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RECENT CRIMINAL CASES

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ACCOMPLICE — DEFINITION — EFFECT OF UNCORROBORATED TESTIMONY.—[Illinois] The defendant was convicted under an indictment for *receiving stolen goods*. The conviction was based solely upon the uncorroborated testimony of the thief, one Morgan. The witnesses for the defense were both numerous and well substantiated. *Held,* on appeal: judgment reversed on the ground that the witness Morgan was an accomplice of the defendant, and though "the testimony of an accomplice is competent, it is subject to great suspicion, and should be acted on with great caution. If such testimony is of such a character as to prove guilt beyond a reasonable doubt, it will authorize a verdict of guilty. Conviction on the uncorroborated testimony of an accomplice, however, will not be sustained unless the record is substantially free from prejudicial error." The court found such error in attempts of the prosecution to introduce wholly irrelevant matter, with the manifest intent of prejudicing the jury: *People* v. *Gordon* (Ill. 1931) 176 N. E. 722.

Aside from a certain looseness of phraseology, the statement of law above quoted is fully in line with established authority both in this and in other jurisdictions: *People* v. *Johnson* (1924) 314 Ill. 486, 145 N. E. 703; *People* v. *Lewis* (1924) 313 Ill. 312, 145 N. E. 149; *People* v. *McGeoghegan* (1927) 325 Ill. 337, 156 N. E. 378; *Faulkner* v. *Town of South Boston* (1924) 139 Va. 569, 123 S. E. 358; *U. S.* v. *Mule* (C. C. A. 2nd, 1930) 45 Fed. (2nd) 132. Cf. *Cobb* v. *State* (1924) 20 Ala. App. 3, 100 S. 463; *Sykes* v. *U. S.* (1913) 204 F. 909, 123 C. C. A. 205. Of course, what the court indubitably means is that the record of a conviction on an accomplice's uncorroborated testimony will be reviewed more carefully than in a case where there is a substantial amount of corroborative evidence against the accused. For to frame the rule as the court does, results in failure to distinguish this class of case from any other. More explicitly, it is true of any criminal case that the record must be substantially free from prejudicial error, or that the jury must

be convinced beyond a reasonable doubt of the guilt of the accused.

The rule that the uncorroborated testimony of an accomplice may be sufficient to sustain a conviction obtained at common law and now prevails in a majority of the states and in the Federal Courts: Comment (1929) 14 Iowa Law Rev. 480; *People* v. *Birger* (1928) 329 Ill. 352, 160 N. E. 564; *People* v. *Buskievich* (1928) 330 Ill. 352, 162 N. E. 196; *Rogers* v. *U. S.* (C. C. A. 10th, 1931) 46 Fed. (2nd) 38; *Tinsley* v. *U. S.* (C. C. A. 8th, 1930) 43 Fed. (2nd) 890; *State* v. *McIntyre* (1931) 132 Kan. 43, 294 Pac. 865; *Hermann* v. *State* (Ind. 1930) 170 N. E. 786. It is an inherent part of this rule, however, as the court says, that such testimony should be subjected to the closest scrutiny: *People* v. *Cotell* (1921) 298 Ill. 207, 131 N. E. 659; *People* v. *Andrae* (1920) 295 Ill. 445, 129 N. E. 178; *People* v. *Schallman* (1921) 295 Ill. 560, 129 N. E. 569; *People* v. *Pattin* (1919) 290 Ill. 542, 125 N. E. 248. *Faulkner* v. *Town of South Boston,* supra: *Rosen* v. *U. S.* (1921) 271 Fed. 651; *Myers* v. *State* (1901) 43 Fla. 500, 31 So. 275. In a few states the general rule has been departed from by means of statutory provisions requiring corroboration of the testimony of accomplices before conviction may be had thereon: Minn. G. S. 1923, sec. 9903; Iowa Code 1924, sec. 13901; Or. Code 1920, sec. 1540; Okla. Comp. Stat. (1921) sec. 2701; Cal. Pen. Code 1923, sec. 1111. It may be observed that in addition to this requirement for corroboration, the California Code also specifically requires that the jury be instructed to consider the testimony of an accomplice with great caution: Cal Code Civ. Proc. 1923, sec. 2061.

However, in addition to a review of the rules discussed, the case also lends itself to further and more pertinent discussion. It is not clear why the court chose to consider the case as one involving the uncorroborated testimony of an accomplice. The testimony in question was that of the thief from whom the goods were allegedly received. It appears erroneous to consider the thief as an accomplice of the one who received the stolen goods. The general test by which to determine whether one is an accomplice of a defendant on trial is whether or not he could be indicted and punished for the crime with which the defendant is charged: *People* v. *Sapp* (1917) 282 Ill. 51, 118 N. E. 416; *Liegois* v. *State* (1914) 73 Tex. Cr. 142, 164 S. W. 382; *People* v. *Sweeney* (1914) 213 N. Y. 37, 106 N. E. 913. Cf. *People* v. *Coffey* (1911) 161 Cal. 433, 119 Pac. 901. And "it is elementary law that one who steals property cannot be convicted of receiving the property stolen," but is guilty of a separate and distinct offense: *State* v. *Scott* (Iowa 1907) 113 N. W. 758; *State* v. *Boyd* (Iowa 1922) 191 N. W. 86; *State* v. *Feinberg* (Iowa 1910) 124 N. W. 208; 2 *Bishop* "Criminal Law" (9th ed. 1923) Par. 1140 cl. 2; *Reser* v. *State* (1924) 27 Ariz. 43, 229 Pac. 936; *Adams* v. *State* (1920) 25 Ga. App. 399, 103 S. E. 722; *State* v. *Glazebrook* (Mo. 1922) 242 S. W. 928; *Buttry* v. *State* (1921) 180 Okla. Cr. 330, 194 Pac. 286.

Undoubtedly the case should have been reversed, either on the ground of insufficient evidence to support the verdict or prejudicial error rising out of misconduct of the prosecution. But, at least technically, there seems to have been no reason for the court to apply the prin-

ciples relating to convictions had on the uncorroborated testimony of accomplices.

HARRY SHRIMAN.

CRIMINAL LAW—MERGER OF OFFENSES — SENTENCE AND PUNISHMENT.—[Illinois] In June, 1903, James Sammons and two others were indicted for the robbery of Michael Larner while armed with a dangerous weapon with the intent, if resisted, to kill and maim Larner. The verdict found Sammons guilty of robbery in manner and form as charged in the indictment, and that at the time of the robbery he was armed with a deadly weapon with intent to kill and maim, if resisted, in manner and form as charged in the indictment. On February 13, 1904, the court overruled motions for new trial and in arrest of judgment, and sentenced Sammons to the penitentiary "for the crime of robbery, etc., whereof he stands convicted . . . until discharged by the State Board of Pardons as authorized and directed by law, provided such term of imprisonment shall not exceed the maximum term for the crime of which the said defendant was convicted and sentenced." Sammons and the same two other men had also been indicted in the same court for the murder of Patrick Barrett, and on February 25, 1904, a jury found them guilty as charged, and fixed the punishment of Sammons at death. There was judgment on the verdict, the court setting June 17, 1904, as the day of execution. On June 16 the Governor commuted his sentence to life imprisonment, and the next day the commutation, together with the mittimus issued on conviction for robbery were delivered to the warden at Joliet, and Sammons began his term of imprisonment. Nineteen years later, on June 20, 1923, a second commutation by the Governor reduced his murder sentence to fifty years. One month later the Division of Pardons and Paroles gave him a conditional parole, and on January 28, 1926, ordered his final discharge "for and on account of his conviction for murder." The Governor approved this discharge. On November 26, 1930, the Division of Pardons and Paroles entered an order expunging and declaring void both the conditional parole and the final discharge, and directing the warden to issue a warrant for the return of Sammons to the penitentiary. He was returned the next day. No commutation or order had ever been made respecting the robbery sentence. A petition alleging Sammons to have been imprisoned illegally, and seeking his release on habeas corpus, was filed in the Supreme Court. The petitioner contended: 1. That the court by its death sentence abrogated the earlier sentence for robbery, or that, in any event, the robbery sentence was abrogated by, or merged in, the sentence for murder. 2. That even if the robbery sentence had been effective, the maximum punishment under it could have been only fourteen years imprisonment, and it had expired before the first parole was granted. 3. That the first two orders of the Parole Board were valid, and the third, expunging them, was void. *Held:* that the robbery sentence was neither abrogated by, nor merged in, the murder sentence, that the sentence was life imprisonment, and, in the absence of action by or under the executive authority releasing Sammons from that sentence, he must continue to serve it. Therefore he was remanded to the custody of respondent; *People ex*

rel. Sammons v. *Hill, Warden* (1931) 345 Ill. 103, 177 N. E. 723.

The court argued that if there had been an abandonment of the robbery sentence the mittimus would not have been delivered to the warden, and Sammons would not have begun to serve his sentence under it. The court also stated that there could have been no merger of the judgments which were absolutely separate and distinct. Before the first judgment there could have been no merger of the offenses of robbery and murder: *Duvall* v. *State* (1924) 111 Ohio St. 657, 146 N. E. 90. The merger of one offense in another occurs when the same criminal act constitutes both a felony and a misdemeanor. In such a case at common law the misdemeanor is merged in the felony, and the latter only is punishable: *Johnson* v. *State* (1857) 26 N. J. L. 313. But this doctrine applies only where the same criminal act constitutes both offenses, and there is identity of time, place, and circumstances: *Johnson* v. *State* (1861) 29 N. J. L. 453; *Hughes* v. *Commonwealth* (1909) 131 Ky. 502, 115 S. W. 744. The offenses must be of different grades, and the rule has no application where both crimes are misdemeanors, or both are felonies, though one may be of much graver character than the other, and punishable with much more severity: *Orr* v. *People* (1896) 63 Ill. App. 305; *Bell* v. *State* (1872) 48 Ala. 684; *State* v. *Dineen* (1865) 10 Minn. 407. In many jurisdictions the rule of merger as formerly existing at common law has been confined to very narrow limits: *Graff* v. *People* (1904) 208 Ill. 312, 70 N. E. 299; *Bell* v. *State* (1898) 103 Ga. 397, 30 S. E. 294.

The commutations by the Governor both expressly recited the conviction for murder, and neither mentioned the robbery conviction. The final discharge by its terms related solely to the murder conviction. The court therefore concluded that the robbery sentence remained wholly unaffected by the orders or proceedings which concerned only the conviction for murder.

The weight of authority supports the rule that two or more sentences of a defendant to the same place of confinement run concurrently in the absence of specific provisions in the judgment to the contrary: *Ex parte Gafford* (1899) 25 Nev. 101, 57 Pac. 484. *Fortson* v. *Elbert* (1902) 117 Ga. 149, 43 S. E. 492; *Ex parte Black* (1913) 162 N. C. 457, 78 S. E. 273; *In re Breton* (1899) 93 Me. 39, 44 Atl. 125. The same rule applies where the sentences are from different courts: *Zerbst* v. *Lyman* (1919) 255 Fed. 609; *People* v. *Graydon* (1928) 329 Ill. 398, 160 N. E. 748. Contra; *Hightower* v. *Hollis* (1904) 121 Ga. 159, 48 S. E. 969; *State* v. *Ryder* (Neb. 1930) 230 N. W. 586. Therefore, if the robbery sentence had been for fourteen years only as the petitioner contended, it would have expired before the time of the parole, and so it became necessary to inquire whether the conviction was for robbery or for the aggravated offense. The court stated the rule that "in determining the insufficiency of a verdict and a judgment thereon, the entire record will be searched, and all parts of the record interpreted together, and a deficiency at one place may be cured by what appears at another: *People* v. *Murphy* (1900) 188 Ill. 144, 58 N. E. 984; *People* v. *Tierney* (1911) 250 Ill. 515, 95 N. E. 447. Under the statute in force in 1904 it was necessary for a conviction of the aggravated offense of robbery that

the jury find the intent of the accused to kill and maim if resisted: *McKevitt* v. *People* (1904) 208 Ill. 460, 70 N. E. 693; *People* v. *Nowasky* (1912) 254 Ill. 146, 98 N. E. 242. This requirement would seem to have been satisfied by the verdict in the case under consideration, and the court approved the verdict by overruling the motion for a new trial, and sentencing Sammons to the penitentiary "for the crime of robbery, etc., whereof he stands convicted." As the court stated it: "The indictment charged and the jury by their verdict found that Sammons had committed the aggravated offense of robbery. The verdict, by the rendition of judgment upon it, determined not only the character of the crime, but also the maximum term of imprisonment: *People* v. *Secco* (1922) 303 Ill. 546, 135 N. E. 884. The punishment prescribed for the crime of robbery while armed with a dangerous weapon with intent, if resisted, to kill and maim the victim, at the time of Sammons conviction was imprisonment for any term of years or for life. 2 Jones and Addingtons Ill. Stat. Ann. pp. 2150, 2151, par. 3924. Sammons was sentenced to imprisonment in the penitentiary for a term "which shall not exceed the maximum term for the crime for which the said defendant was convicted and sentenced." The sentence was governed by the provisions of the Parole Act then in effect, and the sentence was for the maximum term of imprisonment prescribed by law." *People* v. *Connors* (1920) 291 Ill. 614, 126 N. E. 595; *People* v. *Peters* (1910) 246 Ill. 351, 92 N. E. 889; *People* v. *Campbell* (1910) 246 Ill. 432, 92 N. E. 919.

This case presents several interesting questions which were not touched upon by the court, and upon which the authorities seem to be silent. Did the sentence of death for murder abrogate the earlier robbery sentence since it was obviously impossible for Sammons to serve both? If so, did the commutation of the death sentence to life imprisonment revive the robbery sentence? Granting that the orders under the Parole Act were designed to terminate the imprisonment and change the status of the prisoner to that of a free man, restoring him to his former place in society, how is it logically possible to say that a parole and subsequent final discharge were limited to one offense, the prisoner to remain and serve the rest of a sentence arising under another? Did this impossibility, if it is an impossibility, invalidate the parole and subsequent discharge, and is Sammons now imprisoned under two life sentences, or was the order valid and irrevocable in so far as it wiped out the offense and sentence for murder, and inoperative only in restoring Sammons to freedom?

DAVID S. SAMPSELL.

CRIMINAL LAW — EXAMINATION OF JURORS — RACIAL PREJUDICE.— [United States] The defendant, a negro, was convicted of the first degree murder of a white policeman in the District of Columbia. The trial court refused to examine the jury on its voir dire to determine whether any juror, because of the fact that the defendant was a negro and the deceased a white man, might be racially prejudiced in such a manner as would prevent his giving an impartial verdict. *Held:* reversed: *Aldridge* v. *U. S.* (1931) 51 Sup. Ct. 470 (reversing *Aldridge* v. *United States* (App. D. C. 1931) 47 F. (2nd) 407).

Amendment VI of the Federal Constitution provides for a speedy and public trial by an impartial jury. In criminal cases, where the life of the accused is at stake, counsel for the defendant is apt to put so many questions to the prospective jurors in attempting to obtain an impartial jury as to delay considerably the progress of the trial. To what extent the judge should curb counsel in this questioning is a perplexing problem. Difficulty arises in determining not only at what length counsel should question the jurors, but also what inquiries should be put to them. The court has to determine whether or not the inquiries are pertinent to the case at hand and it is within its discretion to limit or permit the questioning: *Bonfils* v. *Hayed* (1921) 70 Colo. 336, 201 P. 677; *Commonwealth* v. *Spencer* (1912) 212 Mass. 438, 99 N. E. 266.

Most jurisdictions have allowed counsel to inquire from the jurors on their voir dire whether they were racially prejudiced to such an extent as would prevent their giving an impartial verdict: *People* v. *Reyes and Valencia* (1855) 5 Cal. 347; *Potter* v. *State* (1919) 86 Tex. Cr. R. 381, 216 S. W. 886; *Pinder* v. *State* (1891) 27 Fla. 370, 8 S. 837; *State* v. *McAfee* (1870) 64 N. C. 339; *Hill* v. *State* (1916) 112 Miss. 260, 72 S. 1003; *Horst* v. *Silverman* (1898) 20 Wash. 233, 55 P. 52.

Prior to the principal case, the question of racial prejudice was considered by an appellate Federal court, and an entirely different result was obtained. This court argued that where the colored race is accorded the same privileges and rights that are given to the white race, and the social situation in the community is not such as to create a feeling of prejudice, the refusal to permit such an inquiry is not an abuse of discretion: *Crawford* v. *United States* (1930) 59 App. D. C. 356, 41 F. (2nd) 979. This reasoning was refuted, however, by the United States Supreme Court in the instant case, finding that the main determination is not that of community feeling, but whether the particular veniremen are biased to such an extent as to prevent their rendering an impartial verdict, which bias or prejudice could not be ascertained without proper examination.

Mr. Justice McReynolds, dissenting, looked to the practical side of the case, and did not feel that the facts warranted a reversal, taking the position that the courts should not "magnify theoretical possibilities" where an individual is obviously guilty of a crime: 51 Sup. Ct. at pages 473-474. There is an increasing tendency for courts to veer away from reversing cases on mere technicalities where the error is not prejudicial to the substantial rights of the defendant: *State* v. *Mulroy* (1922) 152 Minn. 423, 189 N. W. 441; *State* v. *Barnett* (1918) 202 Ala. 191, 79 S. 677; *Crafford* v. *State* (1925) 169 Ark. 225, 273 S. W. 13; *Dunaway* v. *State* (1925) 90 Fla. 142, 105 S. 816; *People* v. *O'Brien* (1917) 277 Ill. 305, 115 N. E. 123; *Meno* v. *State* (1925) 197 Ind. 16, 148 N. E. 420; *People* v. *Kasem* (1925) 230 Mich. 278, 203 N. W. 135; *State* v. *Webb* (1917) 36 N. D. 235, 162 N. W. 362. Especially is this true where the accused is plainly guilty: *Simmons* v. *United States* (C. C. A. 6th 1924) 300 F. 321. In the principal case, the dissent pointed out that there is no actual showing that the refusal to allow the inquiry would work to defendant's

detriment, that is, that any juror was prejudiced.

It seems that racial prejudice is not dependent upon location or social situation. Such prejudice may exist practically everywhere, each race, perhaps, thinking his own superior to the other. Mere race prejudice, however, should not disqualify an individual from becoming a juror: *Bass* v. *State* (1910) 59 Tex. Cr. R. 186, 127 S. W. 1020 *State* v. *Casey* (1892) 44 La. Ann. 969, 11 S. 583; *State* v. *Green* (1910) 229 Mo. 642, 129 S. W. 700; *Commonwealth* v. *DePalma* (1920) 268 Pa. 25, 110 A. 756. The further inquiry should be made as to whether the prejudiced state of mind would prevent him from rendering an impartial verdict. If the prospective juror states that he can give the accused a fair trial, in spite of his racial prejudice such bias should not work to his disqualification. But whatever the degree of prejudice necessary to disqualify a juror, surely it is a better procedure to ask the juror whether he is so biased to such an extent as to cause him to render an impartial verdict, and upon a negative answer allow him to remain as a juror, than to permit a possibly prejudiced juror to try the accused without such inquiry.

EDWARD S. ALTERSOHN.

CRIMINAL LAW—HOMICIDE—EXHUMATION OF BODY OF DECEASED ON MOTION OF DEFENDANT.—[Kentucky] The defendant, with others, had held up and robbed a bank and was making his escape from the immediate vicinity in an automobile. The deceased, a private citizen living in an adjoining town, received a telephone message that the robbers were coming that way and to intercept them. Thereupon, he and a companion, one Kirby, also a private citizen, took the former's automobile and set out. After going a short distance, the deceased met the robbers, who turned their car down a side road and fled, with the deceased in close pursuit. While proceeding thus, the road was found to be blocked by a posse; both cars were brought to a sudden stop, and pursuers and pursued got out of their respective cars at practically the same time. Simultaneously, shots from revolvers and rifles were fired from both sides, and the deceased was killed by a shot in the back as he was alighting from his car. Defendant was shooting a revolver; Kirby, deceased's companion, was armed with a rifle, which was discharged as he was alighting from his side of the car, the bullet passing through the car door.

The State's theory of the case was that the defendant had fired the shot which killed the deceased; the defendant's theory was that the deceased had been shot by the accidental firing of his companion's rifle. A motion was filed by the defendant's attorney, supported by an unsworn affidavit signed only by the attorney, to exhume the body of the deceased, at the defendant's expense, for the purpose of determining the type of bullet which caused the death, and also the direction and angle of fire. This motion was denied and an exception taken. The refusal of the motion was made the focal point of the case on appeal. *Held:* that the overruling of the motion was error and that the judgment should be reversed and a new trial granted: *Sexson* v. *Commonwealth* (1931) 239 Ky. 177, 39 S. W. (2) 229. There was a dissenting opinion by

two Justices on the grounds that there was no showing that the exhumation was necessary in the interests of justice in order to disclose new and pertinent evidence; that the motion to exhume was defective in that it was not sworn to or signed by the defendant; that there was no averment that the defendant would defray the expense of an expert in ballistics should a bullet be found; and that the evidence clearly showed the guilt of the defendant so that his interests had not been prejudiced by the refusal of the motion: *Sexson* v. *Commonwealth* (1931) 239 Ky. at 179.

The question of the privilege of a defendant in a criminal trial to require the exhumation of the body of the deceased for the purpose of securing evidence in aid of his defense appears to have come before courts of last resort in comparatively few cases. In the leading case on the subject, the Court of Criminal Appeals of Texas laid down the general principle, now well established in most jurisdictions, that the granting to a defendant of permission to exhume the body lies within the discretion of the trial court, and that exhumation should be allowed only where there is a strong showing that new and vital facts will be disclosed thereby, and where truth and justice require it for the purpose of protecting life and property: *Gray* v. *State* (1908) 55 Tex. Cr. App. 90, 114 S. W. 635. In its opinion, the Court drew attention to the fact that the State has the right to exhume a body to obtain evidence to make out its case, and that a defendant should have the same advantage in making his defense. In that case the defendant was charged with a murder by shooting. There had been no eyewitnesses to the crime, and the body had been buried after a cursory examination by casual observers. Furthermore, there was a sharp conflict in the evidence as to the position and appearance of the bullet-holes, with reference to the direction and angle of fire of the fatal shot, and also as to the question whether the deceased had been shot from the front or the rear. In this state of the evidence, the Court held that an exhumation was necessary and that it was error to refuse it.

The above-mentioned principle was followed in a similar case in which there was a conflict in the testimony as to whether the deceased had been killed by a bullet fired from a rifle from in front, or from a revolver fired from the rear. In this case, the Supreme Judicial Court of Maine held that it was error to refuse a motion to exhume, regardless of the fact that an examination of the body had been made by the State Medical Examiner, where such examination was lacking in vital facts as to the character of the fatal bullet and the direction of fire: *State* v. *Wood* (1928) 127 Me. 197, 142 Atl. 728. See also a dictum to the effect that it is within the discretion of the trial court to grant a motion to exhume, and where there is a reasonable belief that pertinent facts will be disclosed thereby, it is the duty of the court to so order: *Gilberry* v. *State* (1929) 113 Tex. Cr. App. 9, 18 S. W. (2) 615. The principle that it is within the discretion of the trial court to grant a motion for exhumation has been recognized in the following cases: *Commonwealth* v. *Marshall* (1927) 287 Pa. 512, 135 Atl. 301; *Johnson* v. *State* (1927) 106 Tex. Cr. App. 482, 293 S. W. 173; *Moss* v. *State*

(1907) 152 Ala. 30, 44 So. 598; *People* v. *Campbell* (1918) 282 Ill. 614, 118 N. E. 1032; *Shields* v. *State* (1921) 89 Tex. Cr. App. 421, 231 S. W. 779.

On the other hand, where is appears that no new or pertinent evidence will be disclosed by an exhumation, a refusal of a motion to exhume has been held proper: *Shields* v. *State, supra* (a case in which the witnesses were in accord as to the position of the entrance and exit holes of the bullet, where there was no contention that the deceased had been shot in the back, and where an autopsy, from the nature of the situation, would have failed to reveal whether the deceased was shot while standing up or lying down); *Johnson* v. *State, supra* (refusal of exhumation proper where no new evidence would be disclosed by an autopsy); *Moss* v. *State, supra* (refusal of exhumation proper where a prior autopsy had disclosed the relevant facts and a second one could reveal no new evidence); *People* v. *Campbell, supra* (refusal of exhumation proper where the manner of death was sufficiently established by evidence already submitted, and the only question was as to the identity of the murderer); *Commonwealth* v. *Marshall, supra* (refusal of exhumation proper where the motion to exhume did not show what was proposed to be disclosed, in addition to evidence already submitted). It has been further held that a motion to exhume was properly refused because of failure on the part of the defendant to notify the relatives of the deceased of the proposed exhumation: *Commonwealth* v. *Marshall, supra.*

Where exhumation is allowed, the expenses incidental thereto are to be borne by the defendant; the State may refuse to appoint commissioners to exhume and examine a body at the State's expense, without prejudicing the right of the defendant to exhume at his own expense: *Johnson* v. *State, supra.* Even where a defendant is unable to defray the expense of exhumation, he cannot demand that it be done at the expense of the State: *Salisbury* v. *Commonwealth* (1881) 79 Ky. 425. Where it is resorted to in aid of the prosecution, it has been held that such autopsy at the instance of the District Attorney is proper and need not be under the direction of the coroner: *Commonwealth* v. *Grether* (1902) 214 Pa. 203, 53 Atl. 753. Once exhumation has been had, the evidence disclosed thereby has been held to be admissible: *Bilberry* v. *State, supra; Laney* v. *United States* (1923) 54 App. D. C. 56, 294 Fed. 412 (even without notice to the defendant where the exhumation has been made by the State).

In the instant case, the Court was in accord with the general principle in considering the question of exhumation. It would appear that the evidence was clearly such as to warrant the granting of a motion to exhume, that new and vital facts would be disclosed and the course of justice furthered thereby. It was material to the defendant's case to show whether the deceased was killed by a bullet from a revolver or from a rifle, and whether such bullet entered the body of the deceased from a direction and at an angle from which he could have shot. In view of the present development of the modern science of ballistics, it seems unquestionable that these facts could have been disclosed upon examination, and therefore the ascertainment of them was vital to the defense. See Comment

(1931) 21 JOURNAL OF CRIMINAL LAW AND CRIMINOLOGY 607; *Serhant,* "Admission of Ballistics in Evidence," 2 American Journal of Police Science 202.

STUART C. ABBEY.

CRIMINAL LAW—PUNISHMENT OF CHILD BY TEACHER AS MISDEMEANOR.—[California] A school boy seven years old was punished by the defendant to whom it was reported that the boy had been fighting after school. A wooden paddle was used. Under the California Statute any person who wilfully inflicts on any child "pain or mental suffering is guilty of a misdemeanor": Penal Code of Calif. (1923) Pt. 1, Tit. 9, Ch. 2, Sec. 283a. The magistrate found that punishment of the child by the defendant without having confirmed the hearsay report was unjustifiable within the meaning of this statute. Motions for a new trial and in arrest of judgment were denied. *Held:* on appeal, that the judgment and order should be affirmed; that under the Statute, it is for the jury to determine, under the circumstances of each case, whether or not the infliction of pain or mental suffering is unwarrantable both as to the necessity for as well as the reasonableness of the punishment. Neither malice nor specific intent is an element of the offense: *People* v. *Curtiss* (1931 Calif.) 300 P. 801.

Reasonable punishment of a child seems to be based upon a belief that under certain circumstances punishment is a proper means of discipline and is ultimately beneficial: See *State* v. *Pendergrass* (1837) 19 N. C. (2 Dev. & Bat. Law) 365, 366, 31 Am. Dec. 416, 417; *State* v. *Koonse* (1907) 123 Mo. App. 655, 101 S. W. 139, 141. A teacher stands *in loco parentis* in respect to offenses committed within his jurisdiction and responsibility as a teacher: *Lander* v. *Seaver* (1859) 32 Vt. 114, 76 Am. Dec. 156 (pupil called teacher "Old Jack Seaver" before other pupils); *Danenhoffer* v. *State* (1879) 69 Ind. 295, 35 Am. Rep. 216 (pupil did not deliver a note); *O'Rourke* v. *Walker* (1925) 101 Conn. 130, 128 A. 25 (boys tormenting girls on the way home from school); *Stephens* v. *State* (1906) 44 Tex. Cr. 67, 68 S. W. 281 (pupil writing obscene note in school). See also Comments (1925) 24 Mich. L. Rev. 80; 4 Va. L. Reg. (N. S.) 415-18; (1926) 11 Cornell L. Q. 266; 12 Ann. Cases 353; 76 Am. Dec. 164. For such offenses the common law rule seems to be that the teacher may administer reasonable or moderate corporal punishment: *State* v. *Thornton* (1904) 136 N. C. 610, 48 S. E. 602; *Heritage* v. *Dodge* (1887) 64 N. H. 297, 9 A. 722; *Stephens* v. *State, supra;* on the other hand, it has been held that immoderate, unreasonable, or malicious punishment of a child by a teacher is assault and battery: see *Hathaway* v. *Rice* (1846) 19 Vt. 102, 109; Cf. *State* v. *Bitman* (1862) 13 Ia. 485, 486 (parent and child relation). Some states have enacted protective legislation making "unreasonable," "unjust," or "cruel" treatment of a child a crime: Ill. Rev. Stat. (Cahill, 1931) ch. 38, sec. 91 (a misdemeanor); Comp. Laws of Mich (1929) ch. 247, sec. 12820 (a felony); Penal Code of Ohio (1930) Title I, ch. 3, sec. 12428 (a misdemeanor) Pa. Stat. (1920 West Pub. Co.) sec. 13228 (a misdemeanor); Penal Code of Calif. (1923) Pt. 1, Tit. 9, ch. 2, sec. 273a.

The common law doctrine of "reasonable punishment" refers both

to inflicting any punishment in the first instance and inflicting such severe punishment in a situation in which some punishment is warranted. Some cases hold that the question of the necessity of any punishment is solely for the teacher to decide and is not open to examination by the court: *Stephens* v. *State, supra* (under Texas Penal Code art. 593); *State* v. *Jones* (1886) 95 N. C. 588, 59 Am. Rep. 282; *Patterson* v. *Nutter* (1886) 76 Me. 509, 7 A. 273, 57 Am. Rep. 818. Other cases hold, in the absence of statute, that whether any punishment is warranted is a question for the jury: *Clasen* v. *Pruhs* (1903) 69 Neb. 278, 95 N. W. 640.

Also, as to the amount of punishment there are two distinct lines of authority. Some cases hold that all punishment is reasonable which does not result in disfigurement of or permanent injury to the child, or which was not prompted by legal malice: *Dean* v. *State* (1890) 89 Ala. 46, 8 S. 38; followed in *Roberson* v. *State* (1928) 22 Ala. App. 413, 116 S. 317; *State* v. *Thornton* (1904) 136 N. C. 610, 48 S. E. 602; *State* v. *Pendergrass, supra.* Other cases interpret "reasonable punishment" as a standard to be used by the jury in determining the excessiveness of the punishment. Under the latter theory, permanent injury or malice is not made an element of unreasonable punishment: *Ely* v. *State* (1913) 68 Tex. Cr. 562, 152 S. W. 631; *Patterson* v. *Nutter, supra; Lander* v. *Seaver, supra; People* v. *Green* (1909) 155 Mich. 524, 119 N. W. 1087, 21 L. R. A. (N. S.) 216 (parental relationship); *Hinkle* v. *State* (Ind. 1891) 26 N. E. 778 (parental relationship.) But see, *Greer* v. *State* (Tex. 1907) 106 S. W. 359. It is uniformly held that punishment provoked by a malicious intent is a crime. Malice may be of two kinds, malice in fact and malice in law. Malice in law is imputed from the excessiveness of the punishment: *Boyd* v. *State* (1889) 88 Ala. 169, 7 S. 268, 16 Am. St. Rep. 31 (defendant used a stick and also struck pupil in the face with his fist); *State* v. *Koonse, supra* (defendant used a buggy whip).

The teacher is favored by two presumptions: the first, which is present in every criminal case, that the defendant is presumed innocent until proven guilty beyond a reasonable doubt: *Greer* v. *State, supra;* second, where no improper weapon is used, chastisement was proper: *Anderson* v. *State* (1859) 3 Head 454, 75 Am. Dec. 774; *Van Vactor* v. *State* (1887) 113 Ind. 276, 3 Am. St. 645.

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