be specifically called to the matter on which it is proposed to impeach him. This is not considered necessary in one or two jurisdictions,[1] but no substantive reason can be urged against the specific question,[2] and this practice is approved in nearly all the jurisdictions.

[12] *Stewart* v. *State*, 42 Fla. 591, 28 So. 815; *State* v. *Kingsbury*, 58 Me. 238; *Dilcher* v. *State*, 39 Ohio St. 130; *Com.* v. *Smith*, 163 Mass. 411, 432, 40 N. E. 189. But see *Masterson* v. *St. Louis Transit Co.* 204 Mo. 507, 524, 103 S. W. 48; *State* v. *Watson*, 102 Iowa, 651, 72 N. W. 283; *Com.* v. *Goodnow*, 154 Mass. 487, 28 N. E. 677; *State* v. *Burton*, 27 Wash. 528, 67 Pac. 1097; *Adams* v. *State*, 93 Ark. 260, 137 Am. St. Rep. 87, 124 S. W. 766; *State* v. *Goodson*, 116 La. 388, 40 So. 771; *Long* v. *State*, 59 Tex. Crim. Rep. 103, 127 S. W. 551; *State* v. *McCormick*, 56 Wash. 469, 105 Pac. 1037; *Van Wyk* v. *People*, 45 Colo. 1, 99 Pac. 1009; *Schuh* v. *State*, 58 Tex. Crim. Rep. 165, 124 S. W. 908; *Frazer* v. *State*, 159 Ala. 1, 49 So. 245.

[13] *Com.* v. *Smith*, 163 Mass. 411, 40 N. E. 189. But see *Masterson* v. *St. Louis Transit Co.* 204 Mo. 507, 524, 103 S. W. 48; *State* v. *Pritchett*, 106 N. C. 667, 11 S. E. 357. See *People* v. *Williams*, 18 Cal. 187; *Com.* v. *Brady*, 147 Mass. 583, 18 N. E. 568; *Green* v. *State*, 56 Tex. Crim. Rep. 191, 120 S. W. 425; *State* v. *McCormick*, 56 Wash. 469, 105 Pac. 1037.

[14] *Stewart* v. *State*, 42 Fla. 591, 28 So. 815. See *Daniels* v. *Conrad*, 4 Leigh, 401.

[1] *Fries* v. *Brugler*, 12 N. J. L. 80, 21 Am. Dec. 52; *Walden* v. *Finch*, 70 Pa. 460.

See *Downer* v. *Dana*, 19 Vt. 345.

[2] *Queen's Case*, 2 Brod. & B. 313, 22 Revised Rep. 662, 11 Eng. Rul. Cas. 183; *King* v. *Wicks*, 20 Ohio, 91.

Impeaching testimony can be offered only where the witness denies, directly or qualifiedly, that he made the statement.[8]

[8] *Angus* v. *Smith,* Moody & M. 473; *Crowley* v. *Page,* 7 Car. & P. 789; *Reg.* v. *Shellard,* 9 Car. & P. 277; *Reg.* v. *Holden,* 8 Car. & P. 606; *Queen's Case,* 2 Brod. & B. 313, 22 Revised Rep. 662, 11 Eng. Rul. Cas. 183; *McKinney* v. *Neil,* 1 McLean, 540, Fed. Cas. No. 8,865; *Downer* v. *Dana,* 19 Vt. 338; *Everson* v. *Carpenter,* 17 Wend. 419; *Palmer* v. *Haight,* 2 Barb. 210; *Franklin Bank* v. *Pennsylvania, D. & M. Steam Nav. Co.* 11 Gill & J. 28, 33 Am. Dec. 687; *Able* v. *Shields,* 7 Mo. 120; *Weaver* v. *Traylor,* 5 Ala. 564; *Weinzorpflin* v. *State,* 7 Blackf. 186; *Regnier* v. *Cabot,* 6 Ill. 34; *State* v. *Kinley,* 43 Iowa, 294; *Sealy* v. *State,* 1 Ga. 213, 44 Am. Dec. 641; *Drennen* v. *Lindsey,* 15 Ark. 359; *Treadway* v. *State,* 1 Tex. App. 668; *People* v. *Devine,* 44 Cal. 452; *People* v. *Lee Ah Yute,* 60 Cal. 95; *Aneals* v. *People,* 134 Ill. 401, 25 N. E. 1022; *Carpenter* v. *State,* 62 Ark. 286, 36 S. W. 900; *Klug* v. *State,* 77 Ga. 734; *Bruce* v. *State,* 31 Tex. Crim. Rep. 590, 21 S. W. 681; *Montgomery* v. *Knox,* 23 Fla. 595, 3 So. 211; *State* v. *Turner,* 36 S. C. 534, 15 S. E. 602; *State* v. *Goodbier,* 48 La. Ann. 770, 19 So. 755; *State* v. *Delaneuville,* 48 La. Ann. 502, 19 So. 550; *State* v. *Jones,* 44 La. Ann. 960, 962, 11 So. 596; *Jones* v. *State,* 65 Miss. 179, 3 So. 379; *State* v. *McLaughlin,* 44 Iowa, 82; *Kent* v. *State,* 42 Ohio St. 426; *State* v. *Glynn,* 51 Vt. 577; *State* v. *Baldwin,* 36 Kan. 1, 12 Pac. 318, 7 Am. Crim. Rep. 377; *State* v. *Hunsacker,* 16 Or. 497, 19 Pac. 605; *Cotton* v. *State,* 87 Ala. 75, 6 So. 396; *State* v. *Freeman,* 43 S. C. 105, 20 S. E. 974; *Crossland* v. *State,* 77 Ark. 537, 92 S. W. 776; *State* v. *Anderson,* 120 La. 331, 45 So. 267; *Coker* v. *State,* 144 Ala. 28, 40 So. 516; *Alford* v. *State,* 47 Fla. 1, 36 So. 436; *State* v. *McGowan,* 36 Mont. 422, 93 Pac. 552; *Waller* v. *People,* 209 Ill. 284, 70 N. E. 681; *People* v. *Mallon,* 116 App. Div. 425, 101 N. Y. Supp. 814, 20 N. Y. Crim. Rep. 427, 189 N. Y. 520, 81 N. E. 1171; *Burton* v. *State,* 115 Ala. 1, 22 So. 585; *Brown* v. *State,* 46 Fla. 159, 35 So. 82; *State* v. *Meyers,* 120 La. 127, 44 So. 1008; *Lanasa* v. *State,* 109 Md. 602, 71 Atl. 1058; *Com.* v. *Smith,* 163 Mass. 411, 40 N. E. 189. Cf. contra, *People* v. *Shaw,* 111 Cal. 171, 43 Pac. 593; *Hudson* v. *State,* 28 Tex. App. 323, 13 S. W. 388; *Brown* v. *State,* 76 Ga. 623. See Wharton, Ev. § 555; *Payne* v. *State,* 60 Ala. 80; *Washington* v. *State,* 63 Ala. 189; *Brite* v. *State,* 10 Tex. App. 368; *Atwell* v. *State,* 63 Ala. 61; *State* v. *Angelo,* 32 La. Ann. 407; infra, § 484; *Grosse* v. *State,* 11 Tex. App. 364; *State* v. *Lewis,* 44 La. Ann. 958, 11 So. 572; *People* v. *Row,* 135 Mich. 505, 98 N. W. 13; *People* v. *Tice,* 115 Mich. 219, 69 Am. St. Rep. 560, 73 N. W. 108; *Pitts* v. *State,* 140 Ala. 70, 37 So. 101; *State* v. *Darling,* 202 Mo. 150, 100 S. W. 631; *Scott* v. *State,* 52 Tex. Crim. Rep. 164, 105 S. W. 796; *State* v. *Burns,* 148 Mo. 167, 71 Am. St. Rep. 588, 49

The preliminary questions should be such as to enable the witness to understand the occasion alluded to, but it is not necessary to use any established formula, as that would be sacrificing a right to a technicality.[4] Where the memory of the witness is refreshed by calling his attention to details, he may be able to show that he was honestly mistaken on the former occasion, or that he was misunderstood, and he ought to be permitted to explain the inconsistency in his utterances if he can do so.[5]

The requirements as to the proper foundation for impeach-

S. W. 1005; *Wilson* v. *United States*, 5 Ind. Terr. 610, 82 S. W. 924; *Sherrod* v. *State*, 90 Miss. 856, 44 So. 813; *Ridgell* v. *State*, 156 Ala. 10, 47 So. 71; *Jones* v. *State*, 141 Ala. 55, 37 So. 390; *State* v. *Lockhart*, 188 Mo. 427, 87 S. W. 457; *Brown* v. *State*, 142 Ala. 287, 38 So. 268; *Burton* v. *State*, 115 Ala. 1, 22 So. 585; *Richards* v. *Com.* 107 Va. 881, 59 S. E. 1104; *Smith* v. *State*, 52 Tex. Crim. Rep. 27, 105 S. W. 182; *People* v. *Ye Foo*, 4 Cal. App. 730, 89 Pac. 450; *People* v. *Feinberg*, 237 Ill. 348, 86 N. E. 584; *People* v. *Chin Hane*, 108 Cal. 597, 41 Pac. 697; *Hester* v. *State*, 103 Ala. 83, 15 So. 857; *People* v. *Bosquet*, 116 Cal. 75, 47 Pac. 879; *Com.* v. *Mosier*, 135 Pa. 221, 19 Atl. 943; *Hoge* v. *People*, 117 Ill. 35, 6 N. E. 796; *State* v. *Merriman*, 34 S. C. 576, 13 S. E. 328, 898; *Healy* v. *People*, 163 Ill. 372, 45 N. E. 230; *State* v. *Taylor*, 136 Mo. 66, 37 S. W. 907; *Williford* v. *State*, 36 Tex. Crim. Rep. 414, 37 S. W. 761; *State* v. *O'Brien*, 18 Mont. 1, 43 Pac. 1091, 44 Pac. 399; *People* v. *Butler*, 55 Mich. 408, 409, 21 N. W. 385; *Falkner* v. *State*, 151 Ala. 77, 44 So. 409; *Bressler* v. *People*, 117 Ill. 422, 8 N. E. 62; *Dean* v. *Com.* 25 Ky. L. Rep. 1876, 78 S. W. 1112.

[4] "The modern tendency of American courts, however, is to lose sight of the fact that this specification is a mere means to an end (namely, the end of adequately warning the witness), and to treat it as an inherent requisite, whether the witness really understood the allusion or not. The result of this is that, unless the counsel repeats a particular arbitrary formula of question, he loses the use of his evidence, without regard to the substantial adequacy of the warning. Such a practice is impolitic and unjustified by principle. Add to this that the same court is seldom uniform with itself in the elements of this fetish formula which it prescribes as indispensable, and it will be seen that the rule on the whole is apt to produce to-day in its application, as much detriment as advantage." Wigmore, Ev. § 1029.

[5] *Bressler* v. *People*, 117 Ill. 422, 8 N. E. 62; *Henson* v. *State*, 120 Ala. 316, 25 So. 23; *Brown* v. *State*, 46 Fla. 159, 35 So. 82.

ment apply equally where a party seeks to impeach his own witness, as where he seeks to impeach an adversary witness.[6]

The sufficiency of the foundation for impeachment is to be determined by the trial judge.[7] At common law, when the statements are in writing, it appears that such writings must first be shown to the witness.[8] Where the statements are in writing, it is usually sufficient to show them to the witness to inspect, without the necessity of orally laying the impeachment foundation.[9] In Alabama the entire writing must be read to the witness.[10]

Some states hold that it is not necessary specifically to point out the contradictory statements when contained in a writing,[11] but the better practice is to be specific in pointing out the statements, because it is fairer to the witness, saves the time of the court, and permits specific objections. Some jurisdictions require this method to be pursued.[12] The proper time to lay the impeachment foundation is on cross-examination,[13] but it is proper to recall a witness for the purpose of laying

[6] *State* v. *Clark*, 38 La. Ann. 105; *State* v. *Steeves*, 29 Or. 85, 103, 104, 43 Pac. 947; *State* v. *Shannehan*, 22 Iowa, 435; *State* v. *Goodbier*, 48 La. Ann. 770, 19 So. 755.

[7] *The Charles Morgan*, 115 U. S. 69, 29 L. ed. 316, 5 Sup. Ct. Rep. 1172; *Griffith* v. *State*, 37 Ark. 324; *Evans* v. *State*, 95 Ga. 468, 22 S. E. 298.

[8] Supra, § 156; *Downer* v. *Dana*, 19 Vt. 338; *Bryan* v. *Walton*, 14 Ga. 185; *Molyneaux* v. *Collier*, 30 Ga. 731; *Doe ex dem. Hughes* v. *Wilkinson*, 35 Ala. 453. See *Samuels* v. *Griffith*, 13 Iowa, 103; *Bradford* v. *Barclay*, 39 Ala. 33.

[9] *People* v. *Chrisman*, 135 Cal. 282, 67 Pac. 136; *Hendrickson* v. *Com.* 23 Ky. L. Rep. 1191. 64 S. W. 954; *Gaffney* v. *People*, 50 N. Y. 416, affirming Sheldon, 304.

[10] *Kennedy* v. *State*, 85 Ala. 326, 5 So. 300; *Carden* v. *State*, 84 Ala. 417, 4 So. 823; *Wills* v. *State*, 74 Ala. 21.

[11] *State* v. *Stein*, 79 Mo. 330; *Hanlon* v. *Ehrich*, 80 App. Div. 359, 80 N. Y. Supp. 692, affirmed in 178 N. Y. 474, 71 N. E. 12; *Romertze* v. *East River Nat. Bank*, 49 N. Y. 577; *Clapp* v. *Wilson*, 5 Denio, 285.

[12] *Morrison* v. *Myers*, 11 Iowa, 538; *Grosse* v. *State*, 11 Tex. App. 364, 375; *Richards* v. *United States*, 99 C. C. A. 401, 175 Fed. 911.

[13] *State* v. *Goodbier*, 48 La. Ann 770, 19 So. 755; *Ashton* v. *Ashton*, 11 S. D. 610, 79 N. W. 1001.

a foundation for impeachment.[14] There must be a substantial correspondence between the statement narrated to the witness in the preliminary question, and the statement to be proved for purposes of impeachment,[15] and where such correspondence does not exist, it is proper to exclude the proof;[16] and in order to prevent any confusion, the proper practice is to narrate to the witness the contradictory statement in the preliminary question, for, if his attention is not specifically called to it, it cannot be proved against him.[17] On re-examination the impeached witness may be asked as to the details of the alleged contradictory statement,[18] and it is right to make such explanation as he desires to make,[19] and he may

[14] *Chapin* v. *Siger*, 4 McLean, 379, Fed. Cas. No. 2,600; *Wilson* v. *Genseal*, 113 Ill. 403, 1 N. E. 905; *State* v. *Horne*, 9 Kan. 119; *State* v. *Goodbier*, 48 La. Ann. 770, 19 So. 755; *Crawleigh* v. *Galveston, H. & S. A. R. Co.* 28 Tex. Civ. App. 260, 67 S. W. 140; *Turner* v. *State*, 33 Tex. Crim. Rep. 103, 25 S. W. 635; *Fuller* v. *State*, 30 Tex. App. 559, 17 S. W. 1108; *Bennett* v. *State*, 28 Tex. App. 539, 14 S. W. 1005; *Harvey* v. *State*, 37 Tex. 365; *Angus* v. *Smith*, Moody & M. 473; *Queen's Case*, 2 Brod. & B. 284, 22 Revised Rep. 662, 11 Eng. Rul. Cas. 183; *Johnson* v. *State*, 55 Fla. 46, 46 So. 154; *Hicks* v. *State*, — Miss. —, 47 So. 524; *State* v. *Winter*, 72 Iowa, 627, 34 N. W. 475; *State* v. *Ruhl*, 8 Iowa, 447; *Perkins* v. *State*, 78 Wis. 551, 47 N. W. 827.

[15] *Roller* v. *Kling*, 150 Ind. 159, 49 N. E. 948; *Pence* v. *Waugh*, 135 Ind. 143, 34 N. E. 860; *People* v. *Considine*, 105 Mich. 149, 63 N. W. 196; *Rice* v. *Rice*, 104 Mich. 371, 62 N. W. 833; *Dean* v. *State*, 78 Miss. 360, 29 So. 95; *Bonelli* v. *Bowen*, 70 Miss. 142, 11 So. 791; *Williams* v. *State*, 147 Ala. 10, 41 So. 992.

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

[17] *People* v. *Nonella*, 99 Cal. 333, 33 Pac. 1097; *Manchester Fire Assur. Co.* v. *Insurance Co.* 91 Ill. App. 609; *State* v. *Reinheimer*, 109 Iowa, 624, 80 N. W. 669; *Louisville & N. R. Co.* v. *Alumbaugh*, 21 Ky. L. Rep. 134, 51 S. W. 18; *State* v. *Staley*, 14 Minn. 105, Gil. 75; *Scott* v. *King*, 7 Minn. 494, Gil. 401; *Union Square Nat. Bank* v. *Simmons*, — N. J. Eq. —, 42 Atl. 489; *Bouton* v. *Welch*, 59 App. Div. 288, 69 N. Y. Supp. 407; *Josephi* v. *Furnish*, 27 Or. 260, 41 Pac. 424; *Shields* v. *State*, 8 Tex. App. 427; *State* v. *Goodwin*, 32 W. Va. 177, 9 S. E. 85.

[18] *State* v. *Winkley*, 14 N. H. 480. See *Dunn* v. *People*, 29 N. Y. 523, 86 Am. Dec. 319.

[19] *Queen's Case*, 2 Brod. & B. 284, 313, 22 Revised Rep. 662,

add to his denial an explanation of the statement actually made.[20] As stated,[21] the witness may be impeached by his silence where it was his duty to speak, but, to admit silence as an impeachment, it must be shown from all the circumstances that it was his duty to tell the whole truth. In explanation of his silence, the witness may show that the matter occurred in court where he was not questioned.[22] He may show that he forgot the facts,[23] or that he was afraid to speak,[24] or any other fact that makes his silence consistent with good faith.[25]

§ 484. A witness cannot be impeached on collateral matters.—When a witness is cross-examined on any irrelevant matter, or any matters collateral to the issue, his answers are conclusive, and he cannot be subsequently contradicted on those matters by the party seeking to impeach him.[1] "The test of whether or not a fact inquired of in cross-

11 Eng. Rul. Cas. 183; *Peters* v. *United States*, 36 C. C. A. 105, 120, 94 Fed. 127; *Thomas* v. *State*, 103 Ala. 18, 16 So. 4; *People* v. *Shaver*, 120 Cal. 354, 52 Pac. 651; *Aneals* v. *People*, 134 Ill. 401, 412, 25 N. E. 1022; *Hoge* v. *People*, 117 Ill. 35, 49, 6 N. E. 796; *Armstrong* v. *Com.* 16 Ky. L. Rep. 494, 29 S. W. 342; *State* v. *Steeves*, 29 Or. 85, 103, 104. 43 Pac. 947; *State* v. *Bedard*, 65 Vt. 278, 26 Atl. 719; *Washington* v. *State*, 63 Ala. 189; *State* v. *McGaffin*, 36 Kan. 315, 13 Pac. 560; *People* v. *Lambert*, 120 Cal. 170, 52 Pac. 307; *Snyder* v. *State*, 145 Ala. 33, 40 So. 978.

[20] *Henderson* v. *State*, 70 Ala. 29; *Haley* v. *State*, 63 Ala. 83; *People* v. *Wessel*, 98 Cal. 352, 33 Pac. 216; *Campbell* v. *State*, 23 Ala. 44, 76; *People* v. *Smith*, 134 Cal. 453, 66 Pac. 669; *State* v. *Pulley*, 63 N. C. 8; *State* v. *McDaniel*, 68 S. C. 304, 102 Am. St. Rep. 661, 47 S. E. 384; *People* v. *Glover*, 141 Cal. 233, 244, 74 Pac. 745; *Barber* v. *State*, — Tex. Crim. Rep. —, 69 S. W. 515.

[21] Supra, § 482.

[22] *Babcock* v. *People*, 13 Colo. 515, 22 Pac. 817; *State* v. *Vickers*, 47 La. Ann. 1574, 18 So. 639; *Territory* v. *Clayton*, 8 Mont. 1, 19 Pac. 293; *Hyden* v. *State*, 31 Tex. Crim. Rep. 401, 404, 20 S. W. 764.

[23] *State* v. *Turner*, 36 S. C. 534, 15 S. E. 602.

[24] *People* v. *Chapleau*, 121 N. Y. 266, 24 N. E. 469.

[25] *Miller* v. *State*, 97 Ga. 653, 25 S. E. 366.

[1] *Rex* v. *Watson*, 2 Starkie, 149, 11 Eng. Rul. Cas. 145; *United States* v. *Dickinson*, 2 McLean, 325, Fed. Cas. No. 14,958; *United States* v. *White*, 5 Cranch, C. C. 38, Fed.

examination is collateral is this, Would the cross-examining party be entitled to prove it as a part of his case, tending to establish his plea?" [2] This limitation, however, only applies to answers on cross-examination. It does not affect answers on his examination in chief.[3]

§ 484a. Impeaching one's own witness.—The general rule obtains in criminal[1] as well as civil cases, that a party cannot impeach his own witness, but this is subject to the exception that where a party is compelled to call an indispensable witness,[2] or a witness that is hostile taking the party by surprise, such witness may be impeached by the party calling

Cas. No. 16,675; *State* v. *Kingsbury*, 58 Me. 239; *State* v. *Reed*, 60 Me. 550; *State* v. *Benner*, 64 Me. 267; *State* v. *Thibeau*, 30 Vt. 100; *Com.* v. *Buzzell*, 16 Pick. 153; *Com.* v. *Farrar*, 10 Gray, 6; *Rosenweig* v. *People*, 63 Barb. 634; *Stokes* v. *People*, 53 N. Y. 164, 13 Am. Rep. 492; *People* v. *Ware*, 1 N. Y. Crim. Rep. 166; *Schenley* v. *Com.* 36 Pa. 29, 78 Am. Dec. 359; *Langhorne* v. *Com.* 76 Va. 1012; *Fogleman* v. *State*, 32 Ind. 145; *Cokely* v. *State*, 4 Iowa, 477; *Patten* v. *People*, 18 Mich. 314, 100 Am. Dec. 173; *People* v. *Knapp*, 42 Mich. 267, 36 Am. Rep. 438, 3 N. W. 927; *People* v. *Broughton*, 49 Mich. 339, 13 N. W. 621; *State* v. *Staley*, 14 Minn. 105, Gil. 75; *Murphy* v. *Com.* 23 Gratt. 960; *State* v. *Patterson*, 24 N. C. (2 Ired. L.) 346, 38 Am. Dec. 699; *State* v. *Pulley*, 63 N. C. 8; *State* v. *Roberts*, 81 N. C. 605; *State* v. *Elliott*, 68 N. C. 124; *Rosenbaum* v. *State*, 33 Ala. 354; *Butler* v. *State*, 34 Ark. 480; *People* v. *Devine*, 44 Cal. 452. But see *State* v. *Willingham*, 33 La. Ann. 537; *State* v. *Gregory*, 33 La. Ann. 737; *People* v. *Courtney*, 1 N. Y. Crim. Rep. 574.

[2] *Hildeburn* v. *Curran*, 65 Pa. 63; *Woodard* v. *Eastman*, 118 Mass. 403; *State* v. *Crouse*, 86 N. C. 617; *State* v. *Davis*, 87 N. C. 514; *State* v. *Taylor*, 88 N. C. 694; *Powers* v. *Leach*, 26 Vt. 270; *Nuzum* v. *State*, 88 Ind. 599; *State* v. *Patterson*, 74 N. C. 157. See supra, § 473; *Com.* v. *Pease*, 110 Mass. 412; *State* v. *Parish*, 83 N. C. 613.

[3] *State* v. *Sargent*, 32 Me. 429; *Hastings* v. *Livermore*, 15 Gray, 10; *Whitney* v. *Boston*, 98 Mass. 312. See *State* v. *Petty*, 21 Kan. 54.

[1] *State* v. *Sederstrom*, 99 Minn. 234, 109 N. W. 113.

[2] *Diffenderfer* v. *Scott*, 5 Ind. App. 243, 32 N. E. 87; *Dennett* v. *Dow*, 17 Me. 19; *Whitman* v. *Morey*, 63 N. H. 448, 2 Atl. 899; *Brown* v. *Bulkley*, 14 N. J. Eq. 294; *Hart* v. *Burns*, 4 Clark (Pa.) 337; *Williams* v. *Walker*, 2 Rich. Eq. 291, 46 Am. Dec. 53.

him.[3] This exception is equally applicable to the prosecution, because the state must bring forward all witnesses obtainable, and it would be unfair to the prosecution where it could not contradict an unexpectedly hostile witness.[4] In such case the hostility may be shown by the witness himself or otherwise,[5] and he then may be examined as to his contradictory statements;[6] but the impeachment of one's own witness is limited to those cases where his testimony is in direct contradiction to his prior statements,[7] and he cannot be impeached where he is merely reluctant to give testimony[8] or unless the testimony is actually prejudicial.[9]

§ 485. Witness's testimony as to motives.—A witness's answers as to motives are not open to the criticism that has been applied to his answers as to prior misconduct. Hence, as has been already seen, it has been held that a witness may be asked whether he has not a strong interest in the case or

[3] *Sylvester* v. *State*, 46 Fla. 166, 35 So. 142; *Finley* v. *State*, — Tex. Crim. Rep. —, 47 S. W. 1015.

[4] *State* v. *Slack*, 69 Vt. 486, 38 Atl. 311; *People* v. *Ricker*, 115 N. Y. 668, 22 N. E. 1126; *Ross* v. *State*, — Tex. Crim. Rep. —, 45 S. W. 808.

[5] *Schultz* v. *Third Ave R. Co.* 89 N. Y. 242.

[6] *Conway* v. *State*, 118 Ind. 484, 488, 21 N. E. 285; *Rhodes* v. *State*, 128 Ind. 192, 25 Am. St. Rep. 429, 27 N. E. 866; *Williams* v. *State*, 25 Tex. App. 76, 90, 7 S. W. 661; *Schuster* v. *State*, 80 Wis. 107, 117, 49 N. W. 30; *State* v. *Tall*, 43 Minn. 273, 275, 45 N. W. 449; *People* v. *Sweeney*, 55 Mich. 586, 591, 22 N. W. 50; *People* v. *Jacobs*, 49 Cal. 384; *State* v. *Sarter*, 52 Kan. 531, 34 Pac. 1036; *McAlpine* v. *State*, 117 Ala. 93, 23 So. 130; *Barber* v. *State*, 3 Ga. App. 598, 60 S. E. 285; *People* v. *O'Neill*, 107 Mich. 556, 65 N. W. 540. See contra, *Putnam* v. *United States*, 162 U. S. 687, 40 L. ed. 1118, 16 Sup. Ct. Rep. 923.

[7] *Gibson* v. *State*, 34 Tex. Crim. Rep. 218, 29 S. W. 1085. Contra, *Southworth* v. *State*, 52 Tex. Crim. Rep. 532, 109 S. W. 133; *Dunk* v. *State*, 84 Miss. 452, 36 So. 609.

[8] *Southworth* v. *State*, 52 Tex. Crim. Rep. 532, 109 S. W. 133.

[9] *Nathan* v. *State*, 131 Ga. 48, 61 S. E. 994; *Johnson* v. *Leggett*, 28 Kan. 590; *Bailey* v. *State*, 37 Tex. Crim. Rep. 579, 40 S. W. 281; *Smith* v. *State*, 45 Tex. Crim. Rep. 520, 78 S. W. 519; *Mercer* v. *State*, 41 Fla. 279, 26 So. 317.

hostility to the defendant,[1] and if he denies such interest or bias, that he may be contradicted by evidence of his own statements, or of other implicatory acts.[2] The same rule applies to questions as to quarrels between the witness and the party against whom he is called.[3] It is true that we have cases disputing this conclusion;[4] but it is hard to see how evidence which goes to the root of a witness's impartiality can be regarded as collateral to the issue.[5] We have already seen how the perceptive, as well as the reproductive, powers of the mind, are swayed by prejudice. That a witness was under the influence of such prejudice is a fact without cognizance of which his testimony cannot be properly weighed.

§ 486. Discrediting witness; character evidence.—A witness may be discredited by evidence attacking his character for truth and veracity.[1] Particular independent facts, though

[1] Supra, § 475.

[2] *People* v. *Austin*, 1 Park. Crim. Rep. 154; *Gaines* v. *Com.* 50 Pa. 319; *Scott* v. *State*, 64 Ind. 400; *Com.* v. *Gallagher*, 126 Mass. 54.

[3] *Yewin's Case*, 2 Campb. 638; *Rex* v. *Martin*, 6 Car. & P. 562; *Thomas* v. *David*, 7 Car. & P. 350; *Queen's Case*, 2 Brod. & B. 311, 22 Revised Rep. 662, 11 Eng. Rul. Cas. 183; *Davis* v. *Keyes*, 112 Mass. 436; *Beardsley* v. *Wildman*, 41 Conn. 515; *People* v. *Austin*, 1 Park. Crim. Rep. 154; *Gaines* v. *Com.* 50 Pa. 327; *Geary* v. *People*, 22 Mich. 220.

[4] *Harrison* v. *Gordon*, 2 Lewin, C. C. 156; *Reg.* v. *Holmes*, L. R. 1 C. C. 337, 41 L. J. Mag. Cas. N. S. 12, 25 L. T. N. S. 669, 20 Week. Rep. 122, 12 Cox, C. C. 137; *Harris* v. *Tippett*, 2 Campb. 637, 12 Revised Rep. 767, 11 Eng. Rul. Cas. 144; *State* v. *Patterson*, 24 N. C. (2 Ired. L.) 346, 38 Am. Dec. 699; supra, § 376.

[5] Supra, §§ 376, 476, 477. See *United States* v. *Schindler*, 18 Blatchf. 227, 10 Fed. 547.

[1] *Rookwood's Trial*, 13 How. St. Tr. 210; *Reg.* v. *Brown*, L. R. 1 C. C. 70, 10 Cox, C. C. 453, 36 L. J. Mag. Cas. N. S. 59, 16 L. T. N. S. 364, 15 Week. Rep. 795; *United States* v. *Vansickle*, 2 McLean, 219, Fed. Cas. No. 16,609; *United States* v. *White*, 5 Cranch, C. C. 38, Fed. Cas. No. 16,675; *Starks* v. *People*, 5 Denio, 106; *Bluitt* v. *State*, 12 Tex. App. 39, 41 Am. Rep. 666; supra, §§ 57, 63; *Hamilton* v. *People*, 29 Mich. 173, 186, 1 Am. Crim. Rep. 618; *Com.* v. *Kennon*, 130 Mass. 39; supra, § 65; *Wilson* v. *State*, 3 Wis. 798; *Rex* v. *Bispham*, 4 Car. & P. 392; *Hillis* v. *Wylie*, 26

bearing on the question of veracity, cannot, however, be put in evidence for this purpose.[2] Thus, evidence has been rejected of facts going to show a witness's want of religion,[3] though it is held that it may be proved that a witness had declared that he would swear to anything.[4] General character for "badness" or "infamy" is, for still stronger reasons, inadmissible.[5] And it has been held inadmissible, in order to

Ohio St. 574; *Stevens* v. *Irwin,* 12 Cal. 306; *Sharp* v. *Scoging,* Holt, N. P. 541; *Carlos* v. *Brook,* 10 Ves. Jr. 50; *Wood* v. *Hammerton,* 9 Ves. Jr. 145; *Purcell* v. *M'Namara,* 8 Ves. Jr. 324; *Hudspeth* v. *State,* 50 Ark. 534, 9 S. W. 1; *Suddeth* v. *State,* 112 Ga. 407, 37 S. E. 747; *Com.* v. *McClain,* 4 Clark (Pa.) 462; *Eason* v. *Chapman,* 21 Ill. 33 (Breese, J., dissenting); *State* v. *Christian,* 44 La. Ann. 950, 11 So. 589; *Hoge* v. *People,* 117 Ill. 35, 6 N. E. 796.

[2] Supra, § 61; *Rookwood's Trial,* 13 How. St. Tr. 210; *United States* v. *Masters,* 4 Cranch, C. C. 479, Fed. Cas. No. 15,739; *United States* v. *Vansickle,* 2 McLean, 219, Fed. Cas. No. 16,609; *State* v. *Bruce,* 24 Me. 71; *Com.* v. *Churchill,* 11 Met. 538, 45 Am. Dec. 229; *Com.* v. *Kennon,* 130 Mass. 39; *Johnson* v. *People,* 3 Hill, 178, 38 Am. Dec. 624; *Crichton* v. *People,* 6 Park. Crim. Rep. 363; *Uhl* v. *Com.* 6 Gratt. 706; *Nugent* v. *State,* 18 Ala. 521; *Moore* v. *State,* 68 Ala. 360; *Craig* v. *State,* 5 Ohio St. 605; *Walker* v. *State,* 6 Blackf. 1; *Ketchingman* v. *State,* 6 Wis. 426; *Taylor* v. *Com.* 3 Bush, 508; *Stape* v. *People,* 85 N. Y. 390; *Webb* v. *State,* 29 Ohio St. 351; *People* v. *O'Brien,* 96 Cal. 171, 31 Pac. 45; *People* v. *Ryan,* 55 Hun, 214, 8 N. Y. Supp. 241; *State* v. *Rogers,* 108 Mo. 202, 18 S. W. 976; *State* v. *Barrett,* 40 Minn. 65, 41 N. W. 459; *People* v. *Walcott,* 51 Mich. 612, 17 N. W. 78; *Randall* v. *State,* 132 Ind. 539, 542, 32 N. E. 305; *State* v. *Gesell,* 124 Mo. 531, 27 S. W. 1101; *McArthur* v. *State,* 59 Ark. 431, 27 S. W. 628; *People* v. *Monreal,* 7 Cal. App. 37, 93 Pac. 385; *Seaborn* v. *Com.* 25 Ky. L. Rep. 2203, 80 S. W. 223; *State* v. *Arnold,* 146 N. C. 602, 60 S. E. 504; *Conrad* v. *State,* 132 Ind. 254, 259, 31 N. E. 805.

[3] *Halley* v. *Webster,* 21 Me. 461. See supra, § 362.

[4] *Newhal* v. *Wadhams,* 1 Root, 504; *Anonymous,* 1 Hill, L. 251.

[5] *State* v. *Bruce,* 24 Me. 71; *Com.* v. *Churchill,* 11 Met. 538, 45 Am. Dec. 229; *State* v. *Sater,* 8 Iowa, 420; *State* v. *O'Neale,* 26 N. C. (4 Ired. L.) 88; *People* v. *Yslas,* 27 Cal. 630; Though see *Carpenter* v. *Wall,* 11 Ad. & El. 803, 3 Perry & D. 457, 9 L. J. Q. B. N. S. 217; *State* v. *Boswell,* 13 N. C. (2 Dev. L.) 209; *State* v. *Shields,* 13 Mo. 236, 53 Am. Dec. 147; *State* v. *Breeden,* 58 Mo. 507; *State* v. *Grant,* 76 Mo. 237; *Gilliam* v. *State,* 1 Head, 38, 73 Am. Dec. 161; *Anderson* v. *State,* 34 Ark. 257; *Smith* v. *State,* 58 Miss. 867.

attack veracity, to prove the bad character of a female witness for chastity,[6] or to show that she is a prostitute; or to prove habits of intemperance which do not affect the perceptive or narrative powers.[7]

§ 487. Method of impeaching witness; limitations.— Some conflict in decisions exists in the various courts of the United States with reference to the impeachment of a witness on the ground of moral character. In this work, as we have already seen,[1] "character" is controvertible with "reputation," that is to say, that the character to be proved in court is that which the party bears in the community in which he resides. This may differ from the actual disposition of the man, but inasmuch as it is his reputation that fixes his standing in the community, on every principle of logic it seems unanswerable that his reputation in the community is the only matter about which the court is concerned. The practice adopted in most jurisdictions is to inquire in substance, "Do you know the general reputation of the witness A for truth and veracity in the community in which he resides?"[2] If to this the im-

[6] *Rex* v. *Martin*, 6 Car. & P. 562; *Rex* v. *Hodgson*, Russ. & R. C. C. 211; *Com.* v. *Churchill*, 11 Met. 538, 45 Am. Dec. 229; *Com.* v. *Murphy*, 14 Mass. 388; *Com.* v. *Billings*, 97 Mass. 405; *State* v. *Larkin*, 11 Nev. 314; *Pleasant* v. *State*, 15 Ark. 624; *People* v. *Yslas*, 27 Cal. 630.

[7] *Thayer* v. *Boyle*, 30 Me. 475; *Hoitt* v. *Moulton*, 21 N. H. 586.

See supra, §§ 57–63.

[1] Supra, §§ 57, 58, 63; *State* v. *Parks*, 25 N. C. (3 Ired. L.) 296; *State* v. *Speight*, 69 N. C. 72.

[2] *Willard* v. *Goodenough*, 30 Vt. 397; *United States* v. *Vansickle*, 2 McLean, 219, Fed. Cas. No. 16,609; *Crawford* v. *State*, 112 Ala. 1, 21, 21 So. 214; *Cole* v. *State*, 59 Ark. 50, 26 S. W. 377; *Pleasant* v. *State*, 15 Ark. 624, 652; *People* v. *Tyler*, 35 Cal. 553; *Sims* v. *State*, 68 Ga. 486; *Stokes* v. *State*, 18 Ga. 17, 37; *Doner* v. *People*, 92 Ill. App. 43; *State* v. *Johnson*, 40 Kan. 266, 19 Pac. 749; *State* v. *Christian*, 44 La. Ann. 950, 11 So. 589; *Keator* v. *People*, 32 Mich. 484; *State* v. *Howard*, 9 N. H. 485; *State* v. *Murphy*, 48 S. C. 1, 25 S. E. 43; *Merriman* v. *State*, 3 Lea, 393; *Gilliam* v. *State*, 1 Head, 38, 73 Am. Dec. 161; *Ware* v. *State*, 36 Tex. Crim. Rep. 597, 38 S. W. 198; *Bluitt* v. *State*, 12 Tex. App. 39, 41 Am. Rep. 666; *State* v. *Marks*, 16 Utah, 204, 51 Pac. 1089;

peaching witness replies, "Yes," then the other question is, "Is that reputation good or bad?"

It is to be observed that in a criminal prosecution the accused's bad character as evidence that he committed the offense cannot be introduced against him until he himself has introduced evidence of good character,[3] and this is again limited to the fact that both the accused and the prosecution can use only the trait of character relative to the offense charged.[4]

Courts have also differed as to the question of time in proof of character, but the prevailing rule on this point is that prior character at any time may be admitted as relevant to show present character.[5]

State v. *Meadows*, 18 W. Va. 658; *Wilson* v. *State*, 3 Wis. 798. Compare, however, *Mayes* v. *State*, 33 Tex. Crim. Rep. 33, 24 S. W. 421.

[3] Supra, §§ 57, 58.

[4] *Dover's Trial*, 6 How. St. Tr. 539, 552; *Hardy's Trial*, 24 How. St. Tr. 1076, and *Tooke's Trial*, 25 How. St. Tr. 348; *Turner's Trial*, 32 How. St. Tr. 1007; *Morgan* v. *State*, 88 Ala. 224, 6 So. 761; *Kilgore* v. *State*, 74 Ala. 7; *Morgan* v. *State*, 88 Ala. 223, 6 So. 761; *United States* v. *Chung Sing*, 4 Ariz. 217, 36 Pac. 205; *Kee* v. *State*, 28 Ark. 155, 164, 2 Am. Crim. Rep. 263; *People* v. *Josephs*, 7 Cal. 129; *People* v. *Stewart*, 28 Cal. 395; *People* v. *Fair*, 43 Cal. 137, 147; *People* v. *Chrisman*, 135 Cal. 282, 67 Pac. 136; *Dorsey* v. *State*, 108 Ga. 477, 34 S. E. 135; *Tedens* v. *Schumers*, 112 Ill. 263, 267; *Fletcher* v. *State*, 49 Ind. 124, 131, 19 Am. Rep. 673; *Carr* v. *State*, 135 Ind. 1, 20 L.R.A. 863, 41 Am. St. Rep. 408, 34 N. E. 533, 9 Am. Crim. Rep. 80; *State* v. *Gordan*, 3 Iowa, 410, 415; *State* v. *Curran*, 51 Iowa, 112, 117, 49 N. W. 1006, 3 Am. Crim. Rep. 405; *State* v. *Heacock*, 106 Iowa, 191, 76 N. W. 654; *State* v. *Parker*, 7 La. Ann. 83, 88; *People* v. *Garbutt*, 17 Mich. 9, 16, 97 Am. Dec. 162; *Westbrooks* v. *State*, 76 Miss. 710, 25 So. 491; *State* v. *Daltan*, 27 Mo. 15; *State* v. *King*, 78 Mo. 556; *State* v. *Anslinger*, 171 Mo. 600, 71 S. W. 1041; *State* v. *Tharnhill*, 174 Mo. 364, 74 S. W. 832; *Basye* v. *State*, 45 Neb. 261, 63 N. W. 811; *State* v. *Pearce*, 15 Nev. 188, 190; *State* v. *Snaver*, 63 N. J. L. 382, 43 Atl. 1059, 11 Am. Crim. Rep. 655; *Cathcart* v. *Com.* 37 Pa. 108, 111; *Poyner* v. *State*, 40 Tex. Crim. Rep. 640, 51 S. W. 376; *Poyner* v. *State*, — Tex. Crim. Rep. —, 48 S. W. 516; *State* v. *Surry*, 23 Wash. 655, 63 Pac. 557; *Funderberg* v. *State*, 100 Ala. 36, 14 So. 877; *Happs* v. *People*, 31 Ill. 385, 83 Am. Dec. 231; *State* v. *Knapp*, 45 N. H. 157.

[5] *Kelly* v. *State*, 61 Ala. 19; *Yar-*

In some jurisdictions no other trait than truthfulness can be inquired into,[6] and in other jurisdictions character in other respects than the trait relative to the offense charged cannot be inquired into.[7]

It is inadmissible to ask what character the impeached witness had in a neighborhood in which he did not then reside,[8]

brough v. *State,* 105 Ala. 43, 16 So. 758, 10 Am. Crim. Rep. 57; *Prater* v. *State,* 107 Ala. 26, 18 So. 239; *Lawson* v. *State,* 32 Ark. 220, 222; *Cadwell* v. *State,* 17 Conn. 467, 472; *Watkins* v. *State,* 82 Ga. 231, 14 Am. St. Rep. 155, 8 S. E. 875; *Kirkham* v. *People,* 170 Ill. 9, 48 N. E. 465; *Walker* v. *State,* 6 Blackf. 3; *Stratton* v. *State,* 45 Ind. 468, 472; *Rawles* v. *State,* 56 Ind. 439; *Sage* v. *State,* 127 Ind. 15, 27, 26 N. E. 667; *Hauk* v. *State,* 148 Ind. 238, 46 N. E. 127, 47 N. E. 465; *State* v. *Potts,* 78 Iowa, 659, 5 L.R.A. 814, 43 N. W. 534; *State* v. *Prins,* 117 Iowa, 505, 91 N. W. 758; *Young* v. *Com.* 6 Bush, 317; *Mitchell* v. *Com.* 78 Ky. 219; *State* v. *Taylor,* 45 La. Ann. 605, 609. 12 So. 927; *Com.* v. *Billings,* 97 Mass. 405; *Hamilton* v. *People,* 29 Mich. 173, 188, 1 Am. Crim. Rep. 618; *Keator* v. *People,* 32 Mich. 485; *State* v. *Pettit,* 119 Mo. 410, 414, 24 S. W. 1014; *State* v. *Summar,* 143 Mo. 220, 45 S. W. 254; *State* v. *Miller,* 156 Mo. 76, 56 S. W. 907; *State* v. *Forshner,* 43 N. H. 89, 80 Am. Dec. 132; *Shuster* v. *State,* 62 N. J. L. 521, 41 Atl. 701; *People* v. *Abbot,* 19 Wend. 200; *State* v. *Lanier,* 79 N. C. 622; *Hamilton* v. *State,* 34 Ohio St. 82; *Fry* v. *State,* 96 Tenn. 467, 35 S. W. 883; *Teese* v. *Huntingdon,* 23 How. 2, 16 L. ed. 479; *Amidon* v. *Hosley,* 54 Vt. 25; *State ex rel. Coffey* v. *Chittenden,* 112 Wis. 569, 88 N. W. 588; *State* v. *Knight,* 118 Wis. 473, 95 N. W. 390.

[6] *State* v. *Clawson,* 30 Mo. App. 139; *State* v. *Coffey,* 44 Mo. App. 455; *State* v. *Jackson,* 44 La. Ann. 160, 162, 10 So. 600; *Briggs* v. *Com.* 82 Va. 554; *People* v. *Abbott,* 97 Mich. 484, 37 Am. St. Rep. 360, 56 N. W. 862; *Com.* v. *Lawler,* 12 Allen, 585; *State* v. *Perkins,* 66 N. C. 126; *Holmes* v. *State,* 88 Ala. 26, 16 Am. St. Rep. 17, 7 So. 193; *State* v. *Grove,* 61 W. Va. 697, 57 S. E. 296.

[7] *Kidwell* v. *State,* 63 Ind. 384, 3 Am. Crim. Rep. 236. See Wharton, Crim. Law, 10th ed. § 568.

[8] *Conkey* v. *People,* 5 Park. Crim. Rep. 31; *Griffin* v. *State,* 14 Ohio St. 55; *Campbell* v. *State,* 23 Ala. 44; Wharton, Ev. § 487; *Brown* v *United States,* 164 U. S. 221, 41 L. ed. 410, 17 Sup. Ct. Rep. 33; *State* v. *Rugan,* 5 Mo. App. 592; *State* v. *Beal,* 68 Ind. 345, 346. 34 Am. Rep. 263; *Mershon* v. *State.* 51 Ind. 14; *State* v. *Kirkpatrick,* 63 Iowa, 554, 559, 19 N. W. 660; *State* v. *Johnson,* 41 La. Ann. 574, 577, 7 So. 670; *Jockson* v. *State,* 78 Ala. 471; *Combs* v. *Com.* 97 Ky. 24, 29

or resided at a period long prior to the trial.[9] But evidence of bad reputation for veracity four years previous to the trial is held admissible to impeach a witness who had no fixed domicil, and who had been absent from the state over a year, and whose residence at the place of reputation was as long as at any other place.[10] A stranger sent into a community to learn the character of the witness is not competent to testify to such character.[11]

Testimony must be confined to the general reputation of the witness, or to the relevant trait of character, as proof of specific acts will not be received.[12] When the competency of the impeaching witness has been shown, such witness may then be asked whether or not he would believe the witness under oath.[13] It is held, however, that it is not essential, to

S. W. 734; *State* v. *Norman,* 135 Iowa, 483, 113 N. W. 340; *Alford* v. *State,* 47 Fla. 1, 36 So. 436.

[9] *State* v. *Howard,* 9 N. H. 485; *Rogers* v. *Lewis,* 19 Ind. 405; *Aurora* v. *Cobb,* 21 Ind. 492; *Keator* v. *People,* 32 Mich. 485; *Young* v. *Com.* 6 Bush, 317; *Mitchell* v. *Com.* 78 Ky. 219. See *Com.* v. *Billings,* 97 Mass. 405; *People* v. *Abbott,* 19 Wend. 192.

[10] *Keator* v. *People,* 32 Mich. 484; *Brown* v. *Perez,* 89 Tex. 282, 34 S. W. 725.

[11] *Reid* v. *Reid,* 17 N. J. Eq. 101.

[12] *People* v. *O'Brien,* 96 Cal. 171, 31 Pac. 45; *People* v. *Ryan,* 55 Hun, 214, 8 N. Y. Supp. 241; *State* v. *Rogers,* 108 Mo. 202, 18 S. W. 976; *State* v. *Barrett,* 40 Minn. 65, 41 N. W. 459; *People* v. *Wolcott,* 51 Mich. 612, 17 N. W. 78; *Randall* v. *State,* 132 Ind. 539, 542, 32 N. E. 305; *State* v. *Gesell,* 124 Mo. 531, 27 S. W. 1101; *McArthur* v. *State,* 59 Ark. 431, 27 S. W. 628; *People* v. *Montreal,* 7 Cal. App. 37, 93 Pac. 385; *Seaborn* v. *Com.* 25 Ky. L. Rep. 2203, 80 S. W. 223; *State* v. *Arnold,* 146 N. C. 602, 60 S. E. 504; *Conrad* v. *State,* 132 Ind. 254, 259, 31 N. E. 805.

[13] *Reg.* v. *Brown,* 10 Cox, C. C. 453, L. R. 1 C. C. 70, 36 L. J. Mag. Cas. N. S. 59, 16 L. T. N. S. 364, 15 Week. Rep. 795; *Mawson* v. *Hartsink,* 4 Esp. 103, 6 Revised Rep. 841; *Gass* v. *Stinson,* 2 Sumn. 610, Fed. Cas. No. 5,261; *People* v. *Mather,* 4 Wend. 229, 21 Am. Dec. 122; *Bogle* v. *Kreitzer,* 46 Pa. 465; *Hamilton* v. *People,* 29 Mich. 185, 1 Am. Crim. Rep. 618; *Keator* v. *People,* 32 Mich. 484; *Wilson* v. *State,* 3 Wis. 798; *Stokes* v. *State,* 18 Ga. 17; *Robinson* v. *State,* 16 Fla. 835; *People* v. *Tyler,* 35 Cal. 553; *Holbert* v. *State,* 9 Tex. App. 219, 35 Am. Rep. 738; *State* v. *Cave-*

impeach the witness, that the impeaching witness should state that he could not believe the impeached witness on oath.[14] It has also been held that where the testimony of an absent witness is received in evidence, such absent witness may also be impeached.[15]

The impeaching witness who has sworn to the bad character of the impeached witness for truth may be cross-examined as to the sources of his knowledge of the impeached witness, and such impeaching witness may himself be impeached,[16] but the impeaching witness cannot be asked whether or not his own reputation for veracity is good,[17] but he must be impeached as other witnesses are impeached.

Though the reputation of the impeached witness is shown to be bad, his credibility is a question for the jury.[18]

ness, 78 N. C. 484; *Mayes* v. *State*, 33 Tex. Crim. Rep. 33, 24 S. W. 421; *Ware* v. *State*, 36 Tex. Crim. Rep. 597, 38 S. W. 198; *State* v. *Christian*, 44 La. Ann. 950, 952, 11 So. 589; *State* v. *Boswell*, 13 N. C. (2 Dev. L.) 209, 211; *Hudspeth* v. *State*, 50 Ark. 534, 9 S. W. 1; *People* v. *Rider*, 151 Mich. 187, 114 N. W. 1021; *Douglass* v. *State* (1906) — Tex. Crim. Rep. —, 98 S. W. 840; *Taylor* v. *State*, 5 Ga. App. 237, 62 S. E. 1048; *Walton* v. *State*, 88 Ind. 9, 19; *State* v. *Miles*, 15 Wash. 534, 46 Pac. 1047; *Cline* v. *State*, 51 Ark. 140, 10 S. W. 225; *Spies* v. *People*, 122 Ill. 1, 208, 3 Am. St. Rep. 320, 12 N. E. 865, 17 N. E. 898, 6 Am. Crim. Rep. 570; *Mitchell* v. *State*, 94 Ala. 68, 10 So. 518.

[14] *People* v. *Tyler*, 35 Cal. 553.

[15] *Gregory* v. *State*, 140 Ala. 16, 37 So. 259.

But see *People* v. *Pembroke*, 6 Cal. App. 588, 92 Pac. 668; *Chicago & A. R. Co.* v. *Lammert*, 19 Ill. App. 135.

[16] *Annis* v. *People*, 13 Mich. 511; *State* v. *Perkins*, 66 N. C. 126; post, § 490; *Nelson* v. *State*, 32 Fla. 244, 13 So. 361.

[17] *Glass* v. *State*, 147 Ala. 50, 41 So. 727.

[18] *Taylor* v. *State*, 5 Ga. App. 237, 62 S. E. 1048; *Peadon* v. *State*, 46 Fla. 124, 35 So. 204; *People* v. *Christensen*, 85 Cal. 568, 24 Pac. 888; *State* v. *Lucas*, 24 Or. 168, 33 Pac. 538; *Smith* v. *United States*, 161 U. S. 85, 40 L. ed. 626, 16 Sup. Ct. Rep. 483; *Towns* v. *State*, 111 Ala. 1, 20 So. 598; *Crawford* v. *State*, 112 Ala. 1, 25, 21 So. 214; *Rose* v. *Otis*, 18 Colo. 59, 31 Pac. 493; *Suddeth* v. *State*, 112 Ga. 407, 37 S. E. 747; *Huntingburgh* v. *First*, 22 Ind. App. 66, 53 N. E. 246; *Spivey* v. *State*, 8 Ind. 405; *Parnell* v. *State*, 129 Ala. 6, 29 So. 860; *Evans* v. *State*, 95 Ga. 468, 22 S. E. 298.

§ 488. Cross-examination as to witness's interest or prejudice.—As we have seen,[1] fairness to the witness requires that, in offering testimony of prior contradictory statements made by him, he must first be asked concerning them. The same reasons of fairness require that the witness be asked concerning statements that might indicate bias in testimony. And a number of courts require this.[2] When such ground has been duly laid, it is admissible to impeach a witness under the general conditions which have been already stated.[3] In such cross-examination great latitude is allowed, the general rule being that anything tending to show bias on the part of the witness may be drawn out,[4] so that anything that shows friendship towards,[5] or enmity against, the party,[6] or an in-

[1] Supra, § 483.

[2] Supra, § 477; *Queen's Case*, 2 Brod. & B. 313, 22 Revised Rep. 662, 11 Eng. Rul. Cas. 183; *Carpenter* v. *Wall*, 11 Ad. & El. 804, 3 Perry & D. 457, 9 L. J. Q. B. N. S. 217; *Atty. Gen.* v. *Hitchcock*, 1 Exch. 102, 16 L. J. Exch. N. S. 259, 11 Jur. 478; *Weaver* v. *Traylor*, 5 Ala. 564; *Baker* v. *Joseph*, 16 Cal. 177; *State* v. *Deputy*, 3 Penn. (Del.) 19, 50 Atl. 176; *Aneals* v. *People*, 134 Ill. 401, 414, 25 N. E. 1022; *Horner* v. *Com.* 19 Ky. L. Rep. 710, 41 S. W. 561; *Newcomb* v. *State*, 37 Miss. 383, 403; *Stacy* v. *Graham*, 14 N. Y. 492, 498; *People* v. *Brooks*, 131 N. Y. 325, 30 N. E. 189; *State* v. *Patterson*, 24 N. C. (2 Ired. L.) 354, 38 Am. Dec. 699; *State* v. *Kirkman*, 63 N. C. 248; *State* v. *Wright*, 75 N. C. 440; *State* v. *Brown*, 28 Or. 147, 41 Pac. 1042; *State* v. *Ellsworth*, 30 Or. 145, 47 Pac. 199; *McKnight* v. *United States*, 38 C. C. A. 115, 97 Fed. 208, 212; *State* v. *Glynn*, 51 Vt. 579.

[3] Supra, §§ 475–477, 485.

[4] *Com.* v. *Byron*, 14 Gray, 31; *Atty. Gen.* v. *Hitchcock*, 11 Jur. 478, 1 Exch. 102, 16 L. J. Exch. N. S. 259; *Burger* v. *State*, 83 Ala. 36, 3 So. 319; *People* v. *Wasson*, 65 Cal. 538, 4 Pac. 555; *People* v. *Lee Ah Chuck*, 66 Cal. 662, 6 Pac. 859; *Driggers* v. *State*, 38 Fla. 7, 20 So. 758; *State* v. *Collins*, 33 Kan. 77, 5 Pac. 368; *State* v. *Krum*, 32 Kan. 372, 4 Pac. 621; *Geary* v. *People*, 22 Mich. 220; *Crippen* v. *People*, 8 Mich. 117; *Patten* v. *People*, 18 Mich. 314, 100 Am. Dec. 173; *State* v. *King*, 88 Minn. 175, 92 N. W. 965; *McFarlin* v. *State*, 41 Tex. 23; *Blunt* v. *State*, 9 Tex. App. 234.

[5] *State* v. *Oscar*, 52 N. C. (7 Jones, L.) 305.

[6] *Hartman* v. *Rogers*, 69 Cal. 643, 11 Pac. 581; *Brewer* v. *Crosby*, 11 Gray, 29; *Drew* v. *Wood*, 26 N. H. 363; *Newton* v. *Harris*, 6 N. Y.

clination for or against either party, may be shown.[7] Inasmuch as the jurors are the sole judges of the credibility of the witness, any matter that will properly assist the jurors in forming a correct judgment from all of the facts ought to be shown in evidence.[8] Such right of cross-examination must be held within reasonable limits, which are to be determined by the trial judge in the concrete case.[9] A witness cannot be asked whether or not he is prejudiced against a particular party. He must be asked as to particular facts or conditions.[10] He cannot be cross-examined as to his religious belief,[11] but this does not preclude a question as to the manner in which the witness considers the most binding form of oath.[12]

A witness may be impeached by proof that he stated, after

345; *People* v. *Thomson,* 92 Cal. 506, 28 Pac. 589; *State* v. *Willingham,* 33 La. Ann. 537; *Mackmasters* v. *State,* 81 Miss. 374, 33 So. 2.

[7] *Mayhew* v. *Thayer,* 8 Gray, 172; *Kellogg* v. *Nelson,* 5 Wis. 125.

[8] *Gibson* v. *State,* — Miss. —, 16 So. 298; *People* v. *Rice,* 103 Mich. 350, 61 N. W. 540; *People* v. *Murphy,* 93 Mich. 45, 52 N. W. 1042; *Jackson* v. *Com.* 18 Ky. L. Rep. 670, 37 S. W. 847; *People* v. *Blackwell,* 27 Cal. 66; *Baker* v. *Joseph,* 16 Cal. 173; *People* v. *Cunningham,* 1 Denio, 524, 43 Am. Dec. 709; *United States* v. *Ball,* 163 U. S. 662, 41 L. ed. 300, 16 Sup. Ct. Rep. 1192; *People* v. *Worthington,* 105 Cal. 166, 38 Pac. 689; *People* v. *Anderson,* 105 Cal. 32, 38 Pac. 513; *Atwood* v. *Welton,* 7 Conn. 66; *Ingersol* v. *McWillie,* 9 Tex. Civ. App. 543, 30 S. W. 56; *Jenkins* v. *State,* 34 Tex. Crim. Rep. 201, 29 S. W. 1078; *Brace* v. *St. Paul City R. Co.* 87 Minn. 292, 91 N. W. 1099; *Donahoo* v. *Scott,* — Tex. Civ. App. —, 30 S. W. 385; *Cobban* v. *Hecklen,* 27 Mont. 245, 70 Pac. 805.

[9] *Miller* v. *Smith,* 112 Mass. 470; *Hathaway* v. *Crocker,* 7 Met. 262, 266; *Com.* v. *Sacket,* 22 Pick. 394; *Winship* v. *Neale,* 10 Gray, 382; *Swan* v. *Middlesex County,* 101 Mass. 173; *Johnston* v. *Jones,* 1 Black, 209, 226, 17 L. ed. 117, 122; *Zeltner* v. *Irwin,* 21 Misc. 13, 46 N. Y. Supp. 852; *Com.* v. *Shaw,* 4 Cush. 593, 50 Am. Dec. 813; *Heath* v. *State,* 93 Ga. 446, 21 S. E. 77.

[10] *People* v. *Stackhouse,* 49 Mich. 76, 13 N. W. 364. See Wharton, Ev. § 566.

[11] *Free* v. *Buckingham,* 59 N. H. 219; *Louisville & N. R. Co.* v. *Mayes,* 26 Ky. L. Rep. 197, 80 S. W. 1096; *White* v. *Com.* 96 Ky. 180, 28 S. W. 340.

[12] *Birmingham R. & Electric Co.* v. *Mason,* 137 Ala. 342, 34 So. 207.

having testified, that he had been hired so to testify.[13] So a character witness who has testified as to the good or bad character of the witness whom he is called upon to sustain or to impeach may be cross-examined as to his knowledge of the acts that contradict his testimony,[14] not for the purpose of establishing such acts, but to test the witness's credibility, so the jury may be assisted in determining the weight to be given his testimony.[15]

[13] *McGinnis* v. *Grant,* 42 Conn. 77.

[14] *Jones* v. *State,* 120 Ala. 303, 25 So. 204; *White* v. *State,* 111 Ala. 92, 21 So. 330; *People* v. *Mayes,* 113 Cal. 618, 45 Pac. 860; *McDonel* v. *State,* 90 Ind. 320; *State* v. *McDonald,* 57 Kan. 537, 46 Pac. 966; *State* v. *Pain,* 48 La. Ann. 311, 19 So. 138; *People* v. *Pyckett,* 99 Mich. 613, 58 N. W. 621; *People* v. *Frey,* 112 Mich. 251, 70 N. W. 548; *Basye* v. *State,* 45 Neb. 261, 63 N. W. 811; *Smith* v. *State,* 103 Ala. 57, 15 So. 866; *Lowery* v. *State,* 98 Ala. 45, 13 So. 498; *State* v. *Merriman,* 34 S. C. 16, 12 S. E. 619; *Shears* v. *State,* 147 Ind. 51, 46 N. E. 331; *State* v. *Ogden,* 39 Or. 195, 65 Pac. 449; *Harrison* v. *State,* — Ala. —, 40 So. 57; *Weaver* v. *State,* 83 Ark. 119, 102 S. W. 713; *People* v. *Perry,* 144 Cal. 748, 78 Pac. 284; *People* v. *Moran,* 144 Cal. 48, 77 Pac. 777; *Cook* v. *State,* 46 Fla. 20, 35 So. 665; *Ozburn* v. *State,* 87 Ga. 173, 13 S. E. 247; *Baehner* v. *State,* 25 Ind. App. 597, 58 N. E. 741; *State* v. *Richards,* 126 Iowa, 497, 102 N. W. 439; *State* v. *LeBlanc,* 116 La. 822, 41 So. 105; *State* v. *O'Kelley,* 121 Mo. App. 178, 98 S. W. 804; *State* v. *Brown,* 181 Mo. 192, 79 S. W. 1111; *State* v. *Doris,* 51 Or. 136, 16 L.R.A.(N.S.) 660, 94 Pac. 44; *State* v. *Ogden,* 39 Or. 195, 65 Pac. 449; *Stull* v. *State,* 47 Tex. Crim. Rep. 547, 84 S. W. 1059; *McGray* v. *State,* 38 Tex. Crim. Rep. 609, 44 S. W. 170; *Hall* v. *State,* 43 Tex. Crim. Rep. 479, 66 S. W. 783; *Brittain* v. *State,* 47 Tex. Crim. Rep. 597, 85 S. W. 278; *State* v. *Beckner,* 194 Mo. 281, 3 L.R.A.(N.S.) 535, 91 S. W. 892; *Green* v. *Dodge,* 79 Vt. 73, 64 Atl. 499; *People* v. *Weber,* 149 Cal. 325, 86 Pac. 671; *Way* v. *State,* 155 Ala. 52, 46 So. 273; *Moulton* v. *State,* 88 Ala. 116, 6 L.R.A. 301, 6 So. 758; *Thompson* v. *State,* 100 Ala. 70, 14 So. 878; *Harris* v. *Com.* 25 Ky. L. Rep. 297, 74 S. W. 1044; *Barnes* v. *Com.* 24 Ky. L. Rep. 1143, 70 S. W. 827; *People* v. *Elliott,* 163 N. Y. 11, 57 N. E. 103, 15 Am. Crim. Rep. 41.

[15] *People* v. *Pyckett,* 99 Mich. 613, 58 N. W. 621; *People* v. *Phelan,* 123 Cal. 551, 56 Pac. 424; *State* v. *McLaughlin,* 149 Mo. 19, 50 S. W. 315; *Forrester* v. *State,* 38 Tex. Crim. Rep. 245, 42 S. W. 400; *Wachstetter* v. *State,* 99 Ind.

§ 489. **Impeachment by proof of former conviction.**— In most states, as we have seen,[1] the disqualification of a person as a witness, on the ground of conviction of an infamous crime, no longer exists, but the record of such conviction may be offered in evidence to impeach credibility of such witness.[2] While such conviction must be proved by the record,[3] where such record cannot be produced, docket entries of the former conviction are admissible,[4] but it seems that where proof of former conviction is offered, it must be for an offense committed before the offense on trial,[5] and also there should be proof of identity in addition, because the mere fact that the record shows the conviction of a person of the same name does not sufficiently identify the accused to sustain proof of former conviction.[6] A pardon does not preclude such convic-

290, 50 Am. Rep. 94. But see *State* v. *Wertz*, 191 Mo. 569, 90 S. W. 838.

[1] Supra, § 363.

[2] *United States* v. *Biebusch*, 1 McCrary, 42, 1 Fed. 213; *State* v. *Watson*, 65 Me. 74; *Com.* v. *Knapp*, 9 Pick. 496, 20 Am. Dec. 491; *Com.* v. *Gorham*, 99 Mass. 420; *Donohue* v. *People*, 56 N. Y. 208; *Bartholomew* v. *People*, 104 Ill. 601, 44 Am. Rep. 97; *Johnson* v. *State*, 48 Ga. 116; *People* v. *McLane*, 60 Cal. 412; *Com.* v. *Hall*, 4 Allen, 305. But see *Langhorne* v. *Com.* 76 Va. 1012.

[3] Supra, §§ 153, 474.

[4] *State* v. *Lashus*, 79 Me. 504, 11 Atl. 180; *Myers* v. *State*, 92 Ind. 390; *State* v. *Hines*, 68 Me. 202; *State* v. *O'Connell*, — Me. —, 14 Atl. 291; *People* v. *Oppenheimer*, 156 Cal. 733, 106 Pac. 74; *State* v. *Payne*, 223 Mo 112, 122 S. W. 1062; *Muckenfuss* v. *State*, 55 Tex. Crim. Rep. 216, 117 S. W. 853. See *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. *Boyd*, 178 Mo. 2, 76 S. W. 979; *Com.* v. *McDermott*, 224 Pa. 363, 24 L.R.A.(N.S.) 431, 73 Atl. 427; *Miller* v. *Com.* — Ky. —, 113 S. W. 518; *Com.* v. *Walsh*, 196 Mass. 369, 124 Am. St. Rep. 559, 82 N. E. 19, 13 A. & E. Ann. Cas. 642; *People* v. *Burke*, 157 Mich. 108, 121 N. W. 282; *Deleon* v. *State*, 55 Tex. Crim. Rep. 39, 114 S. W. 828; *Dupree* v. State, 56 Tex. Crim. Rep. 562, 23 L.R.A.(N.S.) 596, 120 S. W. 871; *Howard* v. *State*, 139 Wis. 529, 121 N. W. 133 (statute).

[5] *Com.* v. *Daley*, 4 Gray, 209.

[6] *Reg.* v. *Kennedy*, 10 Ont. Rep. 397; Compare *Reg.* v. *Edgar*, 15 Ont. Rep. 142; *State* v. *Lashus*, 79 Me. 504, 11 Atl. 180.

tion from being put in evidence.[7] When a record of conviction is offered for the purpose of discrediting (not excluding) a witness, it may be impeached.[8]

It is admissible to question the witness as to whether or not he has been in the penitentiary.[10] If the witness admits his prior conviction, proof of the same is inadmissible,[11] and his admissions of identity are competent to establish his identity as that of the defendant named in the record of conviction.[12] Where there is no question of identity, the court may instruct the jury that the record constitutes sufficient proof of former conviction.[13]

§ 490. Impeachment of impeaching witness.—The character of an impeaching witness for truth and veracity may itself be attacked,[1] and it seems that it may also be sustained

[7] "If the King pardon these offenders, they are thereby rendered competent witnesses, though their credit is to be still left to the jury, for the King's pardon takes away *pœnam et culpam in foro humano,* but yet it makes not the man always an honest man." 2 Hale, P. C. 278; *Castlemaine's Trial,* 7 How. St. Tr. 1109, 1110; *Rookwood's Trial,* 13 How. St. Tr. 185, 186; *United States* v. *Jones,* 2 Wheeler, C. C. 451; *Com.* v. *Green,* 17 Mass. 515, 550, 551; *Com.* v. *Rogers,* 136 Mass. 158; *Howser* v. *Com.* 51 Pa. 332, 340; *Anglea* v. *Com.* 10 Grant. 696–699, 703, 704; *Com. ex rel. Crosse* v. *Halloway,* 44 Pa. 210, 84 Am. Dec. 431.

[8] *Sims* v. *Sims,* 75 N. Y. 466. See supra, § 154; post, § 596a.

[10] Supra, § 474; *Reat* v. *People,* 42 N. Y. 270. See *Driscoll* v. *People,* 47 Mich. 413, 11 N. W. 221. The extent to which a witness may be cross-examined as to his own acts and conduct is now so generally regulated by statute that the statutes of the various states ought to be consulted as to the character and range of such cross-examination.

[11] *Howard* v. *State,* 139 Wis. 529, 121 N. W. 133. But see *People* v. *Sickles,* 156 N. Y. 541, 51 N. E. 288.

[12] *State* v. *Boyd,* 178 Mo. 2, 76 S. W. 979.

[13] *State* v. *O'Connell,* — Me. —, 14 Atl. 291. See *State* v. *Haynes,* 36 Vt. 667; *Lindley* v. *State,* 57 Tex. Crim. Rep. 305, 122 S. W. 873.

[1] *Long* v. *Lonkin,* 9 Cush. 361; *Starks* v. *People,* 5 Denio, 106; *State* v. *Brant,* 14 Iowa, 180; *State* v *Moore,* 25 Iowa, 128, 95 Am. Dec 776; *State* v. *Cherry,* 63 N. C. 493 See *Mitchell* v. *Com.* 78 Ky. 219,

by countervailing proof.[2] The question is sometimes suggested that if the impeaching witness can be impeached, there would be no end, as the second impeaching witness might be impeached by the third, but this seldom occurs in practice, and it has been held that the last witness may not be impeached.[3]

But the most effective mode of impeachment of an impeaching witness is by requiring him to specify the particular rumors or statements of individuals that have led him to swear to the bad reputation of the witness, and to discredit him by showing that his knowledge is inadequate.

Inasmuch as witnesses are impeached by evidence of reputation in the community, rather than by the personal knowledge of the witness testifying against them, it is easy to fabricate reputation testimony, or to be mistaken in judging of the reputation, or to find that such reputation is based upon one or two reports which the impeaching witness himself regards as unfavorable. Hence, nothing short of a cross-examination which compels the impeaching witness to state definitely the source of the reports and their nature, upon which he bases his own conclusions as to reputation, will enable the party attacked to show the inadequacy of the impeaching evidence, or to protect the witness where he is unjustly assailed.[4]

supra, 482; *State* v. *Lawlor,* 28 Minn. 216, 9 N. W. 698.

[2] *Lemans* v. *State,* 4 W. Va. 755, 6 Am. Rep. 293. See *State* v. *Howard,* 9 N. H. 485; *Davis* v. *State,* 38 Md. 15, 50; *Stratton* v. *State,* 45 Ind. 468; *State* v. *Perkins,* 66 N. C. 126; *Durham* v. *State,* 45 Ga. 516.

[3] *Gaines* v. *Relf,* 12 How. 472, 13 L. ed. 1071.

[4] *Weeks* v. *Hull,* 19 Conn. 376, 50 Am. Dec. 249; *Lawer* v. *Winters,* 7 Cow. 263; *State* v. *Perkins,* 66 N. C. 126; *Jackson* v. *State,* 77 Ala. 18, 24; *Robinson* v. *State,* 16 Fla. 835, 840; *State* v. *Allen,* 100 Iowa, 7, 69 N. W. 274; *Barnes* v. *Com.* 24 Ky. L. Rep. 1143, 70 S. W. 827; *Phillips* v. *Kingfield,* 19 Me. 375, 381, 36 Am. Dec. 760; *Annis* v. *People,* 13 Mich. 511, 516; *Hamilton* v. *People,* 29 Mich. 173, 185, 1 Am. Crim. Rep. 618, semble; *Pickens* v. *State,* 61 Miss. 563, 566; *French* v. *Sale,* 63 Miss. 386, 393; *State* v. *Howard,* 9 N. H. 487.

§ 491. Sustaining an impeached witness.—The rule is well settled that an impeached witness may be sustained under the same general conditions as those through which his impeachment is attempted. The sustaining evidence should be relevant to the point of attack. Thus, where a witness is impeached by showing bias and prejudice, which of themselves do not indicate lack of moral character, such witness cannot be sustained merely by proof of good moral character.

The presumption obtains that a witness is of normal sanity, normal veracity, normal credibility, normally accurate perception, and normal capability in narrating perceptions, and these presumptions continue, at least until an attack has been made.

Evidence of character is excluded until character is brought into question.[1] Such rebutting evidence is made admissible by the fact that the impeaching party examines an impeaching witness as to the impeached witness's character for truth, even though such answers are favorable,[2] and a direct attack lays the foundation for rehabilitation by testimony to good character.[3]

[1] *State* v. *DeWolf*, 8 Conn. 93, 100, 20 Am. Dec. 90; *State* v. *Ward*, 49 Conn. 429, 433, 442; *Woey Ho* v. *United States*, 48 C. C. A. 705, 109 Fed. 888; *Spurr* v. *United States*, 31 C. C. A. 202, 59 U. S. App. 663, 87 Fed. 701, 714; *United States* v. *Holmes*, 1 Cliff. 98, Fed. Cas. No. 15,382; *Wright* v. *Deklyne*, Pet. C. C. 199, Fed. Cas. No. 18,076; *Funderberg* v. *State*, 100 Ala. 36, 14 So. 877; *Magee* v. *People*, 139 Ill. 138, 28 N. E. 1077; *Clackner* v. *State*, 33 Ind. 412; *State* v. *Archer*, 73 Iowa, 320, 35 N. W. 241; *State* v. *Fruge*, 44 La. Ann. 165, 10 So. 621; *Com.* v. *Ingraham*, 7 Gray, 46; *State* v. *Grant*, 79 Mo. 113, 133, 49 Am. Rep. 218; *People* v. *Gay*, 7 N. Y. 378; *Jackson ex dem. People* v. *Etz*, 5 Cow. 314; *State* v. *Jones*, 29 S. C. 201, 7 S. E. 296; *Reese* v. *State*, 43 Tex. Crim. Rep. 539, 67 S. W. 325; *Red* v. *State*, 39 Tex. Crim. Rep. 414, 46 S. W. 408; *Doucette* v. *State*, — Tex. Crim. Rep. —, 45 S. W. 800; *Murphy* v. *State*, — Tex. Crim. Rep. —, 40 S. W. 978; *Morrison* v. *State*, 37 Tex. Crim. Rep. 601, 40 S. W. 591; *People* v. *Vane*, 12 Wend. 78; *Bell* v. *State*, 124 Ala. 94, 27 So. 414.

[2] *Com.* v. *Ingraham*, 7 Gray, 46.

[3] *Prentiss* v. *Roberts*, 49 Me. 127;

To sustain a witness, the sustaining witness may testify to the good reputation for truth and veracity of the assailed witness, and that he would believe him under oath.[4] As a witness cannot be impeached by proof of specific acts, but through reputation only, such witness cannot be sustained by proof of particular acts of good conduct,[5] nor in any view by general good character as distinguished from reputation for truth.[6]

A witness may be recalled to substantiate his own testimony;[7] and where he is impeached by the party calling him, it is his personal right to sustain himself.[8] Likewise, the testimony of an accomplice may be sustained.[9]

A witness's character is so far impeached by putting in evidence his conviction of a felony, that evidence is admissible of his good reputation for truth.[10] Whether or not, after a

Isler v. *Dewey*, 71 N. C. 14; *Morss* v. *Palmer*, 15 Pa. 51.

[4] *Hadjo* v. *Gooden*, 13 Ala. 718; *Towns* v. *State*, 111 Ala. 1, 20 So. 598; *Harris* v. *State*, 30 Ind. 131; *Swain* v. *State*, 48 Tex. Crim. Rep. 98, 86 S. W. 335; *Runnels* v. *State*, 45 Tex. Crim. Rep. 446, 77 S. W. 458; *Morrison* v. *State*, 37 Tex. Crim. Rep. 601, 40 S. W. 591; *Ledbetter* v. *State*, — Tex. Crim. Rep. —, 29 S. W. 479. *Tipton* v. *State*, 30 Tex. App. 530, 17 S. W. 1097; *Crook* v. *State*, 27 Tex. App. 198, 11 S. W. 444; *Phillips* v. *State*, 19 Tex. App. 158; *Dixon* v. *State*, 15 Tex. App. 271; *Burrell* v. *State*, 18 Tex. 713; *State* v. *Staley*, 45 W. Va. 792, 32 S. E. 198; *United States* v. *Hall*, 10 L.R.A. 324, 44 Fed. 864; *Brown* v. *State*, 142 Ala. 287, 38 So. 268; *Haley* v. *State*, 63 Ala. 83; *Clem* v. *State*, 33 Ind. 418.

[5] *Farley* v. *State*, 57 Ind. 331; *People* v. *Turney*, 124 Mich. 542, 83 N. W. 273.

[6] *Heywood* v. *Reed*, 4 Gray, 574; *People* v. *Gay*, 7 N. Y. 378.

[7] *State* v. *George*, 30 N. C. (8 Ired. L.) 324, 49 Am. Dec. 392.

[8] *Farr* v. *Thompson*, Cheves L. 37.

[9] *People* v. *Vane*, 12 Wend. 78; *Anderson* v. *State*, 34 Tex. Crim. Rep. 546, 53 Am. St. Rep. 722, 31 S. W. 673.

[10] Supra, § 474; *Real* v. *People*, 42 N. Y. 270. See *Driscoll* v. *People*, 47 Mich. 413, 11 N. W. 221; *Rex* v. *Clarke*, 2 Starkie, 241; *Bate* v. *Hill*, 1 Car. & P. 100, 28 Revised Rep. 766, Park J.; *Provis* v. *Reed*, 5 Bing. 435, 538; *Lewis* v. *State*, 35 Ala. 386; *People* v. *Ah Fat*, 48 Cal 61, 64; *People* v. *Amanacus*, 50 Cal. 233, 1 Am. Crim. Rep. 197; *Rogers* v. *Moore*, 10 Conn. 14; *State* v. *Fruge*, 44 La. Ann. 165, 10

record of conviction has been introduced to discredit a witness, it is admissible to sustain him by evidence of his innocence of the offense of which he was convicted, is considered elsewhere.[11]

Where a witness has been impeached by proof of a former conviction,[12] or by indictment,[13] or by imprisonment on charge of crime,[14] his good reputation may be proved to sustain him. And where a witness has been impeached through contradictory statements, some states [15] allow proof of consistent statements to re-establish his character. In those states the consistent statements are admissible whether under oath[16] or

So. 621; *Vernon* v. *Tucker,* 30 Md. 456, 462; *Russell* v. *Coffin,* 8 Pick. 143, 154; *Harrington* v. *Lincoln,* 4 Gray, 563, 567, 64 Am. Dec. 95; *Gertz* v. *Fitchburg R. Co.* 137 Mass. 77, 78, 50 Am. Rep. 285; *People* v. *Rector,* 19 Wend. 569, 584, 595; *Carter* v. *People,* 2 Hill, 317; *People* v. *Hulse,* 3 Hill, 309, 314; *People* v. *Gay,* 7 N. Y. 378, 381; *Webb* v. *State,* 29 Ohio St. 351, 358; *Wick* v. *Baldwin,* 51 Ohio St. 51, 36 N. E. 671; *Hoard* v. *State,* 15 Lea, 318, 328; *Smith* v. *State,* — Tex. Crim. Rep. —, 50 S. W. 363; *Paine* v. *Tilden,* 20 Vt. 554, 564; *Kraimer* v. *State,* 117 Wis. 350, 93 N. W. 1097.

[11] Post, § 596. See *Gardner* v. *Bartholomew,* 40 Barb. 325.

[12] *People* v. *Amanacus,* 50 Cal. 233, 1 Am. Crim. Rep. 197; *Mercer* v. *State,* 40 Fla. 216, 74 Am. St. Rep. 135, 24 So. 154; *State* v. *Farmer,* 84 Me. 436, 24 Atl. 985.

[13] *Carter* v. *People,* 2 Hill, 317; *Luttrell* v. *State,* 40 Tex. Crim. Rep. 651, 51 S. W. 930, 11 Am. Crim. Rep. 226.

[14] *Farmer* v. *State,* 35 Tex. Crim. Rep. 270, 33 S. W. 232.

[15] Indiana.—*Hobbs* v. *State,* 133 Ind. 404, 18 L.R.A. 774, 32 N. E. 1019; *Hicks* v. *State,* 165 Ind. 440, 75 N. E. 641.

North Carolina.—*State* v. *Staton,* 114 N. C. 813, 19 S. E. 96; *State* v. *Rowe,* 98 N. C. 629, 4 S. E. 506.

Pennsylvania. — *Henderson* v. *Jones,* 10 Serg. & R. 322, 13 Am. Dec. 676.

South Dakota.—*State* v. *Caddy,* 15 S. D. 167, 91 Am. St. Rep. 666, 87 N. W. 927.

Tennessee.—*Graham* v. *McReynolds,* 90 Tenn. 673, 18 S. W. 272.

Texas.—*Wallace* v. *State,* 46 Tex. Crim. Rep. 341, 81 S. W. 966; *Lee* v. *State,* 44 Tex. Crim. Rep. 460, 72 S. W. 195; *Hardin* v. *State,* 55 Tex. Crim. Rep. 631, 117 S. W. 974, 57 Tex. Crim. Rep. 401, 123 S. W. 613.

[16] *Perkins* v. *State,* 4 Ind. 222; *State* v. *Grant,* 79 Mo. 113, 133, 49 Am. Rep. 218; *State* v. *Exum,* 138 N. C. 599, 50 S. E. 283; *Henderson* v. *Jones,* 10 Serg. & R. 322, 13 Am.

not, and whether written or verbal,[17] but the consistent statement must be relevant,[18] and it must correspond in substance with the statement to be sustained.[19] Such statements may be proved by any person who heard the corresponding state-

Dec. 676; *Foster* v. *Shaw*, 7 Serg. & R. 156; *Sims* v. *State*, 36 Tex. Crim. Rep. 154, 36 S. W. 256.

[17] *State* v. *Exum*, 138 N. C. 599, 50 S. E. 283.

[18] *Baltimore City Pass. R. Co.* v. *Knee*, 83 Md. 77, 34 Atl. 252; *McClintock* v. *Whittemore*, 16 N. H. 268; *Stevens* v. *Beach*, 12 Vt. 585, 36 Am. Dec. 359; *Dillard* v. *United States*, 72 C. C. A. 451, 141 Fed. 303; *Parnell* v. *State*, 129 Ala. 6, 29 So. 860; *Billings* v. *State*, 52 Ark. 303, 12 S. W. 574; *Sellers* v. *State*, 93 Ark. 313, 124 S. W. 770; *Hinson* v. *State*, 76 Ark. 366, 88 S. W. 947; *People* v. *Gray*, 148 Cal. 507, 83 Pac. 707; *People* v. *Cyty*, 11 Cal. App. 702, 106 Pac. 257; *Askew* v. *People*, 23 Colo. 446, 48 Pac. 524; *State* v. *Main*, 75 Conn. 55, 52 Atl. 257; *State* v. *Pucca*, 4 Penn. (Del.) 71, 55 Atl. 831; *Myers* v. *State*, 43 Fla. 500, 31 So. 275; *Evans* v. *State*, 95 Ga. 468, 22 S. E. 298; *State* v. *Anthony*, 6 Idaho, 383, 55 Pac. 884; *Aneals* v. *People*, 134 Ill. 401, 414, 25 N. E. 1022; *Meyncke* v. *State*, 68 Ind. 401; *State* v. *Maxwell*, 42 Iowa, 208; *State* v. *Keefe*, 54 Kan. 197, 38 Pac. 302; *Mullins* v. *Com.* 23 Ky. L. Rep. 2433, 67 S. W. 824; *State* v. *Haab*, 105 La. 230, 29 So. 725; *State* v. *Kingsbury*, 58 Me. 238; *Davis* v. *State*, 38 Md. 15, 50; *Com.* v. *Smith*, 163 Mass. 411, 426, 427, 40 N. E. 189; *People* v. *Row*, 135 Mich. 505, 98 N. W. 13; *State* v. *King*, 88 Minn. 175, 92 N. W. 965; *State* v. *Downs*, 91 Mo. 19, 3 S. W. 219; *State* v. *Pugh*, 16 Mont. 343, 40 Pac. 861; *Tatum* v. *State*, 61 Neb. 229, 85 N. W. 40; *Territory* v. *Chavez*, 8 N. M. 528, 45 Pac. 1107; *State* v. *Crane*, 110 N. C. 530, 15 S. E. 231; *Com.* v. *Craig*, 19 Pa. Super. Ct. 81, 97; *State* v. *Davidson*, 9 S. D. 564, 70 N. W. 879; *Fox* v. *State*, — Tex. Crim. Rep. —, 87 S. W. 157; *State* v. *Sheppard*, 49 W. Va. 582, 603, 604, 39 S. E. 676; *United States* v. *Dickinson*, 5 McLean, 325, Fed. Cas. No. 14,958; *DeYampert* v. *State*, 139 Ala. 53, 36 So. 772; *People* v. *Cole*, 127 Cal. 545, 59 Pac. 984, 13 Am. Crim. Rep. 420; *Starke* v. *State*, 49 Fla. 41, 37 So. 850; *State* v. *Irwin*, 9 Idaho, 35, 60 L.R.A. 716, 71 Pac. 608, 13 Am. Crim. Rep. 620; *Dehler* v. *State*, 22 Ind. App. 383, 53 N. E. 850; *Com.* v. *Hourigan*, 89 Ky. 305, 12 S. W. 550; *State* v. *Wiggins*, 50 La. Ann. 330, 23 So. 334; *Munshower* v. *State*, 55 Md. 11, 39 Am. Rep. 414; *Com.* v. *McLaughlin*, 122 Mass. 449; *Turner* v. *State*, 33 Tex. Crim. Rep. 103, 25 S. W. 635; *Shephard* v. *State*, 88 Wis. 185, 59 N. W. 449.

[19] *Maitland* v. *Citizen's Nat. Bank*, 40 Md. 540, 560, 17 Am. Rep. 620; *Baltimore City Pass. R. Co.* v. *Knee*, 83 Md. 77, 34 Atl. 252.

ment.[20] In other states, corresponding statements are not admissible to sustain a witness who has been impeached by contradictory acts or statements.[21] In case of impeachment by omissions, the witness may be sustained by his corresponding statement made about the time of the transaction concerning which he testifies.[22]

In whatever manner impeaching evidence is used, whether to sustain or impeach, the credibility of the assailed witness is to be determined by the jury.[23] In determining the credi-

[20] *Goode* v. *State*, 32 Tex. Crim. Rep. 505, 24 S. W. 102; *State* v. *Murphy*, 9 Wash. 204, 217, 37 Pac. 420; *Lee* v. *State*, 44 Tex. Crim. Rep. 460, 72 S. W. 195; *Henderson* v. *Jones*, 10 Serg. & R. 322, 13 Am. Dec. 676; *State* v. *Staton*, 114 N. C. 813, 19 S. E. 96; *State* v. *Rowe*, 98 N. C. 629, 4 S. E. 506; *State* v. *George*, 30 N. C. (8 Ired. L.) 324; *Hobbs* v. *State*, 133 Ind. 404, 18 L.R.A. 774, 32 N. E. 1019; *Foster* v. *Shaw*, 7 Serg. & R. 156.

[21] United States.—*United States* v. *Holmes*, 1 Cliff. 98, Fed. Cas. No. 15,382. Contra, *Wright* v. *Deklyne*, Pet. C. C. 199, Fed. Cas. No. 18,076.

Alabama.—*McKelton* v. *State*, 86 Ala. 594, 6 So. 301.

California.—*People* v. *Doyell*, 48 Cal. 85.

Colorado.—*Davis* v. *Graham*, 2 Colo. App. 210, 29 Pac. 1007.

Georgia.—*Knight* v. *State*, 114 Ga. 48, 88 Am. St. Rep. 17, 39 S. E. 928.

Illinois.—*Chicago City R. Co.* v. *Matthieson*, 212 Ill. 292, 72 N. E. 443.

Iowa.—*State* v. *Vincent*, 24 Iowa, 570, 95 Am. Dec. 753.

Kansas.—*State* v. *Petty*, 21 Kan. 54.

Maine.—*Ware* v. *Ware*, 8 Me. 42, 55.

Massachusetts.—*Com.* v. *Jenkins*, 10 Gray, 485.

Mississippi.—*Head* v. *State*, 44 Miss. 731.

Missouri.—*State* v. *Taylor*, 134 Mo. 109, 154, 155, 35 S. W. 92. Contra, *State* v. *Whelehon*, 102 Mo. 17, 14 S. W. 730.

New Hampshire.—*Judd* v. *Brentwood*, 46 N. H. 430.

New York.—*People* v. *Finnegan*, 1 Park. Crim. Rep. 147. Contra, *People* v. *Moore*, 15 Wend. 419.

South Carolina.—*State* v. *McDaniel*, 68 S. C. 304, 102 Am. St. Rep. 661, 47 S. E. 384. Contra, *Lyles* v. *Lyles*, 1 Hill, Eq. 76.

[22] *Waller* v. *People*, 209 Ill. 284, 70 N. E. 681; *State* v. *Vincent*, 24 Iowa, 570, 95 Am. Dec. 753; *Vilas Nat. Bank* v. *Newton*, 25 App. Div. 62, 48 N. Y. Supp. 1009; *Gilbert* v. *Sage*, 57 N. Y. 639. See also *Com.* v. *Wilson*, 1 Gray, 337.

[23] *Crawford* v. *State*, 112 Ala. 1, 25, 26, 21 So. 214; *People* v. *McLane*, 60 Cal. 412; *Smith* v. *State*, 109 Ga. 479, 35 S. E. 59; *People* v

bility of the assailed witness, the jury, under the instructions of the court, must consider the impeaching evidence in connection with the sustaining evidence,[24] and, in order to reject the testimony of the witness as unworthy, they must also believe that the variance was wilful.[25]

§ 492. Sustaining witness by proof of consistent statements.—When a witness is assailed on the ground that he stated facts differently on former occasions, it is competent, on re-examination, for him to state the circumstances under which the statement was made,[1] but, as we have seen,[2] there is some conflict of decision as to whether or not he can be sustained by proof of former consistent statements. But

Barnes, 2 Idaho, 161, 9 Pac. 532; *Beedle* v. *State*, 204 Ill. 197, 68 N. E. 434; *Barnes* v. *Com.* 24 Ky. L. Rep. 1143, 70 S. W. 827; *Bakeman* v. *Rose*, 18 Wend. 146; *State* v. *Lucas*, 24 Or. 168, 33 Pac. 538; *Rose* v. *Otis*, 18 Colo. 59, 31 Pac. 493; *Hodgkins* v. *State*, 89 Ga. 761, 15 S. E. 695; *East St. Louis Connecting R. Co.* v. *Altgen*, 112 Ill. App. 471; *Huntingburgh* v. *First*, 22 Ind. App. 66, 53 N. E. 246; *Evans* v. *Com.* 79 Ky. 414; *Worthing* v. *Worthing*, 64 Me. 335; *Handy* v. *Canning*, 166 Mass. 107, 44 N. E. 118; *Hahn* v. *Bettingen*, 84 Minn. 512, 88 N. W. 10; *Rheinhart* v. *Grant*, 24 Mo. App. 154; *McCoy* v. *Munro*, 76 App. Div. 435, 78 N. Y. Supp. 849; *Hayden* v. *Stone*, 112 Mass. 346; *Cowan* v. *Third Ave. R. Co.* 56 Hun, 644, 9 N. Y. Supp. 610; *People* v. *Chapleau*, 121 N. Y. 266, 277, 24 N. E. 469; *Crawford* v. *State*, 112 Ala. 1, 25, 21 So. 214; *Hollingsworth* v. *State*, 53 Ark. 387, 14 S. W. 41; *Heath* v. *Scott*, 65 Cal. 548, 4 Pac. 557; *Roy* v. *Goings*, 112 Ill. 656; *Overton* v. *Rogers*, 99 Ind. 595; *State* v. *Woodworth*, 65 Iowa, 141, 21 N. W. 490; *Bates* v. *Barber*, 4 Cush. 107; *State* v. *Baldwin*, 56 Mo. App. 423; *Jernigan* v. *Wainer*, 12 Tex. 189; *People* v. *McLane*, 60 Cal. 412; *Winter* v. *Judkins*, 106 Ala. 259, 17 So. 627; *Taylor* v. *Smith*, 16 Ga. 7.

[24] *State* v. *Jones*, 4 Penn. (Del.) 109, 53 Atl. 858; *Phillips* v. *Kingfield*, 19 Me. 375, 36 Am. Dec. 760; *Huntingburgh* v. *First*, 22 Ind. App. 66, 53 N. E. 246; Contra, *Paxton* v. *Dye*, 26 Ind. 393; *Thrawley* v. *State*, 153 Ind. 375, 55 N. E. 95.

[25] *Yoes* v. *State*, 9 Ark. 42; *Beedle* v. *People*, 204 Ill. 197, 68 N. E. 434; *Kerr* v. *Hodge*, 39 Ill. App. 546. Compare *Cox* v. *Prater*, 67 Ga. 588; *Crabtree* v. *Hagenbaugh*, 25 Ill. 241, 79 Am. Dec. 324.

[1] *State* v. *Reed*, 62 Me. 129.

[2] Supra, § 491.

where the showing is that the witness testified under corrupt motives, or his testimony is a recent fabrication, such testimony may be rebutted.[3] Thus, on an indictment for perjury, a witness for the prosecution swore that B (the accused) was not at the place of the burning at the time of the fire; on cross-examination he was confronted by his testimony to the contrary on the arson trial. Held that, as he had been discredited, he might be sustained by showing that he had made to C, immediately after the arson, a statement in harmony with that made by him on the perjury trial, though the particulars of the statement were inadmissible.[4]

[3] *Henderson* v. *Jones,* 10 Serg. & R. 322, 13 Am. Dec. 676; *Cooke* v. *Curtis,* 6 Harr. & J. 93; *Stolp* v. *Blair,* 68 Ill. 543; *Coffin* v. *Anderson,* 4 Blackf. 395; *Dailey* v. *State,* 28 Ind. 285; *Clark* v. *Bond,* 29 Ind. 555; *State* v. *Vincent,* 24 Iowa, 570, 95 Am. Dec. 753; *State* v. *George,* 30 N. C. (8 Ired. L.) 324, 49 Am. Dec. 392; *State* v. *Dove,* 32 N. C. (10 Ired. L.) 469; *March* v. *Harrell,* 46 N. C. (1 Jones, L.) 329; *Lyles* v. *Lyles,* 1 Hill, Eq. 76; *People* v. *Doyell,* 48 Cal. 85. See also *French* v. *Merrill,* 6 N. H. 465; *Hotchkiss* v. *Germania F. Ins. Co.* 5 Hun, 91; *Com.* v. *Wilson,* 1 Gray, 337; *Dossett* v. *Miller,* 3 Snecd, 72; *Jackson ex dem. People* v. *Etz,* 5 Cow. 314; *State* v. *Dennin,* 32 Vt. 158; *Maitland* v. *Citizens' Nat. Bank,* 40 Md. 540, 17 Am. Rep. 620; *Deshon* v. *Merchants' Ins. Co.* 11 Met. 199; *French* v. *Merrill,* 6 N. H. 465; *People* v. *Finnegan,* 1 Park. Crim. Rep. 147; *Ellicott* v. *Pearl,* 10 Pet. 412, 439, 9 L. ed. 475, 486; *Chicago City R. Co.* v. *Matthieson,* 212 Ill. 292, 72 N. E. 443; *Cloud County* v. *Vickers,* 62 Kan. 25, 61 Pac. 391; *State* v. *Petty,* 21 Kan. 54; *State* v. *Manville,* 8 Wash. 523, 36 Pac. 470; *Waller* v. *People,* 209 Ill. 284, 70 N. E. 681; *Barkly* v. *Copeland,* 74 Cal. 1, 5 Am. St. Rep. 413, 15 Pac. 307; *McCord* v. *State,* 83 Ga. 521, 531, 532, 10 S. E. 437, 8 Am. Crim. Rep. 636; *State* v. *Fontenot,* 48 La. Ann. 283, 19 So. 113; *Baltimore City Pass. R. Co.* v. *Knee,* 83 Md. 77, 34 Atl. 252; *Griffin* v. *Boston,* 188 Mass. 475, 74 N. E. 687; *Reed* v. *Spaulding,* 42 N. H. 114; *Dechert* v. *Municipal Electric Light Co.* 39 App. Div. 490, 57 N. Y. Supp. 225; *State* v. *Exum,* 138 N. C. 599, 50 S. E. 283; *Com.* v. *Brown,* 23 Pa. Super. Ct. 470, 502; *State* v. *McDaniel,* 68 N. C. 304, 102 Am. St. Rep. 661, 47 S. E. 384; *Legere* v. *State,* 111 Tenn. 368, 102 Am. St. Rep. 781, 77 S. W. 1059; *Robb* v. *Hackley,* 23 Wend. 50; *State* v. *Waggoner,* 39 La. Ann. 919, 3 So. 119.

[4] *Reg.* v. *Neville,* 6 Cox, C. C. 69, 65 L. T. 61.

In this connection it is to be observed that a witness may be often corroborated by his own statements, most frequently admitted as *res gestæ* of the transaction. Likewise, where a witness has been assailed, he may be sustained by statements made at or immediately after the transaction. Thus, in prosecutions for rape, the fact that the prosecutrix, immediately after the offense, made complaint, is admissible to sustain her (as well as admissible as part of the evidence in chief),[5] as against the charge of recent fabrication. In some instances this has been held to extend to other offenses, though there is authority to the contrary.[6] But the owner's complaint after robbery or larceny, or the statement by the possessor of stolen goods, is received to repel the suggestion of fabrication, and it is also proper to admit consistent statements to show that an explanation on the trial was not of recent fabrication.[7]

[5] See *Brazier's Case*, 1 East, P. C. 443; *Reg.* v. *Walker*, 2 Moody & R. 212; supra, § 273; Wharton, Crim. Law, 10th ed. § 566; *State* v. *De Wolf*, 8 Conn. 93, 20 Am. Rep. 90; *Conkey* v. *People*, 5 Park. Crim. Rep. 31.

[6] Supra, § 273; *Rex* v. *Wink*, 6 Car. & P. 397; *Reg.* v. *Osborne*, Car. & M. 622; *R.* v. *Ridsdale*, York Spring Assizes, 1837; *Rex* v. *Foster*, 6 Car. & P. 325.

[7] *Goon Bow* v. *People*, 160 Ill. 438, 43 N. E. 593; *State* v. *Driscoll*, 72 Iowa, 583, 585, 34 N. W. 428; *People* v. *Morrigan*, 29 Mich. 5; *Lambert* v. *People*, 29 Mich. 71; *Driscoll* v. *People*, 47 Mich. 416, 11 N. W. 221; *People* v. *Simpson*, 48 Mich. 479, 12 N. W. 662; *People* v. *Hicks*, 98 Mich. 86, 89, 56 N. W. 1102; *State* v. *Smith*, 26 Wash. 354, 67 Pac. 70; *Reg.* v. *Abraham*, 3 Cox, C. C. 430, 2 Car. & K. 550; *Reg.* v. *Crowhurst*, 1 Car. & K. 370; *Reg.* v. *Smith*, 2 Car. & K. 207; *Reg.* v. *Evans*, 2 Cox, C. C. 270; *Rex* v. *Wilson*, 3 Fost. & F. 119; *Reg.* v. *Exall*, 4 Fost. & F. 922, 929; *Crawford* v. *State*, 44 Ala. 45, 47; *Henderson* v. *State*, 70 Ala. 23, 25, 45 Am. Rep. 72; *Allen* v. *State*, 73 Ala. 23; *Smith* v. *State*, 103 Ala. 40, 43, 16 So. 12; *Bryant* v. *State*, 116 Ala. 445, 23 So. 40; *Comfort* v. *People*, 54 Ill. 406; *Bennett* v. *People*, 96 Ill. 602, 607; *Tipper* v. *Com.* 1 Met. (Ky.) 6, 11; *State* v. *Thomas*, 30 La. Ann. 602. See *State* v. *Pettis*, 63 Me. 124; *Com.* v. *Rowe*, 105 Mass. 590; *Payne* v. *State*, 57 Miss. 348; *State* v. *Jones*, 20 N. C. 120 (3 Dev. & B. L. 122); *State* v. *Worthington*, 64 N. C. 594; *Leggett* v. *State*, 15 Ohio, 283; *Mitchell* v. *Territory*, 7 Okla. 527, 54 Pac. 782; *Rhodes* v. *Com.* 48 Pa. 396, 400; *Hampton* v. *State*, 5 Tex. App.

XII. Re-examination.

§ 493. Party may re-examine witness.—A party, when matters testified to on his own side require explanation,[1] or when new matter is introduced by the opposing interest, has a right in rebuttal to examine his witnesses, though, as to new matter of his own, he cannot ordinarily re-examine.[2]

§ 494. Witness may be recalled for re-examination.—The trial judge may, at his discretion, permit a witness to be recalled in order to be re-examined by the party recalling him.[1] As a matter of discretion, however, this is not reviewable by the appellate court,[2] unless it appears that the er-

463, 467; *McPhail* v. *State*, 9 Tex. App. 164; *Sitterlee* v. *State*, 13 Tex. App. 587, 592; *United States* v. *Craig*, 4 Wash. C. C. 729, 730, Fed. Cas. No. 14,883; *State* v. *Daley*, 53 Vt. 442, 38 Am. Rep. 694.

[1] *Queen's Case*, 2 Brod. & B. 297, 22 Revised Rep. 662, 11 Eng. Rul. Cas. 183; *Prince* v. *Samo*, 7 Ad. & El. 627, 3 Nev. & P. 139, 1 W. W. & H. 132, 7 L. J. Q. B. N. S. 123, 2 Jur. 323; *Sturge* v. *Buchanan*, 10 Ad. & El. 605, 2 Perry & D. 573, 2 Moody & R. 90, 8 L. J. Q. B. N. S. 272; *State* v. *Gedicke*, 43 N. J. L. 86, 4 Am. Crim. Rep. 6; *Blewett* v. *Tregonning*, 3 Ad. & El. 554, 5 Nev. & M. 308, 1 Harr. & W. 432.

[2] *Queen's Case*, 2 Brod. & B. 297, 22 Revised Rep. 662, 11 Eng. Rul. Cas. 183; *Reg.* v. *St. George*, 9 Car. & P. 488; *Prince* v. *Samo*, 7 Ad. & El. 627, 3 Nev. & P. 139, 1 W. W. & H. 132, 7 L. J. Q. B. N. S. 123, 2 Jur. 323; *Com.* v. *Wilson*, 1 Gray, 337; *Baxter* v. *Abbott*, 7 Gray, 71; *Campbell* v. *State*, 23 Ala. 44; *State* v. *Denis*, 19 La. Ann. 119; *State* v. *Scott*, 24 La. Ann. 161; *People* v. *Keith*, 50 Cal. 137; *Hemmens* v. *Bentley*, 32 Mich. 89. See *Anderson* v. *State*, 42 Ga. 9; *Donnelly* v. *State*, 26 N. J. L. 463; *Stockwell* v. *Holmes*, 33 N. Y. 53.

[1] *Bevan* v. *M'Mahon*, 2 Swabey & T. 55, 28 L. J. Prob. N. S. 40; *Phettiplace* v. *Sayles*, 4 Mason, 312, Fed. Cas. No. 11,083; *United States* v. *Wilson*, 1 Baldw. 78, Fed. Cas. No. 16,730; *Com.* v. *Moulton*, 4 Gray, 39; *Com.* v. *Dam*, 107 Mass. 210; *State* v. *Alford*, 31 Conn. 40; *Webb* v. *State*, 29 Ohio St. 351; *State* v. *Ruhl*, 8 Iowa, 447; *State* v. *Porter*, 34 Iowa, 131; *Thomas* v. *State*, 27 Ga. 287; *State* v. *Haynes*, 71 N. C. 79; *State* v. *Linney*, 52 Mo. 40; *State* v. *Jones*, 64 Mo. 391; *Dove* v. *State*, 3 Heisk. 348; *People* v. *Cotta*, 49 Cal. 166; *People* v. *Parton*, 49 Cal. 632.

[2] *People* v. *Mather*, 4 Wend. 229, 21 Am. Dec. 122; *Covanhovan* v.

ror goes to the merits of the case.[3] So, a witness may, at the discretion of the court, be permitted to return to the stand after dismissal, to correct his testimony.[4] A witness may also be recalled at the request of the jury.[5]

§ 495. Re-cross-examination permitted at discretion of court.—Whenever explanation is required of answers on re-examination, then the cross-examining party may recross-examine, confining himself to the new matter introduced on the re-examination.[1] It is, however, at the discretion of the court to close such re-cross-examination when the party seeking it has had abundant prior opportunity to draw out his case.[2]

XIII. Privileged Communications.

a. *Attorney and Client.*

§ 496. Communications of attorney and client.—An attorney is not permitted to disclose communications made to

Hart, 21 Pa. 495, 60 Am. Dec. 57; *Howel* v. *Com.* 5 Gratt. 664; *White* v. *Bailey*, 10 Mich. 155; *Williams* v. *Allen*, 40 Ind. 295; *Ross* v. *Hayne*, 3 G. Greene, 211; *State* v. *Rorabacher*, 19 Iowa, 154; *State* v. *Haynes*, 71 N. C. 79; *State* v. *Silver*, 14 N. C. (3 Dev. L.) 332; *Colclough* v. *Rhodus*, 2 Rich. L. 76; *Jesse* v. *State*, 20 Ga. 156; *Bigelow* v. *Young*, 30 Ga. 121; *Gayle* v. *Bishop*, 14 Ala. 552; *Freleigh* v. *State*, 8 Mo. 606; *German Sav. Bank* v. *Kedlin*, 53 Mo. 382; *Cotton* v. *Jones*, 37 Tex. 34. See *State* v. *Alford*, 31 Conn. 40; *Com.* v. *Moulton*, 4 Gray, 39; *Com.* v. *Dam*, 107 Mass. 210.

[3] *People* v. *Cole*, 43 N. Y. 508; *Thompson* v. *State*, 37 Tex. 121; *Edmondson* v. *State*, 7 Tex. App. 116.

[4] *Kingston* v. *Tappen*, 1 Johns. Ch. 368; *Walker* v. *Walker*, 14 Ga. 242; *Dunn* v. *Pipes*, 20 La. Ann. 276.

[5] *Van Huss* v. *Rainbolt*, 2 Coldw. 139.

[1] *Wood* v. *McGuire*, 17 Ga. 303.

[2] *Com.* v. *Nickerson*, 5 Allen, 518; *State* v. *Hoppiss*, 27 N. C. (5 Ired. L.) 406.

him by his client in the course of their professional relations.[1] The privilege is not affected by statutes allowing parties to become witnesses.[2] Such communications were privileged at common law,[3] and are generally protected by statute in all

[1] *Cromack* v. *Heathcote*, 2 Brod. & B. 4, 22 Revised Rep. 638; *Skinner* v. *Great Northern R. Co.* L. R. 9 Exch. 298, 43 L. J. Exch. N. S. 150, 32 L. T. N. S. 233, 23 Week. Rep. 7; *Woolley* v. *North London R. Co.* L. R. 4 C. P. 602, 38 L. J. C. P. N. S. 317, 20 L. T. N. S. 813, 17 Week. Rep. 650, 797; *Branford* v. *Branford*, 48 L. J. Prob. N. S. 40, L. R. 4 Prob. Div. 72, 40 L. T. N. S. 659, 27 Week. Rep. 691; *Maxham* v. *Place*, 46 Vt. 434; *Britton* v. *Lorenz*, 45 N. Y. 57; *Graham* v. *People*, 63 Barb. 468; *Bacon* v. *Frisbie*, 80 N. Y. 394, 36 Am. Rep. 627; *Bowers* v. *State*, 29 Ohio St. 542, 2 Am. Crim. Rep. 592; *Jenkinson* v. *State*, 5 Blackf. 465; *Orton* v. *McCord*, 33 Wis. 205; *Chahoon* v. *Com.* 21 Gratt. 822; *State* v. *Hazleton*, 15 La. Ann. 72; *Berd* v. *Lovelace*, Cary, 62; *Dederick* v. *Ashdown*, 4 Manitoba, L. Rep. 174; *Liggett* v. *Glenn*, 2 C. C. A. 286, 4 U. S. App. 438, 51 Fed. 381; *Crawford* v. *McKissack*, 1 Port. (Ala.) 433; *Bobo* v. *Bryson*, 21 Ark. 387, 76 Am. Dec. 406; *Landsberger* v. *Gorham*, 5 Cal. 450; *Mills* v. *Griswold*, 1 Root, 383; *Bush* v. *McComb*, 2 Houst. (Del.) 546; *Oliver* v. *Cameron*, MacArth. & M. 237; *Neal* v. *Patten*, 47 Ga. 73; *People ex rel. Shufeldt* v. *Barker*, 56 Ill. 300; *Singer* v. *Sheldon*, 56 Iowa, 354, 9 N. W. 298; *Tays* v. *Carr*, 37 Kan. 141, 14 Pac. 456; *Sargent* v. *Hampden*, 38 Me. 581; *Hodges* v. *Mullikin*, 1 Bland, Ch. 503; *Doherty* v. *O'Callaghan*, 157 Mass. 90, 17 L.R.A. 188, 34 Am. St. Rep. 258, 31 N. E. 726; *Lorimer* v. *Lorimer*, 124 Mich. 631, 83 N. W. 609; *Struckmeyer* v. *Lamb*, 75 Minn. 366, 77 N. W. 987; *Parkhurst* v. *McGraw*, 24 Miss. 134; *Gray* v. *Fox*, 43 Mo. 570, 97 Am. Dec. 416; *Spaulding* v. *State*, 61 Neb. 289, 85 N. W. 80; *Mitchell* v. *Bromberger*, 2 Nev. 345, 90 Am. Dec. 550; *Brown* v. *Payson*, 6 N. H. 443; *Bacon* v. *Frisbie*, 80 N. Y. 394, 36 Am. Rep. 627; *Hughes* v. *Boone*, 102 N. C. 137, 159, 9 S. E. 286; *Duttenhofer* v. *State*, 34 Ohio St. 91, 32 Am. Rep. 362; *Beltzhoover* v. *Blockstock*, 3 Watts, 20, 28, 27 Am. Dec. 330; *Austin, T. & W. Mfg. Co.* v. *Heiser*, 6 S. D. 429, 437, 61 N. W. 445; *Lockhard* v. *Brodie*, 1 Tenn. Ch. 384; *Sutton* v. *State*, 16 Tex. App. 490; *People* v. *Mahon*, 1 Utah, 205; *Durkee* v. *Leland*, 4 Vt. 612; *Clay* v. *Williams*, 2 Munf. 105, 5 Am. Dec. 453; *State* v. *Douglass*, 20 W. Va. 770, 780; *Dudley* v. *Beck*, 3 Wis. 274, 284.

[2] *Montgomery* v. *Pickering*, 116 Mass. 227; *Brand* v. *Brand*, 39 How. Pr. 193; *Barker* v. *Kuhn*, 38 Iowa, 395. See supra, § 427.

[3] *King* v. *Barrett*, 11 Ohio St. 261; *Struckmeyer* v. *Lamb*, 75 Minn. 366, 77 N. W. 987; *Brand* v. *Brand*, 39 How. Pr. 193.

of the states. But this would be true irrespective of the statute,[4] as the statute generally is merely declaratory of the common-law rule. The privilege is applicable to criminal cases[5] as well as civil. Courts seek to give the rule its fullest application. Thus, where an accused was on trial for stealing silver coin, it was held error to compel his attorney to testify that his retainer had been paid in silver coin.[6] The object of the rule is to encourage a free communication between the attorney and the client,[7] and the rule is founded on public policy.[8] The privilege belongs to the client.[9] The privilege is protected even if another person is present with the client at the interview.[10] It is not waived if a clerk acts as the attorney in a particular transaction.[11] It is equally privileged

[4] *Peek* v. *Boone*, 90 Ga. 767, 17 S. E. 66.

[5] *Milan* v. *State*, 24 Ark. 346, 355; *Benedict* v. *State*, 44 Ohio St. 679, 688, 11 N. E. 125, 7 Am. Crim. Rep. 11; *State* v. *Hazleton*, 15 La. Ann. 72; *Hernandez* v. *State*, 18 Tex. App. 134, 152, 51 Am. Rep. 295; *Polson* v. *State*, 137 Ind. 519, 35 N. E. 907; *Graham* v. *People*, 63 Barb. 468, 483.

[6] *State* v. *Dawson*, 90 Mo. 149, 154, 1 S. W. 827; *State* v. *Douglass*, 20 W. Va. 770, 781; *Holden* v. *State*, 44 Tex. Crim. Rep. 382, 71 S. W. 600.

[7] *Sleeper* v. *Abbott*, 60 N. H. 162; *Crosby* v. *Berger*, 11 Paige, 377, 42 Am. Dec. 117; *Southwark & V. Water Co.* v. *Quick*, 47 L. J. Q. B. N. S. 258, L. R. 3 Q. B. Div. 315, 26 Week. Rep. 341, 9 Eng. Rul. Cas. 587; *Wade* v. *Ridley*, 87 Me. 368, 32 Atl. 975; *State* v. *White*, 19 Kan. 445, 27 Am. Rep. 137.

[8] *Andrews* v. *Simms*, 33 Ark. 771; *State* v. *Barrows*, 52 Conn. 323; *Oliver* v. *Cameron*, MacArth. & M. 237; *People ex rel. Shufelt* v. *Barker*, 56 Ill. 300; *Carter* v. *West*, 93 Ky. 211, 19 S. W. 592; *Sargent* v. *Hampden*, 38 Me. 581; *Crisler* v. *Garland*, 11 Smedes & M. 136, 49 Am. Dec. 49; *Deuser* v. *Walkup*, 43 Mo. App. 625; *Bacon* v. *Frisbie*, 80 N. Y. 394, 36 Am. Rep. 627; *King* v. *Barrett*, 11 Ohio St. 261; *Austin, T. & W. Mfg. Co.* v. *Heiser*, 6 S. D. 429, 437, 61 N. W. 445; *State* v. *Douglass*, 20 W. Va. 770, 780.

[9] *Chirac* v. *Reinicker*, 11 Wheat. 280, 289, 6 L. ed. 474, 476; *Hunt* v. *Blackburn*, 128 U. S. 464, 32 L. ed. 488, 9 Sup. Ct. Rep. 125; *People* v. *Atkinson*, 40 Cal. 284; *People* v. *Gallagher*, 75 Mich. 512, 42 N. W. 1063; *State* v. *Tall*, 43 Minn. 273, 45 N. W. 449; *Duttenhofer* v. *State*, 34 Ohio St. 91, 32 Am. Rep. 362.

[10] *Bowers* v. *State*, 29 Ohio St. 542, 2 Am. Crim. Rep. 592.

[11] *Clay* v. *Williams*, 2 Munf. 105, 5 Am. Dec. 453.

when made in the presence of a stenographer, who cannot give the communication in evidence,[12] and it is protected where the communication is made to an interpreter who translates it to the attorney.[13] Even where a client, by an accomplice, testifies for the state, his attorney cannot testify to his professional communications.[14] The privilege does not extend to knowledge possessed by the attorney, which he obtained as to matters as to which he had not been consulted professionally by his client,[15] nor does it cover matters of record or matters made public by the client's own action.[16] An attorney cannot testify as to what he stated, or what advice he gave to his client;[17] and the client may object to one of his attorneys testifying to communications between him and other attorneys,[18] and the client himself can refuse to give his own testimony in respect to matters of privileged communication.[19] The rule does not make the attorney an

[12] *State* v. *Brown*, 2 Marv. (Del.) 380, 36 Atl. 458.

[13] *DuBarre* v. *Livette*, 1 Peake, N. P. Cas. 77, 3 Revised Rep. 655; *Foster* v. *Hall*, 12 Pick. 89, 22 Am. Dec. 400; *Jackson ex dem. Haverly* v. *French*, 3 Wend. 337, 20 Am. Dec. 699; *Hatton* v. *Robinson*, 14 Pick. 416, 25 Am. Dec. 415; *Clay* v. *Williams*, 2 Munf. 105, 5 Am. Dec. 453; *Maas* v. *Bloch*, 7 Ind. 202.

[14] *Sutton* v. *State*, 16 Tex. App. 490; *Taylor* v. *State*, 50 Tex. Crim. Rep. 381, 97 S. W. 474. But see *Alderman* v. *People*, 4 Mich. 414, 69 Am. Dec. 321.

[15] *Greenough* v. *Gaskell*, 1 Myl. & K. 98, Coopt. Brougham, 96; *State* v. *Douglass*, 20 W. Va. 770; *Brown* v. *Foster*, 1 Hurlst. & N. 736, 26 L. J. Exch. N. S. 249, 3 Jur. N. S. 245, 5 Week. Rep. 292.

[16] *Snow* v. *Gould*, 74 Me. 540, 43 Am. Rep. 604; post, § 504.

[17] *Lewis* v. *State*, 91 Ga. 168, 16 S. E. 986; *People* v. *Hillhouse*, 80 Mich. 580, 45 N. W. 484; *Erickson* v. *Milwaukee, L. S. & W. R. Co.* 93 Mich. 414, 53 N. W. 393; *Jenkinson* v. *State*, 5 Blackf. 465.

[18] *United States* v. *Six Lots of Ground*, 1 Woods, 234, Fed. Cas. No. 16,299; *Jones* v. *Nantahala Marble & Talc Co.* 137 N. C. 237, 49 S. E. 94.

[19] *Pearse* v. *Pearse*, 1 De G. & S. 12, 16 L. J. Ch. N. S. 153, 11 Jur. 52; *Jenkinson* v. *State*, 5 Blackf. 465; *State* v. *White*, 19 Kan. 445, 27 Am. Rep. 137; *Basye* v. *State*, 45 Neb. 261, 283, 63 N. W. 811; *People ex rel. Updyke* v. *Gilon*, 18 N. Y. Civ. Proc. Rep. 109, 9 N. Y. Supp. 243; *Duttenhofer* v. *State*, 34 Ohio St. 91, 32 Am. Rep.

incompetent witness, nor make the matter communicated incompetent. The privilege applies to the communication itself.[20]

§ 497. Client and attorney; professional relationship.— The formal retainer is not necessary to constitute the relationship of attorney and client, whose professional communications the law will treat as inviolable.[1] It is enough, to enable the protection of the law to apply, that a legal adviser is sought for the purpose of confidential, professional advice, "with a view either to the prosecution of the claim, or a defense against a claim;"[2] and this privilege extends to consultations with a prosecuting attorney, with regard to the institution of a prosecution.[3] However, certain conditions are

362; *Herring* v. *State*, — Tex. Crim. Rep. —, 42 S. W. 301; *Alderman* v. *People*, 4 Mich. 414, 69 Am. Dec. 321; *Rex* v. *Rudd*, Cowp. pt. 1, p. 331, 1 Leach, C. L. 115; *Com.* v. *Knapp*, 10 Pick. 477, 20 Am. Dec. 534.

[20] *Duttenhofer* v. *State*, 34 Ohio St. 91, 32 Am. Rep. 362; *Liggett* v. *Glenn*, 2 C. C. A. 286, 4 U. S. App. 438, 51 Fed. 381, 395; *Aiken* v. *Kilburne*, 27 Me. 252; *Hoyt* v. *Hoyt*, 112 N. Y. 493, 20 N. E. 402.

[1] *Ross* v. *Gibbs*, L. R. 8 Eq. 522, 39 L. J. Ch. N. S. 61; *Foster* v. *Hall*, 12 Pick. 89, 22 Am. Dec. 400; *Beltzhoover* v. *Blackstock*, 3 Watts, 20, 27 Am. Dec. 330. See *Andrews* v. *Simms*, 33 Ark. 771; *Jackson ex dem. Haverly* v. *French*, 3 Wend. 337, 20 Am. Dec. 699; *Sibley* v. *Waffle*, 16 N. Y. 180; *Barnes* v. *Harris*, 7 Cush. 576, 54 Am. Dec. 734; *Sample* v. *Frost*, 10 Iowa, 266; *Bacon* v. *Frisbie*, 80 N. Y. 394, 36 Am. Rep. 627; *Thayer* v. *Thayer*, 101 Mass. 111, 100 Am. Dec. 110.

[2] *Ross* v. *Gibbs*, L. R. 8 Eq. 522, 39 L. J. Ch. N. S. 61; *Wilson* v. *Northampton & B. J. R. Co.* L. R. 14 Eq. 477, 27 L. T. N. S. 507, 20 Week. Rep. 938; *Minet* v. *Morgan*, L. R. 8 Ch. 361, 42 L. J. Ch. N. S. 627, 28 L. T. N. S. 573, 21 Week. Rep. 467; *Sargent* v. *Hampden*, 38 Me. 581; *Foster* v. *Hall*, 12 Pick. 89, 22 Am. Dec. 400; *March* v. *Ludlum*, 3 Sandf. Ch. 35; *Beltzhoover* v. *Blackstock*, 3 Watts, 20, 27 Am. Dec. 330. See however, *Wilson* v. *Rastall*, 4 T. R. 753, 2 Revised Rep. 515; *Scranton* v. *Stewart*, 52 Ind. 68.

[3] *Vogel* v. *Gruaz*, 110 U. S. 311, 28 L. ed. 158, 4 Sup. Ct. Rep. 12. See *Worthington* v. *Scribner*, 109 Mass. 487, 12 Am. Rep. 736; *Oliver* v. *Pate*, 43 Ind. 132, 141; *State* v. *Phelps*, Kirby, 282; *Gabriel* v. *McMullin*, 127 Iowa, 426, 103 N. W.

necessary to establish the professional relationship. To protect the communication, it must appear that it was made to an attorney in his professional character,[4] but even here, where a statute permits any citizen to prosecute an action by any other citizen of good moral character, communications between such are privileged,[5] and, where a man, though never actually admitted to the bar, practises as an attorney at law in the justice of the peace courts, communications made to him, seeking his confidential, professional advice, are privileged.[6] It is not necessary that the attorney be in active practice,[7] and the professional communications are privileged when made to an attorney in a state in which he has not been admitted, even though the privilege is claimed in that state.[8] But the party must know that the one to whom he makes a professional communication is an attorney,[9] for mere belief

355; *Bowers* v. *State*, 29 Ohio St. 542, 2 Am. Crim. Rep. 592; *State* v. *Houseworth*, 91 Iowa, 740, 60 N. W. 221; *State* v. *Brown*, 2 Marv. (Del.) 380, 36 Atl. 458.

While the weight of authority supports the rule that communications between a party and a prosecuting attorney are privileged, several courts hold that they are not so privileged. See the following cases: *Granger* v. *Warrington*, 8 Ill. 299; *People* v. *Davis*, 52 Mich. 569, 18 N. W. 362; *Cole* v. *Andrews*, 74 Minn. 93, 76 N. W. 962; *Cobb* v. *Simon*, 119 Wis. 597, 100 Am. St. Rep. 909, 97 N. W. 276; *Meysenberg* v. *Engelke*, 18 Mo. App. 346.

[4] *McLaughlin* v. *Gilmore*, 1 Ill. App. 563; *Sample* v. *Frost*, 10 Iowa, 266; *Charles City Plow & Mfg. Co.* v. *Jones*, 71 Iowa, 234, 32 N. W. 280; *State* v. *Smith*, 138 N. C. 700, 50 S. E. 859; *Benedict* v. *Smith*, 44 Ohio St. 679, 688, 11 N. E. 125, 7 Am. Crim. Rep. 11; *Schubkagel* v. *Dierstein*, 131 Pa. 46, 54, 6 L.R.A. 481, 18 Atl. 1059; *Holman* v. *Kimball*, 22 Vt. 555; *Brayton* v. *Chase*, 3 Wis. 456. See *Foster* v. *Hall*, 12 Pick. 89, 22 Am. Dec. 400; *Hatton* v. *Robinson*, 14 Pick. 416, 25 Am. Dec. 415; *Pierson* v. *Steortz*, Morris (Iowa) 136; *Machette* v. *Wanless*, 2 Colo. 169, 179; *Doe ex dem. Pritchard* v. *Jauncey*, 8 Car. & P. 99.

[5] *Bean* v. *Quimby*, 5 N. H. 94.

[6] *Benedict* v. *State*, 44 Ohio St. 679, 11 N. E. 125, 7 Am. Crim. Rep. 11.

[7] *Charles City Plough & Mfg. Co.* v. *Jones*, 71 Iowa, 234, 32 N. W. 280.

[8] *Lawrence* v. *Campbell*, 28 L. J. Ch. N. S. 780, 5 Jur. N. S. 1071, 4 Drew. 485, 7 Week. Rep. 336.

[9] *Hawes* v. *State*, 88 Ala. 37, 68,

that he is such is not sufficient [10] to protect a professional communication, unless the belief was caused by fraud or mistake, and the professional communication was made under the influence of such belief.[11] The privilege protects communications made while negotiating to employ the attorney in his professional capacity.[12] It is essential that the professional communication be made because of the existence of the professional relation.[13] On the other hand, if the attorney communicates with a third person relative to the cause in which he is engaged professionally, such communications are presumed to have been made in his professional capacity, and are protected.[14] Thus, where the attorney communicates with an agent to collect evidence in his client's case, the communication between the attorney and the agent is a professional communication protected by the privilege.[15] But such communications must relate to the client's business, and be only such as to enable the attorney to perform his professional duty.[16]

7 So. 302; *Barnes* v. *Harris*, 7 Cush. 576, 54 Am. Dec. 734; *Sample* v. *Frost*, 10 Iowa, 266; *Foster* v. *Hall*, 12 Pick. 89, 22 Am. Dec. 400.

[10] *Hawes* v. *State*, 88 Ala. 37, 68, 7 So. 302; *Barnes* v. *Harris*, 7 Cush. 576, 54 Am. Dec. 734; *Sample* v. *Frost*, 10 Iowa, 266; *Foster* v. *Hall*, 12 Pick. 89, 22 Am. Dec. 400; *Fountain* v. *Young*, 6 Esp. 113.

[11] *People* v. *Barker*, 60 Mich. 277, 1 Am. St. Rep. 501, 27 N. W. 539, 546; *Calley* v. *Richards*, 19 Beav. 401, 2 Week. Rep. 614.

[12] *Brady* v. *State*, 39 Neb. 529, 58 N. W. 161; *Farley* v. *Peebles*, 50 Neb. 723, 70 N. W. 231; *Nelson* v. *Becker*, 32 Neb. 99, 48 N. W. 962; *State* v. *Snowden*, 23 Utah, 318, 65 Pac. 479.

[13] *Morgan* v. *Shaw*, 4 Madd. Ch. 54; *Chappell* v. *Smith*, 17 Ga. 68; *Reinhart* v. *Johnson*, 62 Iowa, 155, 17 N. W. 452; *Hoar* v. *Tilden*, 178 Mass. 157, 59 N. E. 641; *Clay* v. *Tyson*, 19 Neb. 530, 26 N. W. 240; *Taylor* v. *Evans*, — Tex. Civ. App. —, 29 S. W. 172; *State* v. *Fitzgerald*, 68 Vt. 125, 34 Atl. 429; *Bacon* v. *Frisbie*, 80 N. Y. 394, 36 Am. Rep. 627; *Myers* v. *Dorman*, 34 Hun, 115; *State* v. *Stafford*, 145 Iowa, 285, 123 N. W. 167.

[14] *Young* v. *Holloway*, 57 L. T. N. S. 515, L. R. 12 Prob. Div. 167.

[15] *Steele* v. *Stewart*, 1 Phill. Ch. 471, 14 L. J. Ch. N. S. 34, 9 Jur. 121; *Churton* v. *Frewen*, 2 Drew. & S. 390, 12 L. T. N. S. 105, 13 Week. Rep. 490.

[16] *Com.* v. *Best*, 180 Mass. 492, 62 N. E. 748; *Morton* v. *Smith*,

In determining the nature of the professional communication, it is to be considered whether or not the attorney was consulted in his professional capacity;[17] an inference of professional employment is justly drawn from the fact that prior and subsequent to the transaction the parties consulted professionally;[18] and the communication is privileged although counsel regarded it as a matter stated in a mere casual conversation.[19] Whether or not the professional relation exists is a question of fact[20] to be determined by the court,[21] and this finding is not reversible by the appellate court.[22] If the attorney is in doubt as to the nature of the relationship, he should decline to testify,[23] and his testimony ought to be excluded;[24] and in a criminal trial the accused should always have the benefit of the doubt.[25]

An attorney, however, has been compelled to testify as to nonconfidential statements made to him, before retainer, by one who afterwards became his client.[26] While an injunc-

— Tex. Civ. App. —, 44 S. W. 683; *Vaillant* v. *Dodemead*, 2 Atk. 524; *Lecour* v. *Importers' & T. Nat. Bank*, 6 App. Div. 163, 70 N. Y. Supp. 419; *Hawes* v. *State*, 88 Ala. 37, 68, 7 So. 302.

[17] *Parker* v. *Carter*, 4 Munf. 273, 6 Am. Dec. 513; *O'Brien* v. *Spalding*, 102 Ga. 490, 66 Am. St. Rep. 202, 31 S. E. 100; *Wade* v. *Ridley*, 87 Me. 368, 32 Atl. 975; *Denver Tramway Co.* v. *Owens*, 20 Colo. 107, 36 Pac. 848; *Liggett* v. *Glenn*, 51 Fed. 381, 4 U. S. App. 438, 2 C. C. A. 286.

[18] *Bacon* v. *Frisbie*, 80 N. Y. 394, 36 Am. Rep. 627.

[19] *Moore* v. *Bray*, 10 Pa. 519.

[20] *McDonald* v. *McDonald*, 142 Ind. 55, 41 N. E. 336; *Basye* v. *State*, 45 Neb. 261, 282, 63 N. W. 811; *Bacon* v. *Frisbie*, 80 N. Y. 394, 36 Am. Rep. 627; *Hughes* v. *Boone*, 102 N. C. 137, 9 S. E. 286; *Harris* v. *Daugherty*, 74 Tex. 1, 15 Am. St. Rep. 812, 11 S. W. 921; *State* v. *Snowden*, 23 Utah, 318, 65 Pac. 479; *Childs* v. *Merrill*, 66 Vt. 302, 29 Atl. 532; *Goltra* v. *Wolcott*, 14 Ill. 89.

[21] *McDonald* v. *McDonald*, 142 Ind. 55, 41 N. E. 336.

[22] *Childs* v. *Merrill*, 66 Vt. 302, 29 Atl. 532.

[23] *People ex rel. Shufeldt* v. *Barker*, 56 Ill. 300.

[24] *Myers* v. *Dorman*, 34 Hun, 115.

[25] *People* v. *Atkinson*, 40 Cal. 284.

[26] *Cuts* v. *Pickering*, 1 Ventr. 197. See *Reg.* v. *Avery*, 8 Car. & P. 596; *Rex* v. *Tuffs*, 1 Den. C. C. 319; *Wilson* v. *Rastall*, 4 T. R. 753, 2

tion of secrecy is not necessary to protect the communication,[27] it is essential that the professional communication be confidential, and be so regarded by the client.[28]

Revised Rep. 515; *Patten* v. *Glover*, 1 App. D. C. 466; *O'Brien* v. *Spalding*, 102 Ga. 490, 66 Am. St. Rep. 202, 31 S. E. 100; *Goltra* v. *Wolcott*, 14 Ill. 89; *Mills* v. *State*, 18 Neb. 575, 26 N. W. 354; *People* v. *Hess*, 8 App. Div. 143, 40 N. Y. Supp. 486; *Beeson* v. *Beeson*, 9 Pa. 279; *Branden* v. *Gowing*, 7 Rich. L. 459, 472; *Walker* v. *State*, 19 Tex. App. 176; *Coon* v. *Swan*, 30 Vt. 6; *Haulenbeek* v. *McGibbon*, 60 Hun, 26, 14 N. Y. Supp. 393; *Ewers* v. *White*, 114 Mich. 266, 72 N. W. 184; *Alderman* v. *People*, 4 Mich. 414, 69 Am. Dec. 321. See *State* v. *Herbert*, 63 Kan. 516, 66 Pac. 235; *Rex* v. *Brewer*, 6 Car. & P. 363; *Hawkins* v. *Gathercole*, 1 Sim. N. S. 150, 20 L. J. Ch. N. S. 303, 15 Jur. 186; *Toms* v. *Beebe*, 90 Iowa, 612, 58 N. W. 925; *Mueller* v. *Batcheler*, 131 Iowa, 650, 109 N. W. 186; *Walker* v. *Wildman*, 6 Madd. Ch. 47, 22 Revised Rep. 234; *Walsingham* v. *Goodricke*, 3 Hare, 122; *Stratford* v. *Hogan*, 2 Ball & B. 164; *Holmes* v. *Matthews*, 3 Grant, Ch. (U. C.) 379, 384; *Vaillant* v. *Dodemead*, 2 Atk. 524; *Johnson* v. *Cunningham*, 1 Ala. 249; *Chappell* v. *Smith*, 17 Ga. 68; *Jennings* v. *Sturdevant*, 140 Ind. 641, 40 N. E. 61; *State* v. *Swafford*, 98 Iowa, 362, 67 N. W. 284; *Gerhardt* v. *Tucker*, 187 Mo. 46, 85 S. W. 552; *Baker* v. *Arnold*, 1 Caines, 258; *State* v. *Smith*, 138 N. C. 700, 50 S. E. 859; *Stoney* v. *M'Neil*, Harp. L. 557, 18 Am. Dec. 666; *Harris* v. *Daugherty*, 74 Tex. 1, 15 Am. St. Rep. 921, 11 S. W. 921; *Theisen* v. *Dayton*, 82 Iowa, 74, 47 N. W. 891; *Philman* v. *Marshall*, 103 Ga. 82, 29 S. E. 598; *Chillicothe Ferry Road & Bridge Co.* v. *Jameson*, 48 Ill. 281; *Doan* v. *Dow*, 8 Ind. App. 324, 35 N. E. 709; *Williams* v. *Benton*, 12 La. Ann. 91; *Marsh* v. *Howe*, 36 Barb. 649; *Yordan* v. *Hess*, 13 Johns. 492; *Hager* v. *Shindler*, 29 Cal. 47.

[27] *Wheeler* v. *Hill*, 16 Me. 329.

[28] *Bunbury* v. *Bunbury*, 2 Beav. 173, 9 L. J. Ch. N. S. 1, 1 Beav. 318, 8 L. J. Ch. N. S. 297, 3 Jur. 664; *Kling* v. *Tunstall*, 124 Ala. 268, 27 So. 420; *Sharon* v. *Sharon*, 79 Cal. 633, 678, 22 Pac. 26, 131; *Burnside* v. *Terry*, 51 Ga. 186; *Tyler* v. *Tyler*, 126 Ill. 525, 541, 9 Am. St. Rep. 642, 21 N. E. 616; *Harless* v. *Harless*, 144 Ind. 196, 41 N. E. 592; *State* v. *Kidd*, 89 Iowa, 54, 56 N. W. 263; *Re Elliott*, 73 Kan. 151, 84 Pac. 750; *Reeves* v. *Burton*, 6 Mart. N. S. 283; *Henry* v. *Buddecke*, 81 Mo. App. 360; *Smith* v. *Caldwell*, 22 Mont. 331, 56 Pac. 590; *Elliott* v. *Elliott*, 3 Neb. (Unof.) 832, 92 N. W. 1006; *Brown* v. *Payson*, 6 N. H. 443; *King* v. *Ashley*, 96 App. Div. 143, 89 N. Y. Supp. 482; *Levers* v. *Van Buskirk*, 4 Pa. 309; *State* v. *Snowden*, 23 Utah, 318, 65 Pac. 479; *Earle* v. *Grout*, 46 Vt. 113, 125; *C. Aultman & Co.* v. *Ritter*, 81 Wis. 395, 51 N. W. 569; *Stoddard* v. *Kendall*, 140 Iowa, 688, 119 N. W. 138.

§ 498. Waiver of privilege; duration.—As the privilege is personal, the client is the only one who can waive it. This he may do in express words.[1] It may be waived by the inference which arises from a silence or failure to make prompt objection,[2] but it is doubtful if any waiver should be implied in a criminal case.[3] The mere fact that the client testifies does not, it seems, constitute a waiver,[4] nor the fact that he calls his attorney as a witness without examining him as to such privileged communication.[5] Where an accomplice turns state's evidence, he cannot claim his privilege, because he must tell all he knows, as this is a condition of his immunity.[6]

There has been some question as to the method of claiming the privilege; being personal, it has been said that it must be claimed by that person. It has been held that the objection to testimony as incompetent merely is not sufficient to protect it.[7] But in a criminal trial, where the accused cannot be held to waive any right, the court ought to interpose of its own motion, to protect the accused where he may be ignorant of his right,[8] and it has been held, in one case, that

[1] *Walker* v. *State,* 19 Tex. App. 176; *Hamilton* v. *People,* 29 Mich. 173, 1 Am. Crim. Rep. 618.

[2] *Blackburn* v. *Crawford,* 3 Wall. 175, 18 L. ed. 186; *State* v. *De Poister,* 21 Nev. 107, 25 Pac. 1002.

[3] *Duttenhofer* v. *State,* 34 Ohio St. 91, 32 Am. Rep. 362.

[4] *Jones* v. *State,* 65 Miss. 179, 3 So. 379; *State* v. *James,* 34 S. C. 49, 12 S. E. 657; *Chahoon* v. *Com.* 21 Gratt. 822.

[5] *Vaillant* v. *Dodemead,* 2 Atk. 524; *Bate* v. *Kinsey,* 1 Cromp. M. & R. 38, 4 Tyrw. 662, 3 L. J. Exch. N. S. 304.

[6] *Alderman* v. *People,* 4 Mich. 414, 423, 69 Am. Dec. 321; *Foster* v. *People,* 18 Mich. 266; *Hamilton* v. *People,* 29 Mich. 173, 184, 1 Am. Crim. Rep. 618; *People* v. *Gallagher,* 75 Mich. 512, 516, 42 N. W. 1063. Contra, *Sutton* v. *State,* 16 Tex. App. 490, 495.

[7] *Norris* v. *Stewart,* 105 N. C. 455, 18 Am. St. Rep. 917, 10 S. E. 912; *Brennan* v. *Hall,* 131 N. Y. 160, 29 N. E. 1009; *Mandeville* v. *Guernsey,* 38 Barb. 225; *Faylor* v. *Faylor,* 136 Cal. 92, 68 Pac. 482. See *Ft. Dodge* v. *Minneapolis & St. L. R. Co.* 87 Iowa, 389, 54 N. W. 243.

[8] Hare, Discovery of Ev. 151.

the court will stop a witness who seems desirous of revealing privileged communications.[9]

If the client does not waive or consent to the communication, it must remain inviolable.[10] Professional communications are not to be revealed at any time;[11] even death does not have this effect.[12]

§ 499. Client not compelled to disclose his communications.—Professional communications which the attorney is precluded from disclosing, the client himself cannot be compelled to disclose.[1] As we have seen, the better rule is that

[9] *Clay* v. *Williams*, 2 Munf. 105, 5 Am. Dec. 453; *Thorp* v. *Goewey*, 85 Ill. 611; *Austin, T. & W. Mfg. Co.* v. *Heiser*, 6 S. D. 429, 437, 61 N. W. 445; *Sandford* v. *Remington*, 2 Ves. Jr. 189, 2 Revised Rep. 195; *People ex rel. Shufeldt* v. *Barker*, 56 Ill. 300; *People* v. *Atkinson*, 40 Cal. 284.

[10] *Wilson* v. *Rastall*, 4 T. R. 759, 2 Revised Rep. 515; *Cholmondeley* v. *Clinton*, 19 Ves. Jr. 268, 13 Revised Rep. 183; *Charlton* v. *Coombes*, 4 Giff. 372, 1 N. R. 547, 32 L. J. Ch. N. S. 284, 9 Jur. N. S. 534, 8 L. T. N. S. 81, 11 Week. Rep. 504; *Calley* v. *Richards*, 19 Beav. 401, 2 Week. Rep. 614; *Russell* v. *Jackson*, 9 Hare, 387, 21 L. J. Ch. N. S. 146, 15 Jur. 117; *Chant* v. *Brown*, 7 Hare, 79; Underhill, Ev. 2d ed. § 172.

[11] *Bullock* v. *Corry*, 47 L. J. Q. B. N. S. 352, L. R. 3 Q. B. Div. 356, 38 L. T. N. S. 102, 26 Week. Rep. 330; *Hutchins* v. *Hutchins*, 1 Hogan, 315; *Granger* v. *Warrington*, 8 Ill. 299, 308; *Chase's Case*, 1 Bland, Ch. 206, 17 Am. Dec. 277, 288; *Bank of Utica* v. *Mersereau*, 3 Barb. Ch. 528, 49 Am. Dec. 189; *Taylor* v. *Blacklow*, 3 Bing, N. C. 235, 3 Scott, 614, 2 Hodges, 224, 6 L. J. C. P. N. S. 14; *Bush* v. *McComb*, 2 Houst. (Del. 546; *Hughes* v. *Garnons*, 6 Beav. 352.

[12] *Foster* v. *Hall*, 12 Pick. 89, 22 Am. Dec. 400; *Moore* v. *Bray*, 10 Pa. 520.

[1] *Thompson* v. *Falk*, 1 Drew. 21; *Vent* v. *Pacey*, 4 Russ. Ch. 193; *Combe* v. *London*, 1 Younge & C. Ch. Cas. 631, 6 Jur. 571; *Holmes* v. *Baddeley*, 1 Phill. Ch. 476, 14 L. J. Ch. N. S. 113, 9 Jur. 289; *Hemenway* v. *Smith*, 28 Vt. 701; *Carnes* v. *Platt*, 4 Jones & S. 361; *Bigler* v. *Reyher*, 43 Ind. 112; *Duttenhofer* v. *State*, 34 Ohio St. 91, 32 Am. Rep. 362; *Pearse* v. *Pearse*, 1 De G. & S. 12, 16 L. J. Ch. N. S. 153, 11 Jur. 52; *Birmingham R. & Electric Co.* v. *Wildman*, 119 Ala. 547, 24 So. 548; *Bobo* v. *Bryson*, 21 Ark. 387, 76 Am. Dec. 406; *Verdelli* v. *Gray's Harbor Commercial Co.* 115 Cal. 517, 526, 47 Pac. 364;

neither the client nor the attorney can be compelled to disclose professional communications, from the mere fact that either or both of them are called as witnesses.[2]

§ 500. Privilege must be claimed.—The protection insured by the relationship of attorney and client may be lost when not promptly claimed by the client,[1] and, while it may be waived by the client, as we have seen, the evidence of the waiver must be distinct and unequivocal.[2]

§ 501. Privilege belonging to two or more.—It is held, on good authority, that when the privilege belongs to two or more clients, the consent of each is essential to constitute a waiver, to permit testimony concerning the professional communication.[1] But it seems, as between several clients them-

Jenkinson v. *State*, 5 Blackf. 465; *Barker* v. *Kuhn*, 38 Iowa, 392; *State* v. *White*, 19 Kan. 445, 27 Am. Rep. 137; *Basye* v. *State*, 45 Neb. 261, 283, 63 N. W. 811; *People ex rel. Updyke* v. *Gilon*, 18 N. Y. Civ. Proc. Rep. 109, 9 N. Y. Supp. 243; *Herring* v. *State*, — Tex. Crim. Rep. —, 42 S. W. 301; *Herman* v. *Schlesinger*, 114 Wis. 382, 91 Am. St. Rep. 922, 90 N. W. 460; *Rex* v. *Rudd*, Cowpt. 1, p. 331, 1 Leach, C. L. 115; *Com.* v. *Knapp*, 10 Pick. 477, 20 Am. Dec. 534.

[2] Supra, § 498.

[1] Supra, § 498; Hare, Discovery of Ev. 2d ed. 167; *Walsh* v. *Trevanion*, 15 Sim. 577, 16 L. J. Ch. N. S. 330, 11 Jur. 360; *Hunter* v. *Capron*, 5 Beav. 93; *Dartmouth* v. *Holdsworth*, 10 Sim. 476; *Thomas* v. *Rawlings*, 27 Beav. 140, 5 Jur. N. S. 667. See *People* v. *Atkinson*, 40 Cal. 284.

[2] *Hamilton* v. *People*, 29 Mich. 183, 1 Am. Crim. Rep. 618; supra, § 498; *Montgomery* v. *Pickering*, 116 Mass. 231.

[1] *Chant* v. *Brown*, 7 Hare, 79, 87; *Bank of Utica* v. *Mersereau*, 3 Barb. Ch. 528, 49 Am. Dec. 189; *Michael* v. *Foil*, 100 N. C. 178, 6 Am. St. Rep. 577, 6 S. E. 264; *Chahoon* v. *Com.* 21 Gratt. 822, 842; *Herman* v. *Schlesinger*, 114 Wis. 382, 91 Am. St. Rep. 922, 90 N. W. 460; *Whiting* v. *Barney*, 30 N. Y. 330, 86 Am. Dec. 385; *Seip's Estate*, 163 Pa. 423, 43 Am. St. Rep. 803, 30 Atl. 226; *People ex rel. Shufeldt* v. *Barker*, 56 Ill. 299; *People* v. *Patrick*, 182 N. Y. 131, 74 N. E. 843; *Duttenhofer* v. *State*, 34 Ohio St. 91, 32 Am. Rep. 362. But see *Bannon* v. *P. Bannon Sewer Pipe Co.* 136 Ky. 556, 119 S. W. 1170, 124 S. W. 843.

selves, that, as they stand on the same footing as the attorney, one of them can compel him to testify against the others.[2]

§ 502. Extraprofessional communications not privileged.—The privilege of the professional communication does not attach to everything stated to the attorney; the test is, is the communication necessary for the purpose of carrying on the proceeding in which the attorney is employed; if it is, it is privileged; if it is not, it may be disclosed. It does not extend to information that an attorney has received from other sources than his client, though his client may have given him the same information.[1] It seems that the privilege does not protect statements made by the client to the attorney for the purpose of obtaining information as to matters of fact not connected with the professional relation;[2] or the fact that a person is present at such communication, or that such person did not stand in a position of peculiar confidence to the client, does not prevent his testimony as to what he heard;[3]

[2] See Wharton, Ev. § 587; *Re Bauer,* 79 Cal. 304, 21 Pac. 759; *Murphy* v. *Waterhouse,* 113 Cal. 467, 54 Am. St. Rep. 365, 45 Pac. 866. See also *People* v. *Heart,* 1 Cal. App. 166, 81 Pac. 1018; *Stone* v. *Minter,* 111 Ga. 45, 50 L.R.A. 356, 36 S. E. 321.

[1] Wharton, Ev. § 588. See *People* v. *Atkinson,* 40 Cal. 284; *Brown* v. *Foster,* 1 Hurlst. & N. 736, 26 L. J. Exch. N. S. 249, 3 Jur. N. S. 245, 5 Week. Rep. 292; *Rhoades* v. *Selin,* 4 Wash. C. C. 715, Fed. Cas. No. 11,740; *Kling* v. *Tunstall,* 124 Ala. 268, 27 So. 420; *Gallagher* v. *Williamson,* 23 Cal. 331, 83 Am. Dec. 114; *Skellie* v. *James,* 81 Ga. 419, 8 S. E. 607; *Chillicothe Ferry Road & Bridge Co.* v. *Jameson,* 48 Ill. 281; *Davis* v. *New York, O. & W. R. Co.* 70 Minn. 37, 72 N. W. 823; *Patten* v. *Moor,* 29 N. H. 163; *Bogert* v. *Bogert,* 2 Edw. Ch. 399; *Barnes* v. *M'Clinton,* 3 Penr. & W. 67, 23 Am. Dec. 62; *Stoney* v. *M'Neil,* Harp. L. 557, 18 Am. Dec. 666.

[2] *Bramwell* v. *Lucas,* 2 Barn. & C. 745, 4 Dowl. & R. 367, 2 L. J. K. B. 161; *Desborough* v. *Rawlins,* 3 Myl. & C. 515, 7 L. J. Ch. N. S. 171, 2 Jur. 125; *Sawyer* v. *Birchmore,* 3 Myl. & K. 572; *Allen* v. *Harrison,* 30 Vt. 219, 73 Am. Dec. 302; post, § 503; *Reg.* v. *Farley,* 1 Den. C. C. 197, 2 Car. & K. 313.

[3] *Goddard* v. *Gardner,* 28 Conn. 172. See *Hoy* v. *Morris,* 13 Gray, 519, 74 Am. Dec. 650; *Perkins* v.

or a mere bystander may testify as to what was said;[4] or statements made to an attorney to induce him to believe that the case is one he can undertake without a breach of duty towards another client are not privileged.[5]

§ 503. Communications not in the scope of the professional relation not privileged.—Information belonging to the ordinary, as distinguished from the professional, relation, is not within the privilege. The topic must be within the peculiar scope of the attorney's profession. Thus, an attorney may be examined like any other witness concerning a fact that he knew before he was employed in his professional character;[1] or where he was a party to the transaction;[2] or as to any other collateral fact which he might have known without being engaged professionally;[3] or to disclose the name of the person who employed him;[4] or to prove his client's handwriting,[5] or that he was consulted in his professional capacity by the accused;[6] or to disclose his client's address,[7] but, as to the question of address, where it was given

Guy, 55 Miss. 153, 30 Am. Rep. 510; *People* v. *Buchanan,* 145 N. Y. 1, 26, 64 N. Y. S. R. 427, 39 N. E. 846; *State* v. *Perry,* 4 Idaho, 224, 38 Pac. 655; *Tyler* v. *Hall,* 27 Am. St. Rep. 337, note; *Walker* v. *State,* 19 Tex. App. 176, 181, 182; *Holman* v. *Kimball,* 22 Vt. 555; *Bowers* v. *State,* 29 Ohio St. 542, 546, 2 Am. Crim. Rep. 592.

[4] *State* v. *Perry,* 4 Idaho, 224, 38 Pac. 655.

[5] *Heaton* v. *Findlay,* 12 Pa. 304.

[1] *Cuts* v. *Pickering,* 1 Vent. 197; Taylor, Ev. 10th ed. § 931.

[2] *Duffin* v. *Smith,* Peake, N. P. Cas. 108.

[3] Buller, N. P. 284; Taylor, Ev. 10th ed. § 935.

[4] *Brown* v. *Payson,* 6 N. H. 443.

[5] *Hurd* v. *Moring,* 1 Car. & P. 372; *Johnson* v. *Daverne,* 19 Johns. 134, 10 Am. Dec. 198; *Brown* v. *Jewett,* 120 Mass. 215. See *Ramsbotham* v. *Senior,* L. R. 8 Eq. 575, 17 Week. Rep. 1057; *Gower* v. *Emery,* 18 Me. 79; *Holthausen* v. *Pondir,* 23 Jones & S. 73; *Thomson* v. *Perkins,* 39 App. Div. 656, 57 N. Y. Supp. 810; *Oliver* v. *Cameron,* MacArth. & M. 237; *Bowles* v. *Stewart,* 1 Sch. & Lef. 209, 226.

[6] *White* v. *State,* 86 Ala. 69, 5 So. 674, 8 Am. Crim. Rep. 225.

[7] *Com.* v. *Bacon,* 135 Mass. 521, 524; *State use of Townsend* v. *Houston,* 3 Harr. (Del.) 15; *Martin* v. *Anderson,* 21 Ga. 301, 309;

as a matter of the professional relation, it is protected by the privilege,[8] and it is also protected where it is sought for the purpose of serving criminal process on the client.[9] He may also be required to identify his client,[10] but such identity cannot be shown by inquiring into the professional communication.[11] But the condition of the client's mind when he consults his lawyers, when such condition is patent to all observers, is not privileged, and the attorney may testify as to the mental condition, or as to the appearance of his client.[12] He may be asked whether or not he was present when his client took an oath upon which perjury is predicated, for that is a fact within his own knowledge, and not one intrusted to him;[13] but he cannot be compelled to disclose any confession made by his client.[14]

§ 504. Professional communications, contemplating crime, not privileged.—There is a clear distinction between professional communications in which advice is sought to avoid the commission of a criminal act, and those in which a criminal act is contemplated, the advice is sought for the purpose of escaping the consequences. The lawfulness of the communication will be presumed. Thus, if the intent is doubtful, and the act contemplated might be lawful under

Cox v. *Bockett*, 18 C. B. N. S. 239, 34 L. J. C. P. N. S. 125, 11 L. T. N. S. 629, 11 Jur. N. S. 88, 13 Week. Rep. 292; *Alden* v. *Goddard*, 73 Me. 345.

[8] *Re Arnott*, 60 L. T. N. S. 109, 37 Week. Rep. 223, 5 Morrell, 286.

[9] *Harris* v. *Holler*, 7 Dowl. & L. 319, 19 L. J. Q. B. N. S. 62; *Heath* v. *Crealock*, L. R. 15 Eq. 257, 42 L. J. Ch. N. S. 455, 28 L. T. N. S. 101, 21 Week. Rep. 380.

[10] *Com.* v. *Bacon*, 135 Mass. 521; *Studdy* v. *Sanders*, 2 Dowl. & R. 347; *Doe ex dem. Jupp* v. *Andrews*, Cowpt. pt. 2, p. 846.

[11] *Parkins* v. *Hawkshaw*, 2 Starkie, 239, 19 Revised Rep. 711.

[12] *Wicks* v. *Dean*, 103 Ky. 69, 44 S. W. 397; *Daniel* v. *Daniel*, 39 Pa. 191.

[13] Buller, N. P. 284.

[14] Buller, N. P. 284; *Rahm* v. *State*, 30 Tex. App. 310, 28 Am. St. Rep. 911, 17 S. W. 416.

certain circumstances, then the professional communication falls within the first class, and is privileged.[1] A mere charge that the intent of the communication is criminal does not remove the protection.[2] The court must determine the question of intent in the alleged communication;[3] and there is the further limitation that the accused must be on trial for the very crime concerning which the communication was made, and not for some other offense.[4] The communication is protected by the privilege unless it clearly appears that the client intended to commit a criminal act.[5]

But where the act is *malum in se,* it falls within the second class, and the communication is not privileged.[6] So, where

[1] *Bank of Utica* v. *Mersereau,* 3 Barb. Ch. 528, 49 Am. Dec. 189; *People* v. *Blakeley,* 4 Park. Crim. Rep. 176, 181; *Guptill* v. *Verback,* 58 Iowa, 98, 100, 12 N. W. 125. See *State* v. *Smith,* 138 N. C. 700, 50 S. E. 859; *Alexander* v. *United States,* 138 U. S. 353, 34 L. ed. 954, 11 Sup. Ct. Rep. 350.

[2] *State* v. *McChesney,* 16 Mo. App. 259, 268.

[3] *Ibid.*

[4] *Alexander* v. *United States,* 138 U. S. 353, 34 L. ed. 954, 11 Sup. Ct. Rep. 350.

[5] *State* v. *Barrows,* 52 Conn. 323; *Rex* v. *Haydn,* 2 Fox & S. (Ir.) 379. See *Graham* v. *People,* 63 Barb. 468, 484.

[6] *People* v. *Blakeley,* 4 Park. Crim. Rep. 176. See *Hughes* v. *Boone,* 102 N. C. 137, 160, 9 S. E. 286; *Everett* v. *State,* 30 Tex. App. 682, 18 S. W. 674; *Reg.* v. *Hayward,* 2 Car. & K. 234, 2 Cox, C. C. 23; *Reg.* v. *Tylney,* 1 Den. C. C. 319, 18 L. J. Mag. Cas. N. S. 36, 3 Cox, C. C. 160; *Reg.* v. *Downer,* 14 Cox, C. C. 486, 43 L. T. N. S. 445, 45 J. P. 52; *Alexander* v. *United States,* 138 U. S. 353, 34 L. ed. 954, 11 Sup. Ct. Rep. 350; *State* v. *McChesney,* 16 Mo. App. 259, 269; *State* v. *Faulkner,* 175 Mo. 546, 75 S. W. 116, 131; *People* v. *Peterson,* 60 App. Div. 118, 69 N. Y. Supp. 941; *Orman* v. *State,* 22 Tex. App. 604, 58 Am. Rep. 662, 3 S. W. 468; *People* v. *Mahon,* 1 Utah, 205; *McMannus* v. *State,* 2 Head, 213; *People* v. *Von Alstine,* 57 Mich. 69, 23 N. W. 594, 6 Am. Crim. Rep. 272; *State* v. *Kidd,* 89 Iowa, 54, 63, 56 N. W. 263; *Re Cole,* Fed. Cas. No. 2,975; *People* v. *Gallagher,* 75 Mich. 512, 42 N. W. 1063; *Hickman* v. *Green,* 123 Mo. 165, 29 L.R.A. 39, 22 S. W. 455, 27 S. W. 440; *State* v. *Stone,* 65 N. H. 124, 18 Atl. 654; *Matthews* v. *Hoagland,* 48 N. J. Eq. 455, 21 Atl. 1054; *Bank of Utica* v. *Mersereau,* 3 Barb. Ch. 528, 49 Am. Dec. 189; *People ex rel. Mitchell* v. *New York,* 29 Barb. 622; *Rahm* v. *State,* 30 Tex. App. 310, 28 Am.

two persons charged with crime had consulted as to methods of fraudulently concealing their property, the communication was not privileged;[7] and where an attorney had been consulted as to the possibility of forging a deed,[8] or where the attorney receives forged papers, and acts in ignorance of their true character, no privilege attaches to the communication,[9] because full confidence has been withheld, and the fact that the attorney does not know of the criminal intent, or even advises his client against it, does not make the communication privileged.[10] Attorneys are compelled to disclose

St. Rep. 911, 17 S. W. 416; *Taylor* v. *Evans*, — Tex. Civ. App. —, 29 S. W. 172; *Maxham* v. *Place*, 46 Vt. 434; *Dudley* v. *Beck*, 3 Wis. 274; *State* v. *Lehman*, 175 Mo. 619, 75 S. W. 139; *Holden* v. *State*, 44 Tex. Crim. Rep. 382, 71 S. W. 600; *Hartness* v. *Brown*, 21 Wash. 655, 59 Pac. 491; *Reg.* v. *Avery*, 8 Car. & P. 596; *Reg.* v. *Farley*, 2 Car. & K. 313, 1 Den. C. C. 197, 2 Cox, C. C. 82; *Rex* v. *Brewer*, 6 Car. & P. 363; *Follett* v. *Jefferyes*, 1 Sim. N. S. 17; *Charlton* v. *Coombes*, 4 Giff. 372, 1 New Reports, 547, 32 L. J. Exch. N. S. 284, 9 Jur. N. S. 534, 8 L. T. N. S. 81, 11 Week. Rep. 504; *Shore* v. *Bedford*, 5 Mann. & G. 271, 12 L. J. C. P. N. S. 138; *Graham* v. *People*, 63 Barb. 483.

[7] *Reg.* v. *Cox*, L. R. 14 Q. B. Div. 153, 168, 54 L. J. Mag. Cas. N. S. 41, 52 L. T. N. S. 25, 33 Week. Rep. 396, 15 Cox, C. C. 611, 49 J. P. 374, 5 Am. Crim. Rep. 140. See *Cromack* v. *Heathcote* (1820) 4 J. B. Moore, 357, 2 Brod. & B. 4, 22 Revised Rep. 638; *Gartside* v. *Outram*, 26 L. J. Ch. N. S. 113, 3 Jur. N. S. 39, 5 Week. Rep. 35; *Annesley* v. *Anglesea*, 17 How. St. Tr. 1139, 1443; *Rex* v. *Dixon* (1765) 3 Burr. 1687.

[8] *People* v. *Van Alstine*, 57 Mich. 69, 79, 23 N. W. 594, 6 Am. Crim. Rep. 272; *Orman* v. *State*, 22 Tex. App. 604, 617, 58 Am. Rep. 662, 3 S. W. 468; *Greenough* v. *Gaskell*, 1 Myl. & K. 98, 104, Coop t. Brougham, 96; *People* v. *Blakeley*, 4 Park. Crim. Rep. 176, 181; *Coveney* v. *Tannahill*, 1 Hill, 33, 36, 37 Am. Dec. 287; *People* v. *Mahon*, 1 Utah, 205; *Russell* v. *Jackson*, 9 Hare, 387.

[9] *Reg.* v. *Hayward*, 2 Car. & K. 234, 2 Cox, C. C. 23; *Reg.* v. *Tylney*, 1 Den. C. C. 319, 3 Cox, C. C. 160, 18 L. J. Mag. Cas. N. S. 36, 38; *Rex* v. *Haydn*, 2 Fox & S. (Ir.) 379.

[10] *Orman* v. *State*, 22 Tex. App. 604, 617, 58 Am. Rep. 662, 3 S. W. 468; *Reg.* v. *Hayward*, 2 Car. & K. 234, 2 Cox, C. C. 23; *Reg.* v. *Cox*, L. R. 14 Q. B. Div. 153, 163, 165, 54 L. J. Mag. Cas. N. S. 41, 52 L. T. N. S. 25, 33 Week. Rep. 396, 15 Cox, C. C. 611, 49 J. P. 374,

communications of a clearly intended criminal act; thus, threats made in the attorney's office to kill a man subsequently murdered by the client must be disclosed;[11] or a communication made for the purpose of raising money on forged securities.[12]

It is scarcely necessary to add that, when the lawyer connives at the illegal purpose, he so far loses his professional character as to preclude him personally from claiming any privilege. "Where a solicitor is party to a fraud, no privilege attaches to the communications with him on the subject, because the contriving of a fraud is no part of his duty as a solicitor."[13] A lawyer, however, cannot be asked, and certainly cannot be compelled to answer, whether his advice to his client did not involve an illegal purpose.[14] The protection is said to extend to consultations as to all acts not indictable.[15]

5 Am. Crim. Rep. 140; *Matthews* v. *Hoagland,* 48 N. J. Eq. 455, 21 Atl. 1054.

[11] *State* v. *Mewherter,* 46 Iowa, 88.

[12] *Reg.* v. *Farley,* 2 Car. & K. 313, 1 Den. C. C. 197, 2 Cox, C. C. 82; *Gartside* v. *Outram,* 26 L. J. Ch. N. S. 113, 114, 3 Jur. N. S. 39, 5 Week. Rep. 35; *Annesley* v. *Anglesea,* 17 How. St. Tr. 1139; *Mornington* v. *Mornington,* 2 Johns. & H. 697, 703; *Gore* v. *Bowser,* 5 De G. & S. 30; *Goodman* v. *Holroyd,* 15 C. B. N. S. 839; *Blight* v. *Goodliffe,* 18 C. B. N. S. 757; *Chartered Bank* v. *Rich,* 4 Best & S. 73, 32 L. J. Q. B. N. S. 300, 306, 8 L. T. N. S. 454, 11 Week. Rep. 830; *Reg.* v. *Jones,* 1 Den. C. C. 166; *Bassford* v. *Blakesley,* 6 Beav. 131. See also *Doe ex dem. Shellard* v. *Harris,* 5 Car. & P. 594; *Levy* v. *Pope,* Moody & M. 410, 31 Revised Rep. 743; *Reg.* v. *Tylney,* 1 Den. C. C. 319, 3 Cox, C. C. 160, 18 L. J. Mag. Cas. N. S. 36; *Reg.* v. *Brown,* 9 Cox, C. C. 281; *Reynell* v. *Sprye,* 10 Beav. 51; *Follett* v. *Tefferyes,* 1 Sim. N. S. 1; *People* v. *Blakely,* 4 Park. Crim. Rep. 176.

[13] Turner, V. C., in *Russell* v. *Jackson,* 9 Hare, 392; *Brown* v. *Foster,* 1 Hurlst. & N. 736, 26 L. J. Exch. N. S. 249, 3 Jur. N. S. 245, 5 Week, Rep. 292, cited supra, 496.

[14] *Doe ex dem. Shellard* v. *Harris,* 5 Car. & P. 594.

[15] *Bank of Utica* v. *Mersereau,* 3 Barb. Ch. 528, 49 Am. Dec. 189. See *Gartside* v. *Outram,* 26 L. J. Ch. N. S. 115; *Maxham* v. *Place,* 46 Vt. 434.

§ 505. Communications between client and witnesses are privileged.—"The communications," says Mr. Hare in his work on Discovery,[1] "between a party or his legal adviser and witnesses, are also privileged." There is, in those cases, the same necessity for protection; otherwise, as Lord Langdale remarked, "it would be impossible for a party to write a letter for the purpose of obtaining information on the subject of a suit, without incurring the liability of having the materials of his defense disclosed to the adverse party."[2]

Communications between the parties with regard to the preparation of evidence are in like manner privileged.[3]

§ 505a. Writings; when privileged.—The privileged communication itself is protected, without regard to the medium of its transmission as between attorney and client. Thus, the protection is extended when the communication is contained in letters or other documents. Hence, letters exchanged between attorney and client,[1] letters from the client

[1] Hare, Discovery of Ev. 2d ed. 1876, 151.

[2] *Preston* v. *Carr*, 1 Younge & J. 175; *Ross* v. *Gibbs*, L. R. 8 Eq. 522, 39 L. J. Ch. N. S. 61; *Curling* v. *Perring*, 2 Myl. & K. 380, 4 L. J. Ch. N. S. 80; *Storey* v. *Lennox*, 1 Myl. & C. 525, 6 L. J. Ch. N. S. 99; *Llewellyn* v. *Baddeley*, 1 Hare, 527, 11 L. J. Ch. N. S. 310, 6 Jur. 705; *Lafone* v. *Falkland Islands Co.* 4 Kay & J. 34, 27 L. J. Ch. N. S. 25, 6 Week. Rep. 4; *Gandee* v. *Stansfield*, 4 De G. & J. 1; *Daw* v. *Eley*, 2 Hem. & M. 725; *Phillips* v. *Routh*, L. R. 7 C. P. 289, 41 L. J. C. P. N. S. 111, 26 L. T. N. S. 845, 20 Week. Rep. 630; *Wilson* v. *Northampton & B. Junction R. Co.* L. R. 14 Eq. 477, 27 L. T. N. S. 507, 20 Week. Rep. 938; *Hamilton* v. *Nott*, L. R. 16 Eq. 112, 42 L. J. Ch. N. S. 512.

[3] *Kennedy* v. *Lyell*, L. R. 23 Ch. Div. 387, 48 L. T. N. S. 455, 31 Week. Rep. 691. See *Wheeler* v. *Le Marchant*, L. R. 17 Ch. Div. 675, 44 L. T. N. S. 632, 50 L. J. Ch. N. S. 793, 45 J. P. 798; Hare, Discovery of Ev. 152; *Allan* v. *Royden*, 43 L. J. C. P. N. S. 206; *Rayner* v. *Ritson*, 6 Best. & S. 888, 35 L. J. Q. B. N. S. 59, 14 Week. Rep. 81; *Colman* v. *Truman*, 3 Hurlst. & N. 871, 28 L. J. Exch. N. S. 5.

[1] *Greenough* v. *Gaskell*, 1 Myl. & K. 98, Coop. t. Brougham, 96.

to his agent, to be transmitted to his attorney,[2] letters from the agent to the client, after the receipt of the attorney's advice,[3] letters between attorneys themselves, relating to the same client,[4] letters from the attorney instructing a person to procure evidence,[5] letters from attorney to witness,[6] and letters from witness to attorney,[7] are all privileged, where they relate to the professional communication.

Where the privileged communication is contained in a document, to be protected by the privilege, the document must relate to the professional employment, and must be necessary to enable the attorney to perform his duty,[8] and be delivered to the attorney for such purpose. As to documents, the rule prevails that the attorney cannot be compelled to produce those which the client cannot be compelled to produce,[9] and, on the other hand, where the client can be compelled to produce the document, the attorney must produce it.[10]

b. Telegrams.

§ 505b. Telegrams not privileged.—Mr. Wigmore, in his work on Evidence, defines the principles that underlie and are essential to a privileged communication, in the following language: (1) "The communications must originate in a confidence that they will not be disclosed; (2) This element

[2] *Reid* v. *Langlois,* 1 Macn. & G. 627, 2 Hall & Tw. 59, 19 L. J. Ch. N. S. 337, 14 Jur. 467.

[3] *Boughton* v. *Citizen's Ins. Co.* 11 Ont. Pr. Rep. 110.

[4] *United States* v. *Six Lots of Ground,* 1 Woods, C. C. 234, Fed. Cas. No. 16,299.

[5] *Steele* v. *Stewart,* 13 Sim. 533.

[6] *Curling* v. *Perring,* 2 Myl. & K. 380, 4 L. J. Ch. N. S. 80.

[7] *Young* v. *Holloway,* L. R. 12 Prob. Div. 167, 56 L. J. Prob. N. S. 81, 57 L. T. N. S. 515.

[8] *Mitchell's Case,* 12 Abb. Pr. 249; *Reg.* v. *Hoyward,* 2 Car. & K. 234, 2 Cox, C. C. 23; *State* v. *Kidd,* 89 Iowa, 54, 56 N. W. 263.

[9] *Liggett* v. *Glenn,* 2 C. C. A. 286, 4 U. S. App. 438, 51 Fed. 381, 396; *State* v. *Squires,* 1 Tyler (Vt.) 147.

[10] *Small* v. *Marwood,* 9 Barn. & C. 300, 4 Moody & R. 181, 7 L. J. K. B. 197.

of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties; (3) The relation must be one which, in the opinion of the community, ought to be sedulously fostered; and (4) The injury that would inure to the relation, by the disclosure of the communication, must be greater than the benefit thereby gained for the correct disposal of litigation." [1]

With these principles in mind, it is clear why professional communications between attorney and client are privileged, because they answer all the essential principles that cover the matter.

With regard to telegrams, no one of the four conditions is necessarily present. The claim in some of the earlier decisions,[2] that telegrams ought to be privileged, cannot be sustained, and does not now prevail.[3] There is no question that the claim arises from the fact that the medium of communication ought to be confidential. The reasons for this still exist. The method of transmission necessarily requires confidence as between the telegram sender and the receiver, on the one side, and the operator on the other; hence a statute that prohibits an operator from revealing the contents of the telegram merely protects the telegram until the message comes into the hands of the receiver. It is true, of course, that, on the principles of privileged communications, a professional communication sent by the client to the attorney, whether by telegram or by post or verbal, would be privileged, without regard to the method of transmission, because the professional communication itself is the thing that is protected, and

[1] Wigmore, Ev. § 2285.

[2] *Stroud Election Case,* 2 O'Malley & H. 107; Cooley, Const. Lim. 6th ed. 371; 18 Am. L. Reg. N. S. 65.

[3] *Woods* v. *Miller,* 55 Iowa, 168, 39 Am. Rep. 170, 7 N. W. 484; *State* v. *Litchfield,* 58 Me. 267; *Ex porte Brown,* 72 Mo. 83, 37 Am. Rep. 426; *Henisler* v. *Freedman,* 2 Pars. Sel. Eq. Cas. 274; *Kehoe's Triol,* Wests Rep. Pa. 128; *National Bank* v. *National Bank,* 7 W. Va. 544.

not the medium. Hence, unless the contents of the message are privileged, by reason of the nature of the communication, there is no privilege attaching to the telegram.

§ 506. Telegrams, continued.—Telegraphic agents and operators (if there be no statute to the contrary) are compelled to produce in court the originals of telegrams, or, if such originals be lost, to give secondary evidence of their contents.[1] A statute merely prescribing that telegrams shall not be disclosed does not apply to cases where they are called for by process of law.[2] Not only is such production required by the rule which permits a party to compel the production in court of all papers essential to enable him to make out a litigated case, but unless this right be maintained in this special instance, parties not looked upon with favor by the officials of telegraphic corporations might be exposed to ruin by the disclosure of telegrams prejudicing them, and the suppression of telegrams operating to their advantage. It may be said, we have no right to presume such perfidy. We have not; yet, as a matter of fact, it has been found impossible in times of high political or monetary excitement, to seal apertures, through so many of which there is a leakage; and a wire may be tapped where it might be difficult to tap an operator. This abuse cannot be absolutely prevented; but it may be corrected by giving each party equal rights, and by saying to such corporations, "You cannot plead your immunity so as to injure those whom you are unable or unwilling to protect."

But while we must hold that a telegraph corporation is bound to produce whatever papers may be needed to subserve the case of a litigant, the subpœna, to justify an attachment,

[1] *State* v. *Litchfield* 58 Me. 267; *Com.* v. *Jeffries*, 7 Allen, 548, 83 Am. Dec. 712; *Henisler* v. *Freedman*, 2 Pars. Sel. Eq. Cas. 274; *National Bank* v. *National Bank*, 7 W. Va. 544.

[2] *Ex parte Brown*, 72 Mo. 83, 37 Am. Rep. 426.

should designate the specific paper required. A call for a general correspondence, so that an inquirer may pick out what he wants, and get possession in this way of the private affairs of others, should not be sustained.[3]

c. Priest and Penitent.

§ 507. Confessional communications between priest and penitent.—All the conditions essential to constitute a privileged communication are present in confessional communications between priest and penitent. But the privilege was never recognized by the common law.[1] Now, however, the privilege is generally declared and protected by statutes, and in nearly all states they provide in terms that a minister of the Gospel or a priest of any denomination shall not testify concerning any communication made to him in the course of discipline enjoined by the practice of such denomination. Hence the rule, deducible from the statutes and decisions on the subject, is generally recognized in judicial proceedings, that where the communication is in the nature of a confession made in the course of church discipline, to a priest of the same denomination as the penitent,[2] where the priest is acting in his professional capacity, it is privileged.[3]

But if these conditions are not present, as where the confession is made to a fellow member of the same church,[4] or

[3] Supra, 345, 5 Southern L. Rev. N. S. 473.

[1] Post, § 508.

[2] *Knight* v. *Lee,* 80 Ind. 201; *Dehler* v. *State,* 22 Ind. App. 383, 53 N. E. 850; *State* v. *Brown,* 95 Iowa, 381, 64 N. W. 277; *State* v. *Morgan,* 196 Mo. 177, 95 S. W. 402, 7 A. & E. Ann. Cas. 107; *Hills* v. *State,* 61 Neb. 589, 57 L.R.A. 155, 85 N. W. 836; *People* v. *Gates,* 13 Wend. 311; *Colbert* v. *State,* 125 Wis. 423, 104 N. W. 61; *Gillooley* v. *State,* 58 Ind. 182.

[3] *Colbert* v. *State,* 125 Wis. 423, 104 N. W. 61; *People* v. *Gates,* 13 Wend. 311; *State* v. *Morgan,* 196 Mo. 177, 95 S. W. 402, 7 A. & E. Ann. Cas. 107.

[4] *Com.* v. *Drake,* 15 Mass. 161.

where the priest is not acting as a spiritual guide, but simply as an officer of the church, the communication is not privileged.[5] The decisions also seem to support a very narrow construction of both the law and the statute, in that the communication is not privileged unless the penitent is a member of the same denomination as the priest,[6] and such priest is acting as a spiritual adviser only.[7]

§ 508. Priest and penitent; communications not privileged at common law.—It is clear that, by the common law of England as accepted in the United States, communications between priest and penitent, relative to spiritual guidance, were not privileged.[1] At the same time, prosecuting officers, as representing the state, properly shrank from calling upon priests to disclose confessions as evidence against parties on trial for crimes; and eminent judges greatly encouraged this reluctance on the part of the officers.[2] The same sentiment led to the enactment of the statutes that now prevail, protecting the privilege. Under these statutes, the communication, as we have seen,[3] must be in the course of religious discipline, and it could not be intended to cover the contemplation of a crime.[4] Thus, where the accused met the

[5] *Knight* v. *Lee,* 80 Ind. 201.

[6] *State* v. *Brown,* 95 Iowa, 381, 64 N. W. 277; *State* v. *Morgan,* 196 Mo. 177, 95 S. W. 402, 7 A. & E. Ann. Cas. 107; *Knight* v. *Lee,* 80 Ind. 201.

[7] *Gill* v. *Bouchard,* Rap. Jud. Quebec 5 B. R. 138.

[1] Livingston's Works, 467.

[2] *Broad* v. *Pitt,* 3 Car. & P. 518; *Du Barré* v. *Livette,* 1 Peake, N. P. Cas. 78, 3 Revised Rep. 655; *Reg.* v. *Griffin,* 6 Cox, C. C. 219.

[3] Supra, § 507.

[4] Supra, § 504. "The rules of the Catholic church are founded upon the Roman common law. Under it, priests were not required to testify as to what was communicated to them under the confidence of the confesisonal. To this rule, however, the following exceptions have been made: (1) when the disclosure is required by the policy of the state; (2) When an innocent party is charged with a crime, conviction for which he can escape only by a disclosure of facts given in the confessional; (3) When the clergyman receiving the confession is authorized to testify by the person confessing; (4) When dis-

priest with no intention of seeking spiritual aid, but made incriminating statements, it was held that these were not privileged,[5] nor were statements made by the accused to a priest who was to communicate them to the first wife, to induce her to abandon prosecution of accused for bigamy.[6]

d. Judicial Matters.

§ 509. Judges' deliberations privileged.—The privilege of inviolability is necessarily extended to the consultations of judges, though they may be examined, as we have seen, as to what took place before them on trial, in order to identify the case or prove the testimony of a witness.[1] The same privilege extends to justices of the peace, with a like liability to be examined as to the facts of the trial.[2] A presiding judge cannot be sworn as a witness in a case before him.[3] But where the decision of a judge of probate is appealed from, on the ground that he was interested in the estate which his decision settled, it has been held, in Massachusetts, that he is a competent witness on appeal to prove that he was not interested.[4]

The judge of the court cannot be compelled to testify before the grand jury as to what was said by the witness on a

closure is necessary in order to prevent an impending crime. See 15 Weiske, Rechtslexicon, 259."

[5] *State* v. *Brown*, 95 Iowa, 381, 64 N. W. 277.

[6] *Gillooley* v. *State*, 58 Ind. 182; *Hills* v. *State*, 57 L.R.A. 155, note.

[1] Hare, Discovery of Ev. 2d ed. 1876, 182; *Jackson ex dem. Wyckoff* v. *Humphrey*, 1 Johns. 498. See *Welcome* v. *Batchelder*, 23 Me. 85; Wharton, Ev. §§ 180, 785, 986; *Reg.* v. *Gazard*, 8 Car. & P. 595; supra, §§ 227 et seq.

[2] *Highberger* v. *Stiffler*, 21 Md. 338, 83 Am. Dec. 593; *Taylor* v. *Larkin*, 12 Mo. 103, 49 Am. Dec. 119.

[3] *People* v. *Miller*, 2 Park. Crim. Rep. 197. See *Morss* v. *Morss*, 11 Barb. 510; *McMillen* v. *Andrews*, 10 Ohio St. 112; *Ross* v. *Buhler*, 2 Mart. N. S. 313.

[4] *Sigourney* v. *Sibley*, 21 Pick. 101, 32 Am. Dec. 248; post, § 511; Taylor, Ev. § 1244.

trial at which the judge presided.[5] But he may testify as to matters which took place in open court, if he elects so to do.[6]

§ 510. Grand juror's communications; when privileged.—The oath taken by grand jurors, under the English law, contained the words, "The King's counsel, your fellows, and your own, you shall keep secret." Because of this, the proceedings of the grand jury were always conducted in secret, and at one time it was held that the grand jury was to remain silent as to what transpired in the grand jury room at all times.[1] The obvious reasons for this secrecy were, 1. That the grand jurors themselves ought to be perfectly free to debate and exchange opinions without a public accountability as to what was said; 2. The witnesses called before the jury ought to be likewise protected; 3. The innocent man who might be presented, but not found against, ought to be protected; 4. The party indicted ought not to have knowledge to enable him to escape.

Obviously the 1st and 3d reasons are continuous; the 2d and 4th reasons are temporary, and when the reason ceases, the rule ceases.[2] The law, therefore, now is, that a disclosure may be made of the proceedings before the grand jury whenever it is necessary to determine the issue before the grand jury, or the testimony given by any particular witness.[3]

[5] *Reg.* v. *Gazard*, 8 Car. & P. 595.

[6] *Welcome* v. *Batchelder*, 23 Me. 85.

See *Supples* v. *Cannon*, 44 Conn. 424.

[1] *Imlay* v. *Rogers*, 7 N. J. L. 347; *State* v. *Baker*, 20 Mo. 338.

[2] *Com.* v. *Mead*, 12 Gray, 167, 71 Am. Dec. 741.

[3] Wharton, Crim. Pl. & Pr. § 378; *Sykes* v. *Dunbar*, 2 Selw. N. P. 1059, 1 Campb. 202, note; *United States* v. *Charles*, 2 Cranch. C. C. 76, Fed. Cas. No. 14,786; *State* v. *Wood*, 53 N. H. 484; *Com.* v. *Hill*, 11 Cush. 137; *Com.* v. *Mead*, 12 Gray, 167, 71 Am. Dec. 741; *State* v. *Fasset*, 16 Conn. 457; *People* v. *Hulbut*, 4 Denio, 133, 47 Am. Dec. 244; *Huidekoper* v. *Cotton*, 3 Watts, 56; *Gordon* v. *Com.* 92 Pa. 216, 37 Am. Rep. 672; *Thomas* v. *Com.* 2 Rob. (Va.) 795; *Little* v. *Com.* 25 Gratt. 921; *Turk*

Hence, it is proper to show that an indictment was indorsed "A true bill" by mistake;[4] that the jury acted upon evidence in finding an indictment;[5] that a mistake occurred which ought to be set aside;[6] that the accused made a confession to the grand jury;[7] that a person was a witness before the grand jury;[8] that a witness's testimony before the grand jury differed from his testimony on trial;[9] or whenever a dis-

v. *State*, 7 Ohio, pt. 2, p. 240; *State* v. *Boyd*, 2 Hill, D. 288, 27 Am. Dec. 376.

See *Tindle* v. *Nichols*, 20 Mo. 326; *State* v. *Offutt*, 4 Blackf. 355; *Burnham* v. *Hatfield*, 5 Blackf. 21; *Perkins* v. *State*, 4 Ind. 222; *Granger* v. *Warrington*, 8 Ill. 299; *Burdick* v. *Hunt*, 43 Ind. 384; *State* v. *Broughton*, 29 N. C. (7 Ired. L.) 96, 45 Am. Dec. 507; *Sands* v. *Robison*, 12 Smedes & M. 704, 51 Am. Dec. 132; *Rocco* v. *State*, 37 Miss. 357; *People* v. *Young*, 31 Cal. 564; *White* v. *Fox*, 1 Bibb, 369, 4 Am. Dec. 643; *Crocker* v. *State*, Meigs, 127; *Beam* v. *Link*, 27 Mo. 261; *Clanton* v. *State*, 13 Tex. App. 139.

Contra, see *Imlay* v. *Rogers*, 7 N. J. L. 347; *State* v. *Benner*, 64 Me. 284.

[4] *State* v. *Horton*, 63 N. C. 595.

[5] *Com.* v. *Green*, 12 Am. St. Rep. 894, note.

[6] *People* v. *Hulbut*, 4 Denio, 133, 136, 47 Am. Dec. 244; *Com.* v. *McComb*, 157 Pa. 611, 27 Atl. 714; *People* v. *Briggs*, 60 How. Pr. 17.

[7] *United States* v. *Porter*, 2 2 Cranch, C. C. 60, 63, Fed. Cas. No. 16,072; *United States* v. *Charles*, 2 Cranch, C. C. 76, 77, Fed. Cas. No. 14,786.

[8] *Com.* v. *Hill*, 11 Cush. 137.

[9] *Little* v. *Com.* 25 Gratt. 921, 931; *Com.* v. *Mead*, 12 Gray, 167, 170, 171, 71 Am. Dec. 741; *United States* v. *Reed*, 2 Blatchf. 435, 465, Fed. Cas. No. 16,134; *People* v. *Hulbut*, 4 Denio, 133, 135, 47 Am. Dec. 244; *Hinshaw* v. *State*, 147 Ind. 334, 47 N. E. 157; *Jones* v. *Turpin*, 6 Heisk. 181, 185; *Gordon* v. *Com.* 92 Pa. 216, 221, 37 Am. Rep. 672; *Reg.* v. *Gibson*, Car. & M. 672; *Com.* v. *Chance*, 174 Mass. 245, 75 Am. St. Rep. 306, 54 N. E. 551; *People* v. *O'Neill*, 107 Mich. 556, 65 N. W. 540; *State* v. *Thomas*, 99 Mo. 235, 255, 259, 12 S. W. 643; *State* v. *Moran*, 15 Or. 262, 14 Pac. 419; *State* v. *Brown*, 28 Or. 147, 41 Pac. 1042; *Granger* v. *Warrington*, 8 Ill. 299, 310; *Bressler* v. *People*, 117 Ill. 422, 436, 8 N. E. 62; *Perkins* v. *State*, 4 Ind. 222; *State* v. *Van Buskirk*, 59 Ind. 384, 388, 3 Am. Crim. Rep. 353; *State* v. *McPherson*, 114 Iowa, 492, 87 N. W. 421; *State* v. *Benner*, 64 Me. 267, 282; *Jenkins* v. *State*, 35 Fla. 737, 48 Am. St. Rep. 267, 18 So. 182; *State* v. *Broughton*, 29 N. C. (7 Ired. L.) 96, 45 Am. Dec. 507; *United States* v. *Charles*, 2 Cranch, C. C. 76, Fed. Cas. No. 16,072; *United States* v. *Kirkwood*, 5 Utah, 123, 13 Pac. 234.

closure is necessary to the furtherance of justice.[10] But the grand jurors' testimony will not be received to impeach the finding of an indictment, or to state the evidence on which it is based, or to show the vote that was taken on the question.[11]

§ 511. Testimony of petit jurors; when privileged.— The original function of the jury was that of a body of witnesses, and hence they might at that time, with propriety, act upon their own knowledge. But as the function of the juror is that of a trier of facts upon evidence furnished by others, he cannot act upon his own knowledge.[1] This is now the general rule, and many statutes in the various states provide that where a juror has personal knowledge respecting a fact in controversy, he must declare the same in open court, so that he can be sworn, examined, and cross-examined. He cannot be permitted to give evidence to his fellow jurors without being so sworn.[2]

[10] *State* v. *Campbell,* 9 L.R.A. (N.S.) 533, note.

[11] Wharton, Crim. Pl. & Pr. § 379; *Rex* v. *Marsh,* 6 Ad. & El. 236 1 Nev. & P. 187, 2 Har. & W. 366, 1 Jur. 38; *McLellan* v. *Richardson,* 13 Me. 82; *State* v. *Fasset,* 16 Conn. 457; *People* v. *Hulbut,* 4 Denio, 133, 47 Am. Dec. 244; *Huidekoper* v. *Cotton,* 3 Watts, 56; *State* v. *Beebe,* 17 Minn. 241, Gil. 218; *State* v. *Baltimore & O. R. Co.* 15 W. Va. 363, 36 Am. Rep. 803; *State* v. *M'Leod,* 8 N. C. (1 Hawks) 344; *Simms* v. *State,* 60 Ga. 145; *State* v. *Baker,* 20 Mo. 338; *State* v. *Oxford,* 30 Tex. 428; *Reg.* v. *Russell,* Car. & M. 247; *State* v. *Johnson,* 115 Mo. 480, 22 S. W. 463, 9 Am. Crim. Rep. 7.

See contra, *Low's Case,* 16 Am. Dec. 271, note.

See also *Sparrenberger* v. *State,* 53 Ala. 481, 486, 25 Am. Rep. 643, 2 Am. Crim. Rep. 470; *State* v. *Comeau,* 48 La. Ann. 249, 19 So. 130.

[1] *Allen* v. *Rostain,* 11 Serg. & R. 362; *Murdock* v. *Sumner,* 22 Pick. 156; *Washburn* v. *Milwaukee & L. W. R. Co.* 59 Wis. 364, 18 N. W. 328; *Booby* v. *State,* 4 Yerg. 111; *Donston* v. *State,* 6 Humph. 275.

[2] Taylor, Ev. § 1244; *Rex* v. *Rosser,* 7 Car. & P. 648; *Manley* v. *Shaw,* Car. & M. 361; *Bennet* v. *Hartford,* Style, 233; *FitzJames* v. *Moys,* 1 Sid. 133; *Heath's Trial,* 18 How. St. Tr. 123; *Rex* v. *Sutton,* 4 Maule & S. 532, 541, 542; *Dunbar* v. *Parks,* 2 Tyler (Vt.) 217; *State* v. *Powell,* 7 N. J. L. 244; *Howser* v. *Com.* 51 Pa. 332; *M'Kain* v. *Love,* 2 Hill, L. 506, 27 Am. Dec.

The communications between jurors, referring to the case under consideration, as an official body, are privileged, and they cannot be compelled to testify to the same;[3] nor will testimony be received to show their mistake,[4] or to impeach their verdict.[5] But this general rule is not without exception.[6] Thus, it may be shown by jurors' testimony that the judge said if they found a verdict of guilty, they could rely upon him to be merciful to the prisoner.[7]

§ 512. Communications to prosecuting attorneys; when privileged.—A prosecuting attorney is privileged against the disclosure of the proceedings before the grand jury,[1] although he may be examined as to the testimony of witnesses or other matters to which the grand jury could testify.[2] Communications made to a prosecuting attorney relative to suspected criminals, or to the operations of detectives or police,

401; *Sam* v. *State,* 1 Swan, 61; *Anschicks* v. *State,* 6 Tex. App. 524.

[3] *Com.* v. *White,* 147 Mass. 76, 16 N. E. 707.

[4] *Stote* v. *Wood,* 124 Mo. 412, 417, 27 S. W. 1114; *State* v. *Best,* 111 N. C. 638, 643, 15 S. E. 930; *State* v. *M'Leod,* 8 N. C. (1 Hawks) 344, 346; *Taylor* v. *Com.* 90 Va. 109, 117, 17 S. E. 812; *State* v. *Dusenberry,* 112 Mo. 277, 295, 20 S. W. 461; *State* v. *Plum,* 49 Kan. 679, 31 Pac. 308; *Mattox* v. *United States,* 146 U. S. 140, 36 L. ed. 917, 13 Sup. Ct. Rep. 50; *Heller* v. *People,* 22 Colo. 11, 43 Pac. 124; *Carr* v. *State,* 96 Ga. 284, 22 S. E. 570, 10 Am. Crim. Rep. 329; *Mitchell* v. *State,* 36 Tex. Crim. Rep. 278, 33 S. W. 367, 36 S. W. 456.

[5] *Woodward* v. *Leavitt,* 107 Mass. 453, 461, 9 Am. Rep. 49; *Kelly* v. *State,* 39 Fla. 122, 22 So. 303; *Weatherford* v. *State,* 31 Tex. Crim Rep. 530, 536, 37 Am. St. Rep. 828, 21 S. W. 251; *McTyier* v. *State,* 91 Ga. 254, 260, 18 S. E. 140; *Smith* v. *State,* 59 Ark. 132, 140, 43 Am. St. Rep. 20, 26 S. W. 712; *State* v. *Senn,* 32 S. C. 392, 408, 11 S. E. 292; *State* v. *Bennett,* 40 S. C. 308, 311, 18 S. E. 886.

[6] *Crawford* v. *State,* 2 Yerg. 60, 24 Am. Dec. 467.

[7] *McBean* v. *State,* 83 Wis. 206, 53 N. W. 497.

[1] *McLellan* v. *Richardson,* 13 Me. 82; *Clark* v. *Field,* 12 Vt. 485. But see *White* v. *Fox,* 1 Bibb, 369, 4 Am. Dec. 643; Wharton, Crim. Pl. & Pr. § 380.

[2] Supra, note 5; *Knott* v. *Sargent,* 125 Mass. 95; *State* v. *Van Buskirk,* 59 Ind. 384, 3 Am. Crim. Rep. 353.

are privileged, and cannot be disclosed without the consent of the person making the communication.[3] This privilege is well established,[4] but with the limitation that it applies only to the identity of the informer, and not to the contents of the communication. If the informer's identity is known and admitted, then there is no reason for concealment. Even where the privilege is strictly applicable, the trial court may compel a disclosure in the interest of justice.[5]

§ 513. State secrets privileged.—A Crown witness in a political prosecution cannot be asked, so it has been held in England, as to the quarters from which his information was received; and this sanctity was extended to revenue cases.[1] Even as late as O'Connell's Case,[2] it was held that state policy precluded an investigation into the channels through which information of breaches of the law reached the prosecuting authorities. To this extent the protection may be granted, limiting it strictly to cases of public, as distinguished from private, necessity.[3] For the same reason the executive of a

[3] *Oliver* v. *Pate,* 43 Ind. 132. See post, § 513.

[4] *Rex* v. *Akers,* 6 Esp. 126, note; *Hardy's Trial,* 24 How. St. Tr. 808; *Rex* v. *Watson,* 2 Starkie, 116, 135, 32 How. St. Tr. 102; *Reg.* v. *O'Connell,* 1 Cox, C. C. 403, 5 State Tr. N. S. 1, 208; *Reg.* v. *Candy,* cited in 15 Mees. & W. 175; *Reg.* v. *O'Brien,* 7 St. Tr. N. S. 1, 123; Parnell Commission's Precedings 20th day Times Rep. pt. 6, p. 28; *State* v. *Soper,* 16 Me. 293, 33 Am. Dec. 665; *Worthington* v. *Scribner,* 109 Mass. 487, 12 Am. Rep. 736; *Burr's Trial,* Robertson's Rep. 11, 508, 520, 525; *United States* v. *Moses,* 4 Wash. C. C. 726, Fed. Cas. No. 15,825; *Vogel* v. *Gruaz,* 110 U. S. 311, 316, 28 L. ed. 158, 160, 4 Sup. Ct. Rep. 12; *King* v. *United States,* 50 C. C. A. 647, 112 Fed. 988.

[5] *Reg.* v. *Richardson,* 3 Fost. & F. 693; *Marks* v. *Beyfus,* L. R. 25 Q. B. Div. 494.

[1] *Watson's Trial,* 32 How. St. Tr. 100; *Hardy's Trial,* 24 How. St. Tr. 753; *Home* v. *Bentinck,* 2 Brod. & B. 130, 162, 4 J. B. Moore, 563, 8 Price, 225, 22 Revised Rep. 748; post, § 515.

[2] Arm. & T. 178.

[3] *Reg.* v. *Richardson,* 3 Fost. & F. 693; *Atty. Gen.* v. *Briant,* 15 Mees. &. W. 181, 15 L. J. Exch. N. S. 265; *United States* v. *Moses,* 4 Wash. C. C. 726, Fed. Cas. No. 15,825;

state and his cabinet officers are entitled, in exercise of their discretion, to determine how far they will produce papers, or answer questions as to public affairs, in a judicial inquiry.[4] In conformity with this view, it has been held that communications in official correspondence relating to matters of state cannot be produced as evidence in an action against a person holding an office, for an injury charged to have been done by him in the exercise of the power given to him as such officer; not only because such communications are confidential, but because their disclosure might betray secrets of state policy.[5] And where a minister of state, subpœnaed to produce public documents, objects to do so on the ground that their publication would be injurious to the public interest, the court ought not to compel their publication;[6] and the question whether the production of such a document would be injurious to the public service must be determined by the head of the depart-

State v. *Soper,* 16 Me. 295, 33 Am. Dec. 665.

See 1 Burr's Trial, 186; *Worthington* v. *Scribner,* 109 Mass. 487, 12 Am. Rep. 736; *Gray* v. *Pentland,* 2 Serg. & R. 23; *Oliver* v. *Pate,* 43 Ind. 132; post, § 515.

[4] *Beatson* v. *Skene,* 5 Hurlst. & N. 838, 29 L. J. Exch. N. S. 430, 6 Jur. N. S. 780, 2 L. T. N. S. 378, 8 Week. Rep. 544; *Anderson* v. *Hamilton,* 2 Brod. & B. 156, note, 4 J. B. Moore, 593, 8 Price, 244, note, 22 Revised Rep. 751, note; 3 Burr's Trial, Wescott's ed. p. 37; 2 Hopkins & Earle's ed. p. 536; *Gray* v. *Pentland,* 2 Serg. & R. 23; *Yoter* v. *Sanno,* 6 Watts, 164; *Hartranft's Appeal,* 85 Pa. 433, 27 Am. Rep. 667; *Cooper's Case,* Whart. St. Tr. 662; *Marbury* v. *Madison,* 1 Cranch, 144, 2 L. ed. 63; *Thompson* v. *German Valley R. Co.* 22 N. J. Eq. 111.

See *Law* v. *Scott,* 5 Harr. & J. 438; *Clubb* v. *Salomons,* 3 Car. & K. 75; *Sykes* v. *Dunbar,* 2 Selw. N. P. 1059, 1 Campb. 202, note.

[5] *Anderson* v. *Hamilton,* 2 Brod. & B. 156, note, 8 Price, 244, note, 4 J. B. Moore, 593, 22 Revised Rep. 751, note; Powell, Ev. 4th ed. 135; *Home* v. *Bentinck,* 2 Brod. & B. 130, 4 J. B. Moore, 563, 8 Price, 225, 22 Revised Rep. 748.

[6] *Beatson* v. *Skene,* 5 Hurlst. & N. 838, 29 L. J. Exch. N. S. 430, 6 Jur. N. S. 780, 2 L. T. N. S. 378, 8 Week. Rep. 544.

See *Dickson* v. *Wilton,* 1 Fost. & F. 425.

ment having the custody of the paper, and not by the judge.[7] This privilege, however, has been held to be personal to the head of a department, and cannot be claimed by a subordinate;[8] though in a suit against an admiral in the royal navy, to recover damages for a collision caused by his flagship, Sir R. Phillimore refused the plaintiff permission to inspect reports of the collision made by the admiral to the lords of the admiralty, the secretary to the admiralty having made an affidavit that their production would be prejudicial to the public service.[9]

While, as we have seen by the citations made, the privilege of secrecy as to state and official communications is very rigidly enforced under the English law, the privilege cannot be so broad under our own institutions.

Our national and state officials, as well as the inferior officers, hold office in rotation, and to prohibit a disclosure in many instances would be to prohibit investigation. It is true that, during the pendency of diplomatic communications, or the investigation of local conditions, national and state officers should be protected from disclosure, as, under those conditions, they have not yet reached conclusions upon which to base their actions, and to this extent such matters, both national and state, should be rigidly protected. However, these matters are not definitely settled, either by decision or by thorough discussion. It has been held, as we have seen, that the state official himself is the proper party to judge of the propriety and advisability of his testimony as to any such fact,[10] but the better opinion, and that supported by the most convincing reason, is that such matters should be left to the trial

[7] See note 6; Wharton, Crim. Law, § 391.

[8] *Dickson* v. *Wilton,* 1 Fost. & F. 424.

[9] *The Bellerophon,* 23 Week. Rep. 248, 41 L. J. Prob. N. S. 5, 31 L. T. N. S. 756.

[10] *Hartranft's Appeal,* 85 Pa. 433, 27 Am. Rep. 667.

judge for his own determination, in the furtherance of justice, in the concrete case in which the matter might be called into question.[11]

§ 514. Communications between executive and legislature are privileged.—Privilege, also, attaches to the proceedings of legislatures, whether Federal or state, to such an extent as to protect witnesses (whether reporters or members) from questions as to debates and votes in either house of the legislature, unless the consent of the house be first given.[1] And, it was held by Lord Ellenborough[2] that while a member of Parliament or the speaker may be called on to give evidence of the fact of a member of Parliament having taken part or spoken in a particular debate, he cannot be asked what was then delivered in the course of the debate. It has also been held that communications between a governor of a province and his attorney general are privileged.[3] Mere volunteer private communications to the executive are not so privileged.[4]

§ 515. Police secrets privileged.—"It is perfectly right," so it is stated by Eyre, Ch. J.,[1] "that all opportunities should be given to discuss the truth of the evidence given against a prisoner; but there is a rule which has universally obtained on account of its importance to the public for the detection of crimes, that those persons who are the channel by means of which the detection is made should not be unnecessarily

[11] Wigmore, Ev. § 2375.

[1] *Plunkett* v. *Cobbett*, 5 Esp. 136, 2 Selw. N. P. 1042; *Chubb* v. *Salomons*, 3 Car. & K. 75.

[2] *Plunkett* v. *Cobbett*, 5 Esp. 136, 2 Selw. N. P. 1042.

[3] *Wyatt* v. *Gore*, Holt, N. P. 299; *Coorg* v. *East India Co.* 29 Beav. 300, 30 L. J. Ch. N. S. 226, 7 Jur. N. S. 350, 3 L. T. N. S. 646, 9 Week. Rep. 247.

[4] *Blake* v. *Pilfold*, 1 Moody & R. 198.

[1] *Hardy's Trial*, 24 How. St. Tr. 808.

disclosed; if it can be made to appear that it is necessary to the investigation of the truth of the case that the name of the person should be disclosed, I should be very unwilling to stop it; but it does not appear to me that it is within the ordinary course to do it, or that there is any necessity for it in the present case." It has therefore been held that a police officer who has arrested a prisoner will not be bound to disclose the name of the person from whom he received information leading to the arrest.[2] On the other hand, on an indictment for poisoning, Cockburn, Ch. J., when a police officer declined to answer from whom information concerning certain poison was obtained, ordered the answer to be given, such answer being material.[3] The distinction is, materiality. When such information is material to the issue, it cannot be withheld. But when it is immaterial, the courts will not compel its disclosure.[4] This immunity, however, extends only to official counsels. "A witness for the prosecution in a trial for riot may be compelled to state, on cross-examination, whether he is a member of a secret society organized to suppress a sect to which the defendant belongs." [5]

e. Physician and Patient.

§ 516. Communications between, when privileged.—At common law communications between physician and patient were not privileged,[1] and, in the absence of a statute, a physi-

[2] *United States* v. *Moses*, 4 Wash. C. C. 726, Fed. Cas. No. 15,825. See also *State* v. *Soper*, 16 Me. 295, 33 Am. Dec. 665; supra, § 513.

[3] *Reg.* v. *Richardson*, 3 Fost. & F. 693.

[4] *Com.* v. *Pomeroy*, 117 Mass. 144.

[5] *People* v. *Christie*, 2 Park. Crim. Rep. 579.

[1] *Wheeler* v. *Le Marchant*, L. R. 17 Ch. Div. 675, 50 L. J. Ch. N. S. 793, 44 L. T. N. S. 632, 45 J. P. 728; *Springer* v. *Byram*, 137 Ind. 15, 23 L.R.A. 244, 45 Am. St. Rep. 159, 163, 36 N. E. 361; *Prader* v. *National Masonic Acci. Asso.* 95

cian can be compelled to testify to the same on the witness stand.[2] Every reason that supports the privilege as between attorney and client can be successfully invoked in behalf of the privilege between physician and patient. That such reasons have been persuasive is seen in the statutory enactments that exist in many of the states.[3]

But even under the statute the same essential elements are necessary to support the privilege as in the case of attorney and client.

The consultation must be made with a professional physician and surgeon, in the general acceptation of those words. This does not include a veterinary surgeon,[4] nor a druggist,[5] nor a dentist,[6] nor a consultation for other purposes than medical aid,[7] or outside of the professional relation,[8] nor an

Iowa, 149, 63 N. W. 601; *Campau v. North,* 39 Mich. 606, 33 Am. Rep. 433; *Territory* v. *Corbett,* 3 Mont. 50; *People* v. *Stout,* 3 Park. Crim. Rep. 670; *Fuller* v. *Knights of Pythias,* 129 N. C. 318, 85 Am. St. Rep. 744, 40 S. E. 65; *Banigan* v. *Banigan,* 26 R. I. 454, 59 Atl. 313; *Munz* v. *Salt Lake City R. Co.* 25 Utah, 220, 70 Pac. 852; *Boyle* v. *Northwestern Mut. Relief Asso.* 95 Wis. 312, 320, 70 N. W. 351.

[2] *Baker* v. *London & S. W. R. Co.* L. R. 3 Q. B. 91, 8 Best & S. 645, 37 L. J. Q. B. N. S. 53, 16 Week. Rep. 126; *Duchess of Kingston's Case* (1776) 20 How. St. Tr. 573–580, 11 Hargrave, St. Tr. 243; *People* v. *Stout,* 3 Park. Crim. Rep. 670, 673; *Pierson* v. *People,* 79 N. Y. 424, 433, 35 Am. Rep. 524; *People* v. *Lane,* 101 Cal. 513, 36 Pac. 16; *Wilson* v. *Rastall,* 4 T. R. 754, 760, 2 Revised Rep. 515; *Falmouth* v. *Moss,* 11 Price, 455, 470, 25 Revised Rep. 753; *Rex* v. *Powell,* 1 Car. & P. 97; *Greenlaw* v. *King,* 1 Beav. 137, 145, 8 L. J. Ch. N. S. 92; *Russell* v. *Jackson,* 9 Hare, 387, 391, 21 L. J. Ch. N. S. 146, 15 Jur. 117; *Anderson* v. *Bank of British Columbia,* L. R. 2 Ch. Div. 644, 650, 45 L. J. Ch. N. S. 449, 35 L. T. N. S. 76, 24 Week. Rep. 624.

[3] See statutory provisions in various states, also note to 17 Am. St. Rep. 570.

[4] *Hendershot* v. *Western U. Teleg. Co.* 106 Iowa, 529, 68 Am. St. Rep. 313, 76 N. W. 828.

[5] *Brown* v. *Hannibal & St. J. R. Co.* 66 Mo. 597.

[6] *People* v. *De France,* 104 Mich. 563, 28 L.R.A. 139, 62 N. W. 709.

[7] *Bower* v. *Bower,* 142 Ind. 194, 41 N. E. 523, 525.

[8] *Herries* v. *Waterloo,* 114 Iowa,

autopsy,[9] nor where the examination is made at the instance of a legal opponent,[10] nor the mere fact that the communication was made.[11]

The object of the privilege is to protect the patient;[12] it is conferred on him,[13] and belongs to him or his personal representative,[14] and cannot be disclosed when acquired in

374, 86 N. W. 306; *Patterson* v. *Cole,* 67 Kan. 441, 73 Pac. 54; *People* v. *Koerner,* 154 N. Y. 355, 48 N. E. 730.

[9] *Harrison* v. *Sutter Street R. Co.* 116 Cal. 156, 47 Pac. 1019; *Summers* v. *State,* 5 Tex. App. 365, 32 Am. Rep. 573.

[10] *Freel* v. *Market Street Cable R. Co.* 97 Cal. 40, 45, 31 Pac. 730; *Nesbit* v. *People,* 19 Colo. 441, 461, 36 Pac. 221; *State* v. *Height,* 117 Iowa, 650, 59 L.R.A. 437, 94 Am. St. Rep. 323, 91 N. W. 935; *People* v. *Glover,* 71 Mich. 307, 38 N. W. 874; *People* v. *Kemmler,* 119 N. Y. 580, 585, 24 N. E. 9; *People* v. *Sliney,* 137 N. Y. 570, 33 N. E. 150; *People* v. *Hoch,* 150 N. Y. 291, 44 N. E. 977.

[11] *Nelson* v. *Nederland L. Ins. Co.* 110 Iowa, 600, 81 N. W. 807; *Brown* v. *Metropolitan L. Ins. Co.* 65 Mich. 306, 316, 8 Am. St. Rep. 894, 32 N. W. 610; *Briesenmeister* v. *Supreme Lodge, K. P.* 81 Mich. 525, 532, 45 N. W. 977; *Cooley* v *Foltz,* 85 Mich. 47, 48 N. W. 176; *Dittrich* v. *Detroit,* 98 Mich. 248, 57 N. W. 125; *Lammiman* v. *Detroit Citizens' Street R. Co.* 112 Mich. 602, 71 N. W. 153; *Jones* v. *Preferred Bankers' Life Assur. Co.* 120 Mich. 211, 79 N. W. 204; *Price* v. *Standard Life & Acci Ins. Co.* 90 Minn. 264, 95 N. W. 1118; *Sovereign Camp, W. W.* v. *Grandon,* 64 Neb. 39, 89 N. W. 448; *Patten* v. *United Life & Acci. Ins. Co.* 133 N. Y. 450, 452, 31 N. E. 342; *McGowan* v. *Supreme Court, I. O. F.* 104 Wis. 176, 80 N. W. 603.

[12] *Hauk* v. *State,* 148 Ind. 238, 260, 46 N. E. 127, 47 N. E. 465; *Grand Rapids & I. R. Co.* v. *Martin,* 41 Mich. 667, 3 N. W. 173; *Groll* v. *Tower,* 85 Mo. 249, 55 Am. Rep. 358; *People* v. *Stout,* 3 Park. Crim. Rep. 670; *Boyle* v. *North-Western Mut. Relief Asso.* 95 Wis. 312, 322, 70 N. W. 351.

[13] *McConnell* v. *Osage,* 80 Iowa, 293, 303, 8 L.R.A. 778, 45 N. W. 550; *Briesenmeister* v. *Supreme Lodge, K. P.* 81 Mich. 525, 45 N. W. 977.

[14] *Penn Mut. L. Ins. Co.* v. *Wiler,* 100 Ind. 92, 50 Am. Rep. 769; *Springer* v. *Byram,* 137 Ind. 15, 23 L.R.A. 244, 45 Am. St. Rep. 159, 36 N. E. 361; *Hauk* v. *State,* 148 Ind. 238, 260, 46 N. E. 127, 47 N. E. 465; *Fraser* v. *Jennison,* 42 Mich. 206, 3 N. W. 882; *Starrs* v. *Scougale,* 48 Mich. 387, 395, 12 N. W. 502; *Lincoln* v. *Detroit,* 101 Mich. 245, 59 N. W. 617; *Johnson*

the course of the professional relationship.[15] It is protected under any form, whether orally, by deposition, affidavit, certificate, or otherwise,[16] and it cannot be used, even to impeach a witness.[17] It extends to the physician called in by the con-

v. *Johnson,* 14 Wend. 637; *Boyle* v. *Northwestern Mut. Relief Asso.* 95 Wis. 312, 70 N. W. 351; *Kenyon* v. *Mondovi,* 98 Wis. 50, 73 N. W. 314; *Heuston* v. *Simpson,* 115 Ind. 62, 7 Am. St. Rep. 409, 17 N. E. 261; *Staunton* v. *Parker,* 19 Hun, 55.

See *Mott* v. *Consumers' Ice Co.* 52 How. Pr. 148; *Lowenthal* v. *Leonard,* 20 App. Div. 330, 46 N. Y. Supp. 818.

[15] *Adreveno* v. *Mutual Reserve Fund Life Asso.* 34 Fed. 870; *Penn Mut. L. Ins. Co.* v. *Wiler,* 100 Ind. 92, 50 Am. Rep. 769; *Heuston* v. *Simpson,* 115 Ind. 62, 7 Am. St. Rep. 409, 17 N. E. 261; *Raymond* v. *Burlington, C. R. & N. R. Co.* — Iowa, —, 17 N. W. 923; *Grand Rapids & I. R. Co.* v. *Martin,* 41 Mich. 667, 3 N. W. 173; *Grattan* v. *Metropolitan L. Ins. Co.* 80 N. Y. 281, 298, 36 Am. Rep. 617; *Davenport* v. *Hannibal,* 108 Mo. 471, 18 S. W. 1122; *Storrs* v. *Scougale,* 48 Mich. 387, 12 N. W. 502; *Boyle* v. *Northwestern Mut. Relief Asso.* 95 Wis. 312, 70 N. W. 351; *Green* v. *Nebagamain,* 113 Wis. 508, 89 N. W. 520; *Masonic Ben. Asso.* v. *Beck,* 77 Ind. 203, 40 Am. Rep. 295; *Gartside* v. *Connecticut Mut. L. Ins. Co.* 76 Mo. 446, 43 Am. Rep. 765.

[16] *Buffalo Loan, Trust & S. D. Co.* v. *Knights Templar & M. Mut. Aid Asso.* 126 N. Y. 450, 22 Am. St. Rep. 839, 27 N. E. 942; *Davis* v. *Supreme Lodge, K. H.* 165 N. Y. 159, 58 N. E. 891; *Robinson* v. *Supreme Commandery, U. O. G. C.* 38 Misc. 97, 77 N. Y. Supp. 111; *Knapp* v. *Metropolitan L. Ins. Co.* 143 Mich. 369, 114 Am. St. Rep. 651, 106 N. W. 1107; *Carmichael* v. *John Hancock Mut. L. Ins. Co.* 45 Misc. 597, 90 N. Y. Supp. 1033.

Contra: *Dreier* v. *Continental L. Ins. Co.* 24 Fed. 670; *Dick* v. *Supreme Body, I. C.* 138 Mich. 372, 101 N. W. 564; *Penn Mut. L. Ins. Co.* v. *Wiler,* 100 Ind. 92, 50 Am. Rep. 769; *Masonic Mut. Ben. Asso.* v. *Beck,* 77 Ind. 208, 40 Am. Rep. 295.

Contra: *Briesenmeister* v. *Supreme Lodge, K. P.* 81 Mich. 525, 45 N. W. 977; *Nelson* v. *Nederland L. Ins. Co.* 110 Iowa, 600, 81 N. W. 807; *Mott* v. *Consumers' Ice Co.* 52 How. Pr. 148.

See *Lowenthal* v. *Leonard,* 20 App. Div. 330, 46 N. Y. Supp. 818; *Keely* v. *Levy,* 29 N. Y. S. R. 659, 8 N. Y. Supp. 849; *Price* v. *Standard Life & Acci. Ins. Co.* 90 Minn. 264, 95 N. W. 1118.

[17] *McConnell* v. *Osage,* 80 Iowa, 293, 303, 8 L.R.A. 778, 45 N. W. 550.

sulted physician,[18] to his professional partner,[19] and is protected where such physicians disagree.[20] It extends to the person called by the consulted physician to assist him,[21] and to a physician employed to treat another person, even though such physician is sent by another party;[22] and covers all information acquired in the course of the professional employment.[23]

[18] *Renihan* v. *Dennin,* 103 N. Y. 573, 57 Am. Rep. 770, 9 N. E. 320; *Thompson* v. *Ish,* 99 Mo. 160, 17 Am. St. Rep. 552, 12 S. W. 510; *Springer* v. *Byram,* 137 Ind. 15, 23 L.R.A. 244, 45 Am. St. Rep. 159, 36 N. E. 361; *State* v. *Smith,* 99 Iowa, 26, 61 Am. St. Rep. 219, 68 N. W. 428; *Prader* v. *National Masonic Acci. Asso.* 95 Iowa, 149, 63 N. W. 601; *Morris* v. *New York, O. & W. R. Co.* 73 Hun, 560, 26 N. Y. Supp. 342; *Green* v. *Nebagamain,* 113 Wis. 508, 89 N. W. 520; *McGillicuddy* v. *Farmers' Loan & T. Co.* 26 Misc. 55, 55 N. Y. Supp. 242.

But see *Henry* v. *New York, L. E. & W. R. Co.* 57 Hun, 76, 10 N. Y. Supp. 508.

[19] *Raymond* v. *Burlington, C. R. & N. R. Co.* — Iowa, —, 17 N. W. 923; *Morris* v. *New York, O. & W. R. Co.* 73 Hun, 560, 26 N. Y. Supp. 342; *Ætna L. Ins. Co.* v. *Deming,* 123 Ind. 384, 24 N. E. 86, 375.

[20] *Morris* v. *New York, O. & W. R. Co.* 73 Hun, 560, 26 N. Y. Supp. 342.

[21] *Meyer* v. *Supreme Lodge, K. P.* 178 N. Y. 63, 64 L.R.A. 839, 70 N. E. 111.

[22] *Ibid; Griffiths* v. *Metropolitan Street R. Co.* 171 N. Y. 106, 111, 63 N. E. 808; *Colorado Fuel & Iron Co.* v. *Cummings,* 8 Colo. App. 541, 46 Pac. 875; *McRae* v. *Erickson,* 1 Cal. App. 326, 82 Pac. 209; *Raymond* v. *Burlington, C. R. & N. R. Co.* — Iowa, —, 17 N. W. 923; *Keist* v. *Chicago G. W. R. Co.* 110 Iowa, 32, 81 N. W. 181; *New York, C. & St. L. R. Co.* v. *Mushrush,* 11 Ind. App. 192, 37 N. E. 954, 38 N. E. 871; *Battis* v. *Chicago, R. I. & P. R. Co.* 124 Iowa, 623, 100 N. W. 543.

[23] *Finnegan* v. *Sioux City,* 112 Iowa, 232, 83 N. W. 907; *Jones* v. *Brooklyn & W. E. R. Co.* 21 N. Y. S. R. 169, 3 N. Y. Supp. 253; *Grossman* v. *Supreme Lodge, K. & L. H.* 25 N. Y. S. R. 843; 6 N. Y. Supp. 821; *Lackland* v. *Lexington Coal Min. Co.* 110 Mo. App. 634, 85 S. W. 397; *Edington* v. *Ætna L. Ins. Co.* 13 Hun, 543; *Battis* v. *Chicago, R. I. & P. R. Co.* 124 Iowa, 623, 100 N. W. 543; *Barker* v. *Cunard S. S. Co.* 91 Hun, 495, 36 N. Y. Supp. 256.

Contra: *Metropolitan L. Ins. Co.* v. *Howle,* 68 Ohio St. 614, 68 N. E. 4; *Nelson* v. *Nederland L. Ins. Co.* 110 Iowa, 600, 81 N. W. 807;

But it does not cover information that would result in shielding a crime, and this is especially true where the physician himself may be implicated in the crime.[24] But the fact that a person is on trial on a criminal charge will not permit the disclosure of the communication, where it was made in good faith to secure medical aid.[25]

The privilege does not cease upon the death of the patient,[26] nor when the professional relation ceases.[27]

Sloan v. *New York C. R. Co.* 45 N. Y. 125; *Lammiman* v. *Detroit Citizens' Street R. Co.* 112 Mich. 602, 71 N. W. 153; *Cahen* v. *Continental L. Ins. Co.* 69 N. Y. 300; *Hunn* v. *Hunn,* 1 Thomp. & C. 499; *Redmond* v. *Industrial Ben. Asso.* 78 Hun, 104, 28 N. Y. Supp. 1075; *Davis* v. *Supreme Lodge, K. H.* 35 App. Div. 354, 54 N. Y. Supp. 1023; *Grattan* v. *Metropolitan L. Ins. Co.* 80 N. Y. 281, 36 Am. Rep. 617; *Brown* v. *Metropolitan L. Ins. Co.* 65 Mich. 306, 8 Am. St. Rep. 894, 901, 32 N. W. 610; *Jones* v. *Preferred Bankers' Life Assur. Co.* 120 Mich. 211, 79 N. W. 204; *McGowan* v. *Supreme Ct. I. O. F.* 104 Wis. 173, 80 N. W. 603.

[24] *Hauk* v. *State,* 148 Ind. 238, 46 N. E. 127, 47 N. E. 465; *Seifert* v. *State,* 160 Ind. 464, 98 Am. St. Rep. 340, 67 N. E. 100; *Guptill* v. *Verback,* 58 Iowa, 99, 12 N. W. 125; *State* v. *Smith,* 99 Iowa, 26, 61 Am. St. Rep. 219, 68 N. W. 428; *State* v. *Grimmell,* 116 Iowa, 596, 88 N. W. 342.

Compare § 2382; *Pierson* v. *People,* 79 N. W. 424, 432, 35 Am. Rep. 524; *People* v. *Murphy,* 101 N. Y. 126, 54 Am. Rep. 661, 4 N. E. 326, 6 Am. Crim. Rep. 194; *People* v. *Harris,* 136 N. Y. 423, 437, 448, 33 N. E. 65; *People* v. *Griffith,* 146 Cal. 339, 80 Pac. 68; *State* v. *Height,* 117 Iowa, 650, 59 L.R.A. 437, 94 Am. St. Rep. 323, 91 N. W. 935; *People* v. *Lane,* 101 Cal. 513, 36 Pac. 16; *People* v. *West,* 106 Cal. 89, 39 Pac. 207.

[25] *People* v. *Brower,* 53 Hun, 217, 6 N. Y. Supp. 730.

[26] *Penn Mut. L. Ins. Co.* v. *Wiler,* 100 Ind. 92, 50 Am. Rep. 769; *Gratton* v. *Metropolitan L. Ins. Co.* 80 N. Y. 281, 36 Am. Rep. 617; *Westover* v. *Ætna L. Ins. Co.* 99 N. Y. 56, 52 Am. Rep. 1, 1 N. E. 104; *Edington* v. *New York Mut. L. Ins.* 5 Hun, 1, 9; *Cahen* v. *Continental L. Ins. Co.* 9 Jones & S. 296; *Shuman* v. *Supreme Lodge, K. H.* 110 Iowa, 480, 81 N. W. 717.

[27] *Smart* v. *Kansas City,* 91 Mo. App. 586, 596..

f. Husband and Wife.

§ 517. Communications between husband and wife are privileged.—As we have already seen,[1] confidential communications between husband and wife are so far privileged that the law refuses to permit them to be asked as to their confidential communications during the marital relation.

The statutes which deal with the marital relation disqualify husband and wife as witnesses for or against the other during marital relation, but a clear distinction should be observed between the statutory disqualification and the privileged communication incident to their relations. The statutory disqualification cannot be waived; the privileged communication ought to permit of a waiver, because it is essential, to constitute a privilege, that it may be waived. In each case the statutory provision of the state should be consulted as to the extent of disqualification and its waiver, but the question of privilege between husband and wife is analogous to that which prevails between attorney and client, and embraces the essential factors of that relation, both being based upon the necessarily confidential relation. Privileged communications between husband and wife were protected at common law,[2] and the statute rendering one competent against the other does not affect the privileged communication.[3] It is also essential to such communication that the legal relation of husband and

[1] Supra, § 398.

[2] *Hopkins* v. *Grimshaw*, 165 U. S. 342, 41 L. ed. 739, 17 Sup. Ct. Rep. 401; *McCartney* v. *Fletcher*, 10 App. D. C. 572, 595; *Joiner* v. *Duncan*, 174 Ill. 252, 51 N. E. 323; *Short* v. *Tinsley*, 1 Met. (Ky.) 397, 401, 71 Am. Dec. 482; *Dexter* v. *Booth*, 2 Allen, 559; *Leppla* v. *Minnesota Tribune Co.* 35 Minn. 310, 29 N. W. 127; *Stuhlmuller* v. *Ewing*, 39 Miss. 447, 461; *Shanklin* v. *McCracken*, 140 Mo. 348, 357, 41 S. W. 898; *Mercer* v. *Patterson*, 41 Ind. 440; *Hagerman* v. *Wigent*, 108 Mich. 192, 65 N. W. 756.

[3] *Mercer* v. *State*, 40 Fla. 216, 74 Am. St. Rep. 135, 24 So. 154; *Gee* v. *Scott*, 48 Tex. 510, 26 Am. Rep 331.

wife should exist;[4] and the rule is not changed by the fact that they are living apart;[5] and the subject of the communication must be one that would not have been disclosed except for the marital relation;[6] and its admissibility is not affected by the divorce nor the death of the parties.[7] And it has been held that it is the duty of the trial court to prevent a husband

[4] *Wells* v. *Fletcher,* 5 Car. & P. 12; *Cole* v. *Cole,* 153 Ill. 585, 38 N. E. 703.

[5] *Murphy* v. *Com.* 23 Gratt. 960.

[6] *Warner* v. *Press Pub. Co.* 132 N. Y. 181, 30 N. E. 393; *Beyerline* v. *State,* 147 Ind. 125, 45 N. E. 772; *Hanks* v. *Van Garder,* 59 Iowa, 179, 13 N. W. 103.

[7] *Davis* v. *State,* 45 Tex. Crim. Rep. 292, 77 S. W. 451; *State* v. *Jolly,* 20 N. C. 108 (3 Dev. & B. L. 110), 32 Am. Dec. 656; *Perry* v. *Randall,* 83 Ind. 143; *Com.* v. *Sapp,* 90 Ky. 580, 29 Am. St. Rep. 405, 14 S. W. 834; *Briggs* v. *Briggs,* — R. I. —, 26 Atl. 198; *Brooks* v. *Francis,* 3 MacArth. 109; *Doker* v. *Hasler,* Ryan & M. 198; *O'Connor* v. *Majoribanks,* 5 Scott, N. R. 394, 4 Mann. & G. 435, 442, 12 L. J. C. P. N. S. 161, 7 Jur. 834; *Stein* v. *Bowman,* 13 Pet. 209, 223, 10 L. ed. 129, 136; *McCartney* v. *Fletcher,* 10 App. D. C. 572, 595; *Farmers' Bank* v. *Cole,* 5 Harr. (Del.) 418; *Fletcher* v. *Shepherd,* 174 Ill. 262, 51 N. E. 212; *Griffin* v. *Smith,* 45 Ind. 366; *Dexter* v. *Booth,* 2 Allen, 559; *Derham* v. *Derham,* 125 Mich. 109, 83 N. W. 1005; *Newstrom* v. *St. Paul & D. R. Co.* 61 Minn. 78, 63 N. W. 253; *Willis* v. *Gammill,* 67 Mo. 730; *Young* v. *Gilman,* 46 N. H. 484; *Keator* v. *Dimmick,* 46 Barb. 158; *Hitner's Appeal,* 54 Pa. 110; *State use of Baker* v. *McAuley,* 4 Heisk. 424, 430; *Mitchell* v. *Mitchell,* 80 Tex. 101, 15 S. W. 705; *Robin* v. *King,* 2 Leigh, 140; *Owen* v. *State,* 78 Ala. 425, 56 Am. Rep. 40, 6 Am. Crim. Rep. 206; *Reeves* v. *Herr,* 59 Ill. 81; *Crose* v. *Rutledge,* 81 Ill. 266; *Mercer* v. *Patterson,* 41 Ind. 440; *German-American Ins. Co.* v. *Paul,* 5 Ind. Terr. 703, 83 S. W. 60; *Com.* v. *Sapp,* 90 Ky. 580, 29 Am. St. Rep. 405, 14 S. W. 834; *Dickerman* v. *Graves,* 6 Cush. 308, 53 Am. Dec. 41; *Hitchcock* v. *Moore,* 70 Mich. 112, 116, 14 Am. St. Rep. 474, 37 N. W. 914; *State* v. *Kodat,* 158 Mo. 125, 51 L.R.A. 509, 81 Am. St. Rep. 292, 59 S. W. 73; *Chamberlain* v. *People,* 23 N. Y. 85, 80 Am. Dec. 255; *State* v. *Jolly,* 20 N. C. 108 (3 Dev. & B. L. 110), 32 Am. Dec. 656; *Cook* v. *Grange,* 18 Ohio, 526; *Brock* v. *Brock,* 116 Pa. St. 109, 9 Atl. 486; *Robinson* v. *Robinson,* 22 R. I. 121, 84 Am. St. Rep. 832, 46 Atl. 455; *Clark* v. *Evans,* 6 S. D. 244, 60 N. W. 862; *Davis* v. *State,* 45 Tex. Crim. Rep. 292, 77 S. W. 451; *People* v. *Mullings,* 83 Cal. 138, 17 Am. St. Rep. 223, 23 Pac. 229; *Lingo* v. *State,* 29 Ga. 470, 483; *Mercer* v. *State,* 40 Fla. 216, 74 Am. St. Rep. 135, 24 So. 154.

or wife from giving testimony concerning such communication, even though no objection is made.[8] The privilege in general extends only to the matter communicated, but does not usually cover the acts of the parties. Thus, a wife may testify concerning acts of cruelty towards her by her husband, and even introduce a letter containing expressions of cruelty;[9] or where evidence of the communication will show that a fraud is practised by one against the other;[10] or that the husband compelled her to forge a name to a promissory note.[11] A husband may testify in a homicide case that his wife informed him of threats made by the deceased;[12] and a statement by one to the other, to induce a confession, is not privileged as a confidential communication;[13] and a widow may give in evidence her husband's dying declaration, upon the theory that it ought to be known in the interest of justice.[14]

§ 517a. Privilege not extended to domestic relationship.—With the exception of the marital relation, there is no domestic relationship recognized by the law that gives the privileged character to communications made during its existence. Thus, parents will be compelled to disclose communi-

[8] *Carter* v. *Hill,* 81 Mich. 275, 45 N. W. 988.

[9] *E. W. M.* v. *J. C. M.* 2 Tenn. Ch. App. 463, 484.

[10] *Henry* v. *Sneed,* 99 Mo. 407, 17 Am. St. Rep. 580, 12 S. W. 663; *State* v. *Gabriel,* 88 Mo. 631; *Darrier* v. *Darrier,* 58 Mo. 222; *Moeckel* v. *Heim,* 134 Mo. 576, 36 S. W. 226.

[11] *Reynolds* v. *State,* 147 Ind. 3, 46 N. E. 31; *Beyerline* v. *State,* 147 Ind. 125, 45 N. E. 772; *Polson* v. *State,* 137 Ind. 519, 35 N. E. 907.

[12] *Shepherd* v. *Com.* 119 Ky. 931, 85 S. W. 191.

[13] *Fowler* v. *Fowler,* 19 N. Y. Civ. Proc. Rep. 282, 11 N. Y. Supp. 419; *State* v. *Mann,* 39 Wash. 144, 81 Pac. 561.

[14] *State* v. *Ryan,* 30 La. Ann. 1176; *Arnett* v. *Com.* 114 Ky. 593, 71 S. W. 635; *Bright* v. *Com.* 120 Ky. 298, 117 Am. St. Rep. 590, 86 S. W. 527; *Hilbert* v. *Com.* 21 Ky. L. Rep. 537, 51 S. W. 817.

cations from their children,[1] servants, from their employers,[2] and friends, from each other.[3]

§ 518. Parents cannot assail legitimacy.—The lips of parents are, as a rule, sealed on the question of sexual intercourse, so far as such testimony would go to assail the legitimacy of children. Whether there was such intercourse cannot be inquired of either father or mother, either directly or by aid of circumstances from which the result could be inferred.[1] This inviolability, however, is limited to cases where legitimacy is at issue, and does not preclude the examination, in cases of bastardy, of a married woman as to her adultery with a third person, when nonaccess with her husband is first proved.[2] And it has been held competent for a widow, after

[1] Gilbert, Ev. 135.

[2] *State* v. *Charity,* 14 N. C. (2 Dev. L.) 543; *Isham* v. *State,* 6 How. (Miss.) 35.

[3] *Smith* v. *Daniell,* L. R. 18 Eq. 649, 44 L. J. Ch. N. S. 189, 30 L. T. N. S. 752, 22 Week. Rep. 856.

[1] *Rex* v. *Luffe,* 8 East, 193, 9 Revised Rep. 406; *Goodright ex dem. Stevens* v. *Moss,* Cowp. pt. 2, p. 594; *Wright* v. *Holdgate,* 3 Car. & K. 158; *Rex* v. *Sourton,* 5 Ad. & El. 180, 6 Nev. & M. 575, 2 Harr. & W. 209, 5 L. J. Mag. Cas. N. S. 100; *Reg.* v. *Mansfield,* 1 Q. B. 444, 1 Gale & D. 7, 10 L. J. Mag. Cas. N. S. 97, 5 Jur. 505; *Anoymous* v. *Anonymous,* 22 Beav. 481; *Re Rideout,* L. R. 10 Eq. 41; *Chamberlain* v. *People,* 23 N. Y. 85, 80 Am. Dec. 255; *Boykin* v. *Boykin,* 70 N. C. 262, 16 Am. Rep. 776.

See supra, § 390; *Re Mills,* 137 Cal. 298, 92 Am. St. Rep. 175, 70 Pac. 91; *Tate* v. *Penne,* 7 Mart. N. S. 548, 555; *Canton* v. *Bentley,* 11 Mass. 441; *Hemmenway* v. *Towner,* 1 Allen, 209; *Haddock* v. *Boston & M. R. Co.* 3 Allen, 298, 81 Am. Dec. 656; *Abington* v. *Duxbury,* 105 Mass. 287, 290; *Egbert* v. *Greenwalt,* 44 Mich. 245, 248, 38 Am. Rep. 260, 6 N. W. 656; *People ex rel. Crandall* v. *Ontario,* 15 Barb. 286, 292; *State* v. *Pettaway,* 10 N. C. (3 Hawks) 623, 625; *State* v. *Wilson,* 32 N. C. (10 Ired. L.) 131; *Bell* v. *Territory,* 8 Okla. 75, 56 Pac. 853; *Dennison* v. *Page,* 29 Pa. 420, 423, 62 Am. Dec. 644; *Johnson* v. *Chapman,* 45 N. C. (Busbee, Eq.) 213; *Simon* v. *State,* 31 Tex. Crim. Rep. 186, 196, 199, 37 Am. St. Rep. 802, 20 S. W. 399, 716; *Mink* v. *State,* 60 Wis. 583, 585, 50 Am. Rep. 386, 19 N. W. 445; *Watts* v. *Owens,* 62 Wis. 512, 519, 22 N. W. 720.

[2] *Cope* v. *Cope,* 1 Moody & R. 272, 5 Car. & P. 604; *Rex* v. *Reading,* Cas. Hardw. 79; *Com.* v. *Connelly,*

her husband's death, to testify in support of her children's legitimacy.[3] But the mother of a child begotten before marriage, though born after, is incompetent to prove that the child was not begotten by the husband.[4] The privilege thus established is not affected by the statutes removing disability from interest.[5] And it does not extend to cases of sexual abuse of wife by husband.[6]

1 Browne (Pa.) 284; *Com.* v. *Shepherd,* 6 Binn. 283, 6 Am. Dec. 449; *State* v. *Pettaway,* 10 N. C. (3 Hawks) 623.

[3] *Moseley* v. *Eakin,* 15 Rich. L. 324.

[4] *Dennison* v. *Page,* 29 Pa. 420, 62 Am. Dec. 644.

[5] Wharton, Ev. § 608; *Egbert* v. *Greenwalt,* 44 Mich. 245, 38 Am. Rep. 260, 6 N. W. 654; *Chamberlain* v. *People,* 23 N. Y. 85, 80 Am. Dec. 255; *Tioga County* v. *South Creek Twp.* 75 Pa. 433.

[6] *Melvin* v. *Melvin,* 58 N. H. 569, 42 Am. Rep. 605.