STATE OF VERMONT

v.

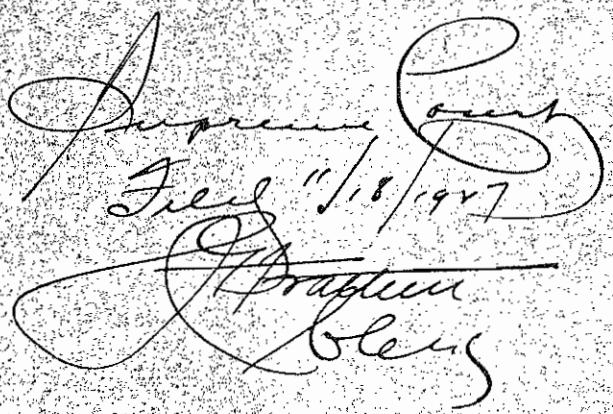
JOHN C. WINTERS

SUPREME COURT

WINDSOR COUNTY

JANUARY TERM, 1928

CASE



STATE

v.

JOHN C. WINTERS

WINDSOR COUNTY COURT

DECEMBER TERM, 1926

RESPONDENT'S EXCEPTIONS

This is a prosecution by indictment for murder; trial by jury at said Term; Thompson, J. presiding; verdict, guilty of murder in the first degree; judgment upon verdict; exceptions by the respondent; respondent not sentenced.

During the course of the trial the State offered various evidence, which was objected to by the respondent, admitted by the Court, and exceptions allowed to the respondent for such admission. The respondent offered various evidence which was objected to by the State, excluded by the Court, and exceptions allowed to the respondent for such exclusion. Certain motions were made by the respondent and by the State which were decided by the Court adversely to the contention of the respondent, and to such rulings the respondent was allowed exceptions. During the course of the arguments to the jury the respondent objected to certain arguments then being made by counsel for the State, the objections were overruled, the argument permitted, and the respondent allowed exceptions. The respondent further asked for and was allowed exceptions to the charge of the Court as given, to the failure of the Court to charge as requested and to the failure of the Court to charge at all on certain subjects.

The exceptions fully appear by the stenographic reporter's official transcript in said cause. Said transcript, certified to by the reporter, together with the exhibits in the case, are hereby referred to and made

a part hereof and are to control. The same is to be the Bill of Exceptions and is referred to for the purpose of showing the tendency of the evidence, claims and concessions of the parties, motions, rulings, exceptions taken during the trial, and charge of the Court and exceptions thereto. The same may be referred to for all purposes connected with the trial, but the same need not be printed, and only one copy furnished the Court.

The stenographic reporter's transcript provided for by Sec. 1623 of the General Laws of Vermont shall be the transcript referred to, and in compliance with Sec. 5 of Rule 32 of the County Court Rules.

Amended exceptions allowed, execution of sentence stayed and cause passed to Supreme Court.

Dated at Newfane in the County of Windham this 3rd day of May, A. D. 1927.

FRANK D. THOMPSON,
Presiding Judge.

EXCEPTION I.

During the direct examination of Dr. Fred S. Kent he was inquired of concerning certain marks on the sheet at the foot of the bed on which Miss Gullivan was found lying and exception was taken as follows (Tr. pp. 152, 153).

"Q. You have referred to some material that was at the foot of the bed on the sheet. That we may not have any mistake and that we may understand each other, you stated further, if I heard correctly, that there were marks at the foot of the sheet that were not loose material, is that correct?

A. Yes.

Q. Will you give us an idea of the size of those marks at the foot of the sheet that were not material, that were marks on the sheet itself?

A. Why, the size of my hand, possibly; the palm of one's hand.

Q. What color were those marks?

A. A dirt color.

Q. Dirt color? A. Yes.

Q. How many were there? A. There were two.

Q. Where were those marks at the foot of the sheet with reference to the body of Miss Gullivan as it lay on the bed?

A. On each side.

Q. Did you form any opinion at the time as to whether those marks were made by foot-scuffing, or whether they were foot marks or not? A. Yes.

MR. TUPPER: I object.

THE COURT: Your objection may be treated as having been made before the answer was received, and you may have an exception.

Q. What is your opinion as to whether those two marks at the foot of the sheet, which you say were about the size of your hand, on each side of the body, were marks that were made by feet or otherwise?

BY MR. TUPPER: I object. In the first place the question is leading; and in the second place it does not appear the witness is qualified any more than anyone else to express an opinion on this point.

BY THE COURT: Take the answer and note an exception for the Respondent.

Question read.

A. They were made by feet.

Q. You say they were made by feet, in your opinion?

A. Yes."

EXCEPTION II.

G. W. Putnam testified to conversation had with the respondent the night of the murder of Miss Gullivan regarding a conversation the respondent had just previously had with one Stephanie Cole and exception taken as follows (Tr. pp. 430, 431).

"Q. And did you and he have some talk then?

A. Why, he told me about her.

MR. TUPPER: Wait a moment; that is not responsive to the question.

THE COURT: You can answer the question yes or no. Strike out the answer.

A. Yes.

Q. What did he say?
Objected to.

THE COURT: What do you offer to show?

MR. TRAINOR: That he came back and told this witness that he had tried to date up Mrs. Cole for that evening. This is on the question of motive; and what he offered her; the money that he offered her in trying to date her up; and also in corroboration of Mrs. Cole's testimony when she testifies.

THE COURT: We will take the answer and the respondent may have an exception.

Q. You tell what he said to her, what he told you he said to her.

A. He said "I told her that I had twenty dollars I would like to go out and spend with her in a good time." "

EXCEPTION III.

During the Direct Examination of Wallis L. Fairbanks he was inquired of regarding marks on the wall at the foot of Miss Gullivan's bed as follows (Tr. p. 462).

"Q. Can you tell the jury what kind of marks those were?

A. They were dark, black; dark colored marks.

Q. And from observing it did you draw any conclusion as to what it was. A. It looked as though * *

MR. BICKNELL: He is not answering the question.

Q. That should be answered yes or no. Question read.

A. Yes.

Q. Will you tell us what it was?

THE COURT: He can state what they appeared to be.

A. They appeared like * * *

MR. BICKNELL: I don't think he should tell what they appeared like; he should tell what they are.

THE COURT: He may answer and the respondent may have an exception.

A. They appeared like foot marks of a shoe."

EXCEPTION IV.

During the Direct Examination of Wallis L. Fairbanks, a bed, a screen, two mattresses, a rug, bed room slippers, a pillow, a sofa pillow, a clock, two sheets and a couch cover, which were in the sleeping porch in which Miss Gullivan's body was found, were identified by the witness and introduced in evidence (Tr. pp. 457, 461). It appeared from the testimony of the witness that there were other pieces of furniture in the room, notably a sewing basket and a dresser or bureau (Tr. p. 456). Subject to the objection and exception by the respondent the witness was permitted to rearrange the respective articles so admitted in the position in which they were the morning that Miss Gullivan's body was found. The witness was also permitted to use the State's table, which was not offered in evidence, as representing the

window sill and to place the clock, State's 65, thereon. It also appeared that the screen, State's 60, was at the foot of the bed on the morning of November 8th, (Tr. p. 455). The witness was then permitted (Tr. p. 462) to place the screen so as to represent the south wall and to then point out on the screen the position of the marks that the witness said resembled footprints. Neither the bureau nor the sewing basket was offered in evidence, nor were their relative positions with reference to the other articles pointed out.

EXCEPTION V.

During the Direct Examination of Mrs. Bessie Pandjiris, (Tr. p. 558).

"Q. In 1926 you say you were at the Evarts house at 7 North Main Street? A. Yes.

Q. Were you there during all the year of 1926. A. Yes.

Q. What was your duty there? That is, were you nursing some one?

MR. TUPPER: We fail to see the connection of this line of testimony with the respondent.

MR. TRAINOR: AT BENCH: The State offers to show that at about ten minutes of two on Sunday morning, November 7th, this respondent entered the house at No. 7 North Main Street, in Windsor,—which was then occupied by this witness and Miss Tottie Evarts and two other ladies, and then and there assaulted this witness, with the intent to rape her. We offer to show his conversation there at that time and place, and his actions with this witness, claiming that those actions show, conclusively, his motive to be that of the raper. We offer this on the question of motive, in connection with the Gullivan murder; and we further offer it as evidence to show the respondent's presence at different places that night.

THE COURT: What time are you going to claim that this attack was made upon Miss Gullivan?

MR. TRAINOR: After that.

THE COURT: About what time?

MR. TRAINOR: Between ten minutes past two and about quarter past three, or three twenty-five, on that morning, November 7th; and this is offered also to show intent.

ATTORNEY GENERAL: This question simply bears upon one of the side issues:

THE COURT: I understand this question is preliminary, leading up to the main question.

MR. TUPPER: In the first place, Mrs. Pandjiris testified at a preliminary hearing, and it did not seem to me that it would bear—if her testimony is to be the same here, that it would bear the construction of an assault with intent to commit rape. I suppose, however, that if the State makes the offer to show that, that in and by itself, that is something that probably we can't take advantage of until we come to it.

THE COURT: The way it impresses me, under the statute—that tends to show that he merely broke into the house—if he entered and was caught stealing it would constitute burglary.

MR. TRAINOR: Yes, that is our version of the law; entrance would be a breaking and entering.

THE COURT: Unexplained, assuming there was nothing connected with Mrs. Pandjiris in the way of rape, then it would be a breaking and entering with attempt to commit burglary or robbery.

MR. TRAINOR: Yes, but we claim that the evidence will show that the intent was rape.

THE COURT: That is a question for the jury.

MR. TUPPER: But this is offered by the State on the question of his intent to commit rape on Miss Gullivan.

COURT: I understand that, but I think so far as the rape part is concerned, if the jury should believe that that it would tend to show the lustful desire of mind on part of the respondent, and tend to characterize the act; if the jury should find that he entered Miss Gullivan's place. Have you seen STATE v LAPAGE, 34th New Hampshire?

MR. TUPPER: Yes.

COURT: And in STATE v SARGOOD, have you read that?

MR. TUPPER: Yes.

COURT: It seems to me this would have a tendency to throw light upon the question. We will receive this evidence, and will let all of it come in on this subject, and the objection you have made may be treated as applying to it all, without renewing the same as questions come in, and you may have an exception.

MR. TUPPER: This is, undoubtedly, the most important legal question that will rise in the progress of this trial, on the question of evidence, and I wish to make some specific objections, if I may.

THE COURT: All right.

MR. TUPPER: The respondent objects to the admission of evidence offered.

COURT: When the words "evidence offered" is used it means the subject matter, showing entrance of Tottie Evart's home and the attack upon Mrs. Pandjiris; that is what you mean by evidence offered?

MR. TUPPER: Yes. The respondent objects to the admission of evidence offered on the ground that the respondent's feeling toward this witness indicated nothing as to his feelings towards Miss Gullivan; and for the further reason that his actions towards this witness indicate nothing as to his actions with Miss Gullivan. For the further reason that his mental state, as indicated by what he said to and did to Mrs. Pandjiris, indicates nothing as to his mental state towards Miss Gullivan. And further, for the reason that the disposition of the respondent to commit a crime is not admissible. For the further reason that the commission or attempt to commit a crime, other than the crime with which the respondent is charged, is not admissible, unless there is a causal connection between that crime and the crime for which the respondent is on trial, and there is no causal connection between this occurrence at the Pandjiris house and the crime with which the respondent is charged.

COURT: It is admissible to show propensity to commit a certain crime.

MR. TUPPER: I think that is not the rule in Vermont, as laid down in STATE v KELLEY, as to the matter of his presence; of course this shows, the offered evidence, the exact opposite of this, because the alleged crime occurred in one part of the village and this offer shows the respondent in a part of the village totally opposite. So, it seems to me, it is not admissible for that purpose. If the Court admits it for a specific purpose, for that purpose alone, then we think the evidence should be restricted solely to his presence in that locality.

COURT: I don't think the Court will restrict it for that purpose alone.

MR. TUPPER: There is something that Brother Bicknell suggests,—taking the language of the offer in the light most favorable to the respondent, his language and acts do not show an assault with intent to commit rape. I can see in the form the offer is made that perhaps that objection is not a good objection, but I anticipate when we get to the point where the specific offer and the language of the witness appear that then that will be the case. I would like to have the State, if the Court cares to do so make a more specific offer as to what the State claims constitutes the assault with intent to commit rape.

MR. TRAINOR: We are perfectly willing to do so. The evidence will tend to show that this woman was in her bed asleep, and was awakened by the intruder, whom we will indentify as the respondent, grabbed this woman and struck her, and dragged her from her bed on to the floor, and that she fell on her stomach, and that he got on top of her; that he gouged her eyes with his fingers; put his thumbs in her mouth toward her jaw on the side; that he inserted his hand in her vagina, and asked her if she would take it; if she wanted it; that he made a hand insertion in her private parts; that she asked him to let her up; that he did partially, holding on to her left hand; and that then some people came in and he ran. Now we claim that is fairly good evidence of a man's intent.

MR. TUPPER: I don't know as we can say it isn't, but it is not the testimony of the witness given previously.

THE COURT: All of this evidence, as to this occasion, may be received, subject to the objections stated by counsel for respondent, and an exception is noted, without the objections being renewed from time to time.

MR. BICKNELL: I understand the Court to say as to each of these questions and answers we have an objection and an exception on each of the several grounds, without bothering to object to each.

THE COURT: Yes, all the grounds that have been stated.

EXCEPTION VI.

At BENCH AFTER STATE RESTS (Tr. p. 807).

"BY MR. TUPPER: The respondent moves that all of the evidence of Mrs. Pandjiris and other witnesses who have testified relating to the assault on Mrs. Pandjiris, be stricken out, for the reason that the evidence does not come up to the offer of the STATE.

BY THE COURT: In what respect do you claim it does not come up to the offer of the State?

BY MR. TUPPER: The testimony as to the assault is not quite in accordance with the offer, I think.

BY THE COURT: Do you mean the testimony does not tend to show that he entered that house with intent to commit rape?

BY MR. TUPPER: Yes, Your Honor.

BY THE COURT: What do you claim the evidence shows that he entered that house for, if it was the respondent?

A. I can't tell.

BY THE COURT: What is the inference to be drawn from a man entering a house at that time of night?

BY MR. TUPPER: I think the testimony in this case shows—if an inference were to be drawn, it would be the inference of robbery rather than the inference of rape. The State expressly disclaims that the assault at the Gullivan house was with intent to commit robbery or burglary, as I understand, as the case stands at present.

BY THE COURT: I don't know whether they have disclaimed that; they have claimed it tends to show rape; but there is evidence from which the jury could infer—if they find he was the one who entered that he was attempting burglary; I think there is evidence on which they could find either one of those two motives. How about that, Mr. Carver?

BY MR. CARVER: We made no disclaimer one way or the other, but we did say in opening that the evidence on the part of the State would tend to show that that was the motive, and that was in view of the fact that the valuables and things which were there were unmolested.

BY THE COURT: Do you make that disclaimer as to any intent other than rape?

BY MR. CARVER: No. I think I should argue from the evidence, as it now stands in the case, that it was not a breaking and unlawful entry for the purpose of larceny, though it may have been; there are two inferences which might be drawn from the testimony.

BY MR. TUPPER: But the State has introduced evidence, as to the search of the house there, for the express purpose, as I recall the offer, of showing that the motive wasn't robbery.

BY THE COURT: If the jury should find that his entering the the Gullivan house was not for the purpose of rape but for the purpose of committing larceny, then it would be evidence tending to show that house was burglarized. It might be a question as to whether the Evarts house—in regard to that,—that is, if he did not enter through open doors; but the evidence would tend to show burglary at the Gullivan house; and the fact remains that Miss Gullivan was killed, and no one knows except from inference to what extent the one who entered the house had accomplished the purpose for which he entered. The question as to the breaking and entering,—I think there is no question there was any other purpose than it was for an unlawful purpose. I also think this evidence as to the Evarts matter:—There is evidence there, now, which tends to show that the same person who entered that house and assaulted Mrs. Pandjiris was the same one who entered the Gullivan house,—and that is those burrs, and that material found—if the jury find they are similar—they must have come from the same source. I think the State stated, didn't they, in offering that evidence, they offered it on the question of indentification, too?

MR. TRAINOR: Yes.

MR. TUPPER: No, not when they offered it: I understood the offer, when they made it, it was for the purpose of showing motive, knowledge and for the purpose of showing that he was in that locality.

MR. TRAINOR: The evidence as to the burrs and cinders * *

BY THE COURT: They are discussing now as to what your offer was.

BY MR. TRAINOR: The purpose of it? I don't know whether the offer was asked to be disclosed or not.

BY MR. TUPPER: Yes, it was.

BY MR. TRAINOR: It was for the purpose of identification; that was the only purpose of offering the evidence as to the similarity of the two materials.

BY MR. TUPPER: You didn't state that in making your offer.

BY MR. TRAINOR: I don't just remember about what was said, but I assume that was the way; I know that was the purpose of it, to show the similarity of the material; that the fellow who was in the Pandjiris house was the same as the one who was in the Gullivan house, because the same material was found in both houses and both beds.

BY MR. TUPPER: This evidence taken in the light most favorable to the respondent as to what took place in the Pandjiris house would indicate some motive other than rape.

BY MR. TRAINOR: His actions show what he was up to; he didn't want money. Mrs. Pandjiris told him to take anything in the house, and still he persisted in his lustful acts; she told what he did and what she did or rather what she said.

BY MR. TUPPER: (Handing paper to Court) We have the Motion written out.

COURT HANDS PAPER TO Mr. Trainor.

BY THE COURT: I think there is evidence tending to show that, and also evidence tending to show some other things, if the jury believe it, as identifying him.
I will overrule your Motion to strike out the evidence, and allow you an exception."

EXCEPTION VII.

The State was permitted to show (Tr. p. 334) that after Nov. 7, 1926, there was blood upon the trousers and overcoat worn by the respondent the night of Miss Gullivan's death. To explain the presence of the blood the respondent was inquired of and exception taken as follows (Tr. p. 913).

"Q. Have you lost a finger at sometime? A. I have.
Q. Which hand is that on? A. On the left hand (indicating).
Q. When did you lose that finger? A. The latter part of last April.
Q. The last April that ever was? A. Yes.
Q. 1926? A. Yes.
Q. Where were you when you lost that finger?
A. At my house, the house I am building.
Q. Did you cut that finger off? A. I did.
Q. After cutting that finger off, where did you go?
A. Directly home.
Q. And after going directly home, what did you do?
A. Called in a doctor.
Q. Whom did you call?

By MR. TRAINOR: Objected to as immaterial.

BY MR. BICKNELL: It is merely for this purpose. We offer to show that at the time he cut that finger off when he went to have it dressed he wore the trousers that are in this case, and the overcoat.

BY THE COURT: Do you offer to show he got blood on his trousers and coat at that time?

BY MR. BICKNELL: No, we can't; but we can show his opportunity to have done it.

Excluded. (Exception noted for respondent)."

EXCEPTION VIII.

During Argument of MR. TRAINOR by MR. TUPPER, (Tr. p. 993).

"I desire an exception to the portion of BROTHER TRAINOR'S argument where he says that there has been no evidence produced here to show any suspicion of guilt, in substance, on the part of anybody, except the guilt of the respondent, John C. Winters. We object, because it is the duty of the State to show the respondent guilty.

BY THE COURT: An exception may be noted for respondent."

EXCEPTION IX.

From CHARGE OF THE COURT (Referring to testimony of assault on Mrs. Pandjiris,) (Tr. pp. 1017, 1018, 1019, 1020).

"It is a fundamental principle of law that evidence that a respondent committed one offence cannot be received to prove that he committed another and distinct although similar offence. This rule as applied to this case means that the mere fact that the respondent entered the Evart's house and assaulted Mrs. Pandjiris, if you find that he is the person who entered the Evart's home and assaulted Mrs. Pandjiris, is not evidence that he entered Miss Gullivan's home and killed her. And the Court wants you to distinctly understand that if you find that

the respondent was the person who entered Miss Evart's home and assaulted Mrs. Pandjiris, you are not to consider that fact alone as evidence tending to prove the fact that the respondent killed Miss Gullivan.

But evidence tending to identify a respondent as the perpetrator of a crime charged, or tending to show motive or intent on the part of a respondent, when motive or intent is in issue, or as tending to characterize the act of a respondent, is admissible in evidence to prove such facts; although such evidence may also show that the respondent has committed another and distinct offence; and when such evidence tends to show motive or intent on the part of a respondent it is not necessary that when the first crime was committed the purpose to commit the second should be already formed and entertained. It is enough if the commission of the first crime is so related to the second as to shed a light upon it which may enable the jury to see why or by whom it was committed.

In this case if you find that the respondent was the person who entered the Evarts home and assaulted Mrs. Pandjiris, the evidence of that transaction will be considered by you only as it tends to identify the respondent as the murderer of Miss Gullivan, and as showing the motive and intent of the respondent and as characterizing his act in killing Miss Gullivan, if you find that he did kill her.

You will first carefully consider the evidence tending to show that the respondent was the person who entered the Evarts home and assaulted Mrs. Pandjiris; if from a consideration of such evidence and the circumstances bearing upon that matter, you are satisfied beyond a reasonable doubt that the respondent was the person who entered that home and assaulted Mrs. Pandjiris you will next consider the bearing which the evidence concerning that entering and assault has upon the killing of Miss Gullivan.

If you are satisfied beyond a reasonable doubt that the burrs found in Mrs. Pandjiris's room and the material found in Mrs. Pandjiris's bed (and I refer now to the coal ashes and cinders testified to by Mr. Lombard and Mr. Degnan and others) came from the clothing

of the respondent, and that such burrs and material are so similar to the burrs and material found on and in the bed of Miss Gullivan that they must have come from the same source, namely from the respondent's clothing, then that is evidence tending to identify the respondent as the person who killed Miss Gullivan, and may be considered by you as evidence of that fact, together with the other evidence in the case.

The evidence of the State further tends to show that the respondent entered the Evarts home and assaulted Mrs. Pandjiris with the intent to rape her, but was frightened away before he accomplished his purpose. Now, if you are satisfied beyond a reasonable doubt that the respondent did enter the Evart's home and assault Mrs. Pandjiris with the intent to rape her, that is evidence tending to show the lustful thoughts which were then in his mind, and that he had formed in his mind a plot to commit the crime of rape; and if you are satisfied beyond a reasonable doubt that the respondent is the person who killed Cecelia Gullivan, it is evidence bearing upon the motive with which he entered Miss Gullivan's home, and bearing upon the character of the homicide of Miss Gullivan, as being a murder committed while perpetrating or attempting to perpetrate rape; it tends to show the existence in the mind of the respondent of a motive or passion which might render an attempt to commit rape upon Cecelia Gullivan more probable than it might otherwise seem to you."

AT BENCH:

"BY MR. TUPPER: Respondent excepts to all of the charge of the Court as to the use that the jury may make of the testimony of the assault on Mrs. Pandjiris.

Respondent excepts to that part of the Charge wherein the Court states, in substance, that if the jury find that the respondent assaulted Mrs. Pandjiris it is evidence of his state of mind and tends to show his state of mind towards Cecelia Gullivan."

NO. 1227 A.

STATE OF VERMONT

v.

JOHN C. WINTERS

SUPREME COURT
WINDSOR COUNTY
JANUARY TERM, 1928

BRIEF FOR RESPONDENT

By FRED G. BICKNELL,
HERBERT G. TUPPER,
His Attorneys.

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STATE OF VERMONT

v

JOHN C. WINTERS

SUPREME COURT,
WINDSOR COUNTY,
JANUARY TERM, 1928.

STATEMENT OF THE CASE

The Respondent, John C. Winters, was indicted for the murder of Cecelia Gullivan in Windsor, Vermont, on November 7th, 1926. The evidence of the State tended to show that Cecelia Gullivan, a single woman, lived alone in a bungalow on Clough Avenue in the Village of Windsor; that she was employed in the office of the Cone Automatic Machine Company and that the respondent, John C. Winters, worked in the shop of the Cone Automatic Machine Company as a mechanic.

The testimony of the State further tended to show that on Saturday evening, November 6th, shortly after ten o'clock, Miss Gullivan went to ride with Frank L. Cone, Manager of the Cone Automatic Machine Company; returning home between eleven and eleven thirty P. M., that said Frank L. Cone left Miss Gullivan's home directly after their return. There was no direct testimony as to any other person seeing Miss Gullivan between that time and shortly after eight a. m. on Monday morning, November 8th.

On Monday morning, November 8th, Miss Gullivan did not report at the office of the Cone Automatic Machine Company and the said Frank L. Cone went to her bungalow and discovered her dead body lying upon a couch in a sleeping porch in the rear of the bungalow. It appeared that the couch or couch bed was the bed upon which she ordinarily slept in the sleeping porch. The said Frank L. Cone notified the Sheriff's department of Windsor County and the police officer of Windsor, and later in the day a post mortem examination was made by Dr. F. S. Kent of the Vermont State Laboratory of Hygiene.

Dr. Kent testified that he went to Windsor on November 8th with E. C. Brown of the Attorney General's office, arriving there between three thirty and four o'clock in the afternoon. That he went directly to Miss Gullivan's home and performed an autopsy upon her body. That he found her body covered with bed clothing lying upon the couch in the sleeping porch, the head lying on the left side; that her face showed three or four wounds on the right side, and there were seven or eight wounds on the right side of her head; that her death was caused by loss of blood from the wounds. Miss Gullivan was undressed and clothed only in a nightdress, and there was a quantity of blood on the bed and on the nightdress. That he observed some material on the sheet at the foot of the bed on each side of the body, and among this material were burdock burrs. He also testified, under exception of the respondent, that there were marks on each side of the body at the foot of the sheet that were not loose material and that, in his opinion, these marks were foot prints.

Dr. Kent further testified that the body was removed to the Cabot Undertaking Rooms in Windsor and an autopsy there performed. Neither this witness or any other witness for the State testified to any marks or bodily conditions indicating rape or attempted rape.

The witness, Dr. Kent, testified further that Miss Gullivan had a large vaginal tumor which had almost completely obstructed the passage to the vagina so that it was impossible for her to have sexual intercourse.

Wallis L. Fairbanks, Sheriff of Windsor County, testified to the appearance of the marks and that they resembled footprints.

It appeared that the bed or couch bed was in the southwest corner of the sleeping porch; that there was a bureau or dresser in the southeast corner of the sleeping porch, a matter of a few feet from the bed, a screen at the foot of the bed, and a sewing basket in the northeast corner of the sleeping porch.

It further appeared that a cellar window on the north end of the bungalow from which a person might have access to the sleeping porch, had been removed.

The rear of Miss Gullivan's bungalow faces a declivity leading down to a pond formed by the damming of a stream at the entrance to a rough, rocky gorge. The dam is of cement and around the east side of the pond, leading from the east end of the dam is a high wire fence made high and tight with the object of keeping trespassers from the pond and the dam. At a short distance from the west end of the dam is a street across or along which the respondent passed on his way to and from his home to the Cone Automatic Machine Company, or to the business part of Windsor Village.

The evidence of the State tended to show that Miss Gullivan's business occasionally took her out into the shop when she passed near where the respondent was working, and that the respondent had made remarks and did certain things tending to show that he had a desire to have sexual intercourse with Miss Gullivan.

The evidence on the part of the State tended to show that the respondent on the evening of November 6th procured a bottle of alcohol, the greater part of which he drank. That on two occasions during the evening he went to a place in Windsor Village and procured alcohol which he drank. That he met a man named George Putnam with whom he drank and talked. That he left Putnam, and in Putnam's sight had a conversation with a Mrs. Stephanie Cole. That after he returned from talking with Mrs. Cole he told Putnam, under the objection and exception of the respondent, that he had told Mrs. Cole that he had twenty dollars that he was willing to spend on a good time with her and that Mrs. Cole told him that wasn't enough.

Subject to the objection and exception of the respondent, Putnam was permitted to testify that the respondent told Putnam that he had never been to a dance and would like to go to Hartland with him to a dance to be held there that evening.

The testimony on behalf of the State tended to show movements of the respondent during the evening, and subject to the objection and exception of the respondent, one Reginald Hutt testified that he met Winters and Winters said he wanted to borrow some money. Otto

Hochstein testified to his calling at his house and trying to get Hochstein to go somewhere with him to play cards.

The testimony of the State showed that Winters was seen in the vicinity of the Putnam Block in Windsor, Vermont, about twelve o'clock, and at that time was somewhat under the influence of liquor but could walk and talk all right.

Subject to objection and exception of the respondent, the State was permitted to show that about two p. m. on Sunday morning a man entered the home of Miss Tottie Evarts, a house distant about one mile and 24 rods from the home of Miss Gullivan, and made an assault upon Mrs. Bessie Pandjiris, an inmate of Miss Evarts' home; that he was driven away by the awakening of other inmates of the house; that he broke out of the house and disappeared. Later, Mrs. Pandjiris identified the respondent as the person who entered the house.

Evidence was also introduced tending to show that there were footprints near a burdock bush across the road from the Evarts home. These footprints lead up the bank and toward the Evarts home. There was also evidence tending to show that there were burdock burrs or pieces of burdock burrs left on the bed on which Mrs. Pandjiris was lying at the time of the assault upon her; also, loose dirt on the bed which the testimony tended to show resembled the loose material found in the Gullivan bed.

It appeared that on Monday, November 8th, the Chief of Police of Windsor and other officers went to the home of the respondent and found a shirt, overcoat, trousers and sweater which the respondent said he had worn the previous Saturday night. That the testimony of the State tended to show that there was blood on the coat and trousers.

A. EXCEPTION TO EVIDENCE

EXCEPTION NO. 1.

The witness, Dr. Kent, testified as to the matters objected to on a subject in which it did not appear that he had expert knowledge, and on this point was testifying as a lay witness. He testified as to the ap-

pearance of certain marks at the foot of the sheet with reference to the body of Miss Gullivan and described them. He was then asked to express his opinion, but his opinion was not confined to the facts about which he had testified. In this there was error.

The opinion given must be based upon the testimony of the witness as to the facts and circumstances testified to by the witness in order that the jury may give the opinion its proper weight.

Londonderry v. Fryor, 84 Vt. 294, 79 Atl. 46.
In Re Wood's Will, 95 Vt. 407, 115 Atl. 231.
Foster's Exrs. v. Dickerson, 64 Vt. 233, 24 Atl. 253.
In Re Estate of Martin, 92 Vt. 362, 104 Atl. 100.
Maughan v. Estate of Burns, 64 Vt. 316, 23 Atl. 583.
Hefflon v. Cashman, 92 Vt. 323, 103 Atl. 1023.

EXCEPTION NO. II.

To sustain the admission of evidence regarding the statements of the respondent as to what he said to Mrs. Cole, it is necessary that the Court hold that evidence of a solicitation by the respondent to have sexual intercourse with one woman is evidence of the respondent's motive to rape Cecelia Gullivan about six hours afterward. This is carrying the "State of mind" idea to its logical conclusion. If admissible to show his "State of mind" on this evening, why would not evidence of the same kind as to occurrences three or four days before be admissible? Why not three months before? Or three years before? The answer is that the law is that the respondent's tendency or disposition to commit a certain crime may not be shown. The only answer to this is that this may be shown as a temporary condition. If so, why not as a permanent condition? Where is the distinction? There can be no question but that this evidence was extremely prejudicial to the respondent.

EXCEPTION NO. III.

Exception No. 3 is so closely related to Exception No. 1 that what has been said relative to that Exception applies to this.

EXCEPTION NO. IV.

The Court was in error in permitting the partial re-arrangement of the articles in the sleeping porch in the Gullivan house. Photographs had been introduced showing the interior of the sleeping porch (See State's Exs. 13, 14, 15). This re-arrangement could serve no useful purpose or be of any aid to the jury in visualizing the room. It could not constitute a true picture for the following reasons:—

1. It did not show the walls of the room.
2. It did not show the size of the room.
3. It did not show the position of the doors in the room.
4. It did not profess to be a re-arrangement of all the articles in the room.
5. The screen, which it appears was at the end of the bed, was placed so as to represent, not its position on the morning of November 8th, but the south wall.

It is difficult to see the various ways in which the jury might be misled by this demonstration. If the re-arrangement could possibly be of any value it would be because it showed the whole room except for the walls and doors. This was not done. It was an extremely dangerous demonstration to permit from the respondent's standpoint and it is impossible for anyone to say that if it was error, it was not harmful error. The following authorities, while not directly in point, show the correct rule:—

Hardwick Savings Bank & Trust Co. v. Drenan, 72 Vt. 438, 44 Atl. 347.
Congdon v. Howe Scale Company, 66 Vt. 255, 29 Atl. 253.
Hughes v. State, 126 Tenn. 40, 148 S. W. 543.
Baltimore & O. R. Co. v. Fouts, 88 Oh. 305, 104 N. E. 544.

EXCEPTION NO. V.

This exception relates to the evidence relating to the Pandjiris assault.

The general rule is that proof that a person has been guilty of some other crime furnishes no evidence that he is guilty of the one for which he is being tried. The proof of the other crime under such circumstances is irrelevant and so not admissible. But it does not follow that the Court erred in receiving the testimony excepted to. There are certain well established exceptions to the rule not to be lost sight of. Evidence which legitimately tends to support the charge for which the respondent is being tried is not to be excluded on the ground that it tends to show another offence.

State v. Kelley, 65 Vt. 531, 27 Atl. 203, 36 A. S. R. 884.

When evidence offered by the prosecution in a criminal action tends to prove a relevant or essential fact, and is competent for that purpose, the circumstance that it also tends to prove an independent offense does not render such evidence inadmissible.

Note, 62 L. R. A. 198, and cases cited.

It is competent for the prosecution to put in evidence all relevant facts and circumstances which tend to establish any of the constitutive elements of the crime of which the respondent is accused in the case on trial, even though such facts and circumstances tend to prove that he has committed other crimes.

State v. Donaluzzi, 94 Vt. 145, 109 Atl. 57
8 R. C. L. 199.

The reasons for the general rule are well stated in Shaffner v. Commonwealth, 72 Penn. St. 50, 13 Am. Rep. 649, a murder case in which the Court says:

"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. 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."

In STATE v. LAPAGE, 57 N. H. 245, 24 Am. Rep. 69, the opinion of Cushing, C. J., states the law in these terms at page 289:

"1. It is not permitted to the prosecution to attack the character of the prisoner, unless he first puts that in issue by offering evidence of his good character.

2. It is not permitted to show the defendant's bad character by showing particular acts.

3. It is not permitted to show in the prisoner a tendency or disposition to commit the crime with which he is charged.

4. It is not permitted to give in evidence other crimes of the prisoner, unless they are so connected by circumstances

with the particular crime in issue as that the proof of one fact with its circumstances has some bearing upon the issue on trial other than such as is expressed in the foregoing three propositions."

In the same case Ladd, J., states the reason for the rule on page 300 as follows:

"If I know a man has broken into my house and stolen my goods, I am for that reason more ready to believe him guilty of breaking into my neighbors' house and committing the same crime there. We do not trust our property with a notorious thief. We cannot help suspecting a man of evil life and infamous character sooner than one who is known to be free from every taint of dishonesty or crime. We naturally recoil with fear and loathing from a known murderer, and watch his conduct as we would the motions of a beast of prey. When the community is startled by the commission of some great crime, our first search for the perpetrator is naturally directed, not among those who have hitherto lived blameless lives, but among those whose conduct has been such as to create the belief that they have the depravity of heart to do the deed. This is human nature—the teaching of human experience.

If it were the law, that everything which has a natural tendency to lead the mind towards a conclusion that a person charged with crime is guilty must be admitted in evidence against him on the trial of that charge, the argument for the State would doubtless be hard to answer. If I know a man has once been false, I cannot after that believe in his truth as I did before. If I know he has committed the crime of perjury once, I more rapidly believe he will commit the same awful crime again, and I cannot accord the same trust and confidence to his statements under oath that I otherwise should. Yet, does the law permit the credit of a witness to be impeached by showing individual acts of falsehood? We do not and we can not believe a known liar the same as we believe a known man of truth. Why, then, ought not evidence showing that a witness has lied on any particular occasion to be received, in order that we may weigh the credit of his testimony by rules

derived from human nature and experience, such as we naturally and instinctively apply in the other affairs of life?

Suppose the general character of one charged with crime is infamous and degraded to the last degree; that his life has been nothing but a succession of crimes of the most atrocious and revolting sort: does not the knowledge of all this inevitably carry the mind in the direction of a conclusion that he had added the particular crime for which he is being tried to the list of those that have gone before? Why, then, should not the prosecutor be permitted to show facts which tend so naturally to produce a conviction of his guilt. The answer to all these questions is plain and decisive: The law is otherwise."

This case was a prosecution for a murder committed "in perpetrating or attempting to perpetrate rape" under a Statute very similar, if not identical with the Vermont Statute. Evidence was admitted of a rape about four and half years before the trial, and it was urged by the State that this evidence was admissible on the question of intent.

There are various exceptions to the general rule which are classified in State v. Donaluzzi, as showing a common plan, scheme, or motive; as tending to illustrate, characterize or explain the act in question; and to show how the business under investigation was conducted. We say that the case at bar does not fall within the exceptions to the general rule, or any of them.

In McAllister v. State, 112 Wis. 496, 88 N. W. 212, the charge was assault with intent to rape. The evidence showed an attempt to commit rape upon one woman at about two o'clock p. m. on the day in question. Another woman was allowed to testify against objection that on the same day, just after one o'clock, the respondent called at her house and made an attempt to commit rape upon her. As to this exception the Court said: "Was the evidence of the separate assault committed on Mrs. Casper an hour before the assault upon Mrs. Montgomery competent evidence? It is freely admitted by the state as a general rule that upon a prosecution for one offense evidence of the commission of another and separate offense is not admissible, but the claim is made

that the evidence was admissible in this case for the purpose of proving intent. The rule that, where intent must be proven, other crimes of like nature, which are so intimately related to the act in question as to show a common purpose or a continuity of purpose in all, may be shown upon the question of motive or intent, or to repel the inference of accident, is well recognized. State v. Miller, 47 Wis. 530; 1 Jones, Ev. 143, 144; Zoldoske v. State, 82 Wis. 580. The rule is one which is not always easy to apply, and it is manifestly one which needs to be most carefully applied and guarded, or it is likely to result in many convictions based largely upon proof of the commission of crimes not charged in the information,—a result which our criminal law does not contemplate. In the case of Proper v. State, 85 Wis. 615, which was a prosecution for rape upon a girl, proof that the accused had previously got into bed with the prosecutrix and another girl named Emma, and had sexual intercourse with the other girl, was held proper on the sole ground that such an act was an indecent assault upon both girls; but it was said in the opinion by the late Mr. Justice Pinney:

'We do not suppose that evidence that the defendant had committed adultery or been guilty of acts of improper familiarity with the girl Emma at another time and place would be competent evidence on the trial of the present issue.'

While this remark was obiter in that case, it is believed that it expresses the rule which had been generally approved by the authorities, namely, that in prosecutions for crimes of this nature evidence of previous attempts by the accused to commit the crime upon the same person is admissible on an indictment for rape, though not for rapes on other to commit the crime upon other persons is not admissible. Mr. Wharton says: 'Evidence of prior sexual assaults on the prosecutrix is admissible on an indictment for rape, though not of rapes on other persons.' Wharton, Cr. Ev. (9th ed.), Par. 46. If this be the rule as to rape actually committed, it would seem to apply to mere unsuccessful assaults, where the purpose does not clearly appear, with equal, if not greater, force. There may be a number of motives for the commission of an assault besides rape,—such as robbery, revenge and the

like,—and it can hardly be logically argued that because a man has assaulted two women, although the assaults were both on the same day, the same motive impelled both assaults. We are therefore of the opinion that the evidence in question was erroneously received."

In Farris v. People, 129 Ill. 521, 4 L. R. A. 582, 16 A. S. R. 283, the respondent was indicted for the murder of one Stephen McGehee. The evidence showed that the respondent had been divorced from his wife and she had married the deceased. That about noon on the 18th day of April, 1888, the respondent came to their home and shot McGehee, and that soon afterward the respondent committed the crime of rape upon Mrs. McGehee.

Exception was taken to the ruling of the Court that the prosecution "might prove that the defendant committed the crime of rape upon Mrs. McGehee within a reasonable time after the killing, upon the theory that such evidence tended to prove the motive or intent with which the homicide was committed." As to this exception the Court said: "Our conclusion, from all the authorities, is, that whatever be the object of the testimony,—whether to prove guilty knowledge, as in prosecutions for passing forged notes or counterfeit money, where proof of other offenses of the same kind is competent; to prove that the act was not accidental, or done by mistake, as in case of poisoning or embezzlement; to prove motive, as on trial of a husband for the murder of his wife, in which case, in the absence of direct evidence, proof of adultery by the prisoner with another woman was held competent; or in cases where the prisoner says he did not do the act, and supports his denial with the assertion that no motive existed within him for the commission of such a crime, or to refute some anticipated defense,—proof of a distinct, substantive crime is never admissible, unless there is some logical connection between the two, from which it can be said the one tends to establish the other. In this case, it must be borne in mind that there is no evidence whatever connecting the two acts, or tending to show wherein the commission of the rape had any bearing upon or tendency to explain the commission of the homicide, and therefore, if it be held that evidence of the one tended to

prove the other, it must be upon the ground that there is some natural or obvious connection between the two acts. Did the proof of rape in this case tend to prove defendant guilty of murder? What element in the crime of murder was wanting when this evidence was admitted, or what fact in evidence necessary to make out the crime of murder did it tend to strengthen or corroborate? It seems clear to us that these are questions which puzzle the legal mind, and can only be answered so as to sustain the admissibility of the evidence in question, if at all, by drawing exceedingly fine distinctions."

In People v. Gibson, 255 Ill. 302, 99 N. E. 599, 48 L. R. A. (N. S.) 236, the respondent was found guilty of statutory rape upon Ida Cedergren, a girl twelve years of age. The evidence of the State showed that the respondent had intercourse with the said Ida in the presence of another girl named Nora Porter and that directly afterwards the respondent had intercourse with the said Nora Porter. Nora Porter testified to the same acts.

The Court said:—"Plaintiff in error was tried for rape upon Ida Cedergren. If, as alleged, he a few minutes later committed the same offense against Nora Porter, it no more formed a part of the transaction with Ida, and was no more an explanation of that act, than if it had been committed in her presence on another occasion. Proof of it was no more necessary to an understanding of the question at issue than the testimony of the other girls that on subsequent days plaintiff in error had intercourse with them, and their testimony the court held was incompetent, and either refused to admit it or ordered it stricken out after the witnesses had testified. The mere proximity of time within which two offenses may be committed does not necessarily make one a part of the other. Immediateness is not the true test. There must be a causal relation or logical and natural connection between the two acts or they must form parts of but one transaction. Tested by these rules, it seems very plain the court erred in admitting testimony of an offense against Nora."

In England, 1913, Rodley's Case, 9 Cr. App. 69, 3 K. B. 468, the facts were as follows:

"The appellant was indicted for having in the night time broken and entered a dwelling house with intent to ravish a woman. The evidence for the prosecution was to the effect that appellant broke into the house between midnight and 1 a. m., that the prosecutrix, hearing a noise, came downstairs, when the appellant seized her, and pulled up her clothes, and that upon the father coming downstairs he went away. The defence at the trial was that the evidence for the prosecution was not true, that the appellant went to the house for the purpose of courting the prosecutrix with her consent, and that he did not break into the house and did not intend or attempt to ravish her. The prosecution tendered evidence that the appellant at about 2 a. m. on the same morning went to the house of another woman, about three miles from the prosecutrix's house, and gained access to her bedroom down the chimney, and with her consent had connection with her. It was contended that this evidence was admissible to show the state of the appellant's mind and body at the time when he broke into the prosecutrix's house, and coupled with the evidence of what happened when he was in the house was admissible to show the intent with which he broke in. The evidence was admitted and the appellant was convicted.—The Court said:—

'In summing up to the jury in the present case the learned judge, in referring to the evidence which is now objected to, puts the case in this way. He says: 'Then he (the appellant) goes away, and the next thing that is heard is that hardly a stone's throw off the farm lives a woman with whom he has already had immoral intercourse. The suggestion of the prosecution is that he was raging with lust, and that, being foiled as regards the prosecutrix Miss Jones, he immediately went to gratify his passion upon the woman who he knew would not be unwilling to yield.'

Is the evidence objected to admissible upon the ground thus indicated by the learned judge, or under any of the rules formulated in the cases above referred to? This Court is of opinion that the evidence is not admissible. At the point in the trial at which the evidence was tendered the defences really in issue were: (1). That the

appellant never broke into the house at all: (2). That the appellant did not break into the house with any intention of committing rape: (3). That the prosecutrix's story as to what occurred in the house was not true.

The evidence which was objected to was not, in the opinion of this Court, relevant to any of those issues, and was not therefore admissible to rebut any of the above defences. If the jury believed the evidence of the prosecutrix, the only issue was as to whether, in the opinion of the jury, the acts of the appellant amounted to an attempt to rape, and whether from his acts the jury would infer that the appellant broke into the house with the intention of committing a rape. In the opinion of this Court upon neither of those issues was the evidence objected to relevant. The conclusion therefore arrived at by this Court is that the evidence objected to was not admissible on any ground and ought to have been rejected."

In Canada, 1912, R. v. Paul, Atla. S. C., 5 D. L. R. 347, the charge was rape and evidence was admitted to show that directly after the alleged rape the accused raped the sister of the complainant. The Court said: "It seems to me that the line should be strictly drawn between a repetition of the act upon the same girl who is the complainant and assault upon another female. Where it was not necessary to tell the one story owing to its being so mixed up with the other as to be inseparable, it seems to me the only test to be applied is: has the fact of his having done the second act any logical probative force as tending to prove the commission of the first? Put in this way, it seems to me the answer must be 'No'—unless, indeed, it were open to the Crown, as the Crown counsel suggested at the trial, to show the existence of strong sexual passion and weak powers of control in a man in order to show that he would be the more likely to commit rape. This is really, it appears to me, the logical result to which the argument would lead."

So in Parkinson v. People, 135 Ill. 401, 25 N. E. 764, a preceding rape on the prosecutrix and another girl was held inadmissible. The Court said:—"One of the grounds specified in the motion for a new trial was

the admission of improper evidence on the part of the state. The testimony of the prosecuting witness, Gussie Johnson, tended to establish at least two separate distinct offenses,—one a rape, perpetrated when she was alone with the defendant, and the other a ravishment upon another and different day, in the presence of one Annie Moore. 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. In Baker v. People, 105 Ill. 452, this court said: '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.' There are exceptions to the rule above stated, but the case at bar does not come within any of these exceptions. It was error to admit evidence of two separate, distinct, and substantive crimes over the objections of the defendant.

The prosecutrix testified that one day she left school at 12 o'clock and met Annie Moore, and that they went together to the laundry of the defendant, when and where he made assaults and committed offenses upon both of them. This evidence would have been admissible had there not been before the jury evidence of an assault before, when she was in the laundry alone with the defendant. Where a party is indicted for one offense and a complete detailed narration of that offense by the witness involves a recital of another offense, it is not error to permit them to complete the detailed narative of the offense for which the party is indicted, notwithstanding the recital of an offense for which he was not indicted."

In Addison v. People, 193 Ill. 405, 62 N. E. 235, a prosecution for rape, defendant's conduct that day in becoming intoxicated and treating a boy to some beer was admitted by the trial court. The court held this to be error and said:—"Counsel for the people say, however, that intoxication does away with moral restraint, and that liquor incites to evil actions, and renders a person more liable to commit crime.

If that is so, they have found no authority for the admission of evidence that one accused of crime had a mind susceptible to evil thoughts or without moral restraint, either as a temporary or permanent condition. The only effect of the evidence was to prejudice the jury against defendant on account of an evil habit, and because he had done wrong in drinking and giving drink to the boy. It was prejudicial error to admit it."

There would seem to be no particular distinction in principle between evidence of other offenses with third parties in rape cases and in adultery cases, yet the universal rule is that such offenses cannot be shown. If a man's propensity to commit rape can be shown by evidence of assaults on other women, why may not his propensity to commit adultery be shown. Does it not lead to the same conclusion?

In State v. Kelley, 65 Vt. 531, the Court said on Page 536:—"It is also held that in establishing certain offences involving sexual intimacy, the prosecution may show other instances of like criminal conduct between the respondent and the one with whom the offence is claimed to have been committed. This is upon the ground that it is proper to show the existence of a continuing adulterous disposition of the two persons towards each other, and that there can be no better evidence of such a disposition than commissions of the act itself. State v. Bridgman, 49 Vt. 202. But it will be noticed that this evidence touches only the respondent's relations to the particular individual concerned in the offense charged. Evidence of other offences is never received to establish a criminal disposition in the broad sense of the term, or a tendency to commit generally offences like the one alleged."

As to intent the rule is concisely stated in Wharton's Criminal Evidence (10th Ed.) at page 140, as follows: "In many criminal offenses, intent is the essence of the crime, and where not established, the prosecution fails. In crime 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, declaratons, 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."

The same author (Page 143) says further "For the same reason evidence of prior sexual assaults on the prosecutrix are admissible on an indictment for rape though not of rapes on other persons."

In State v. Lapage there is a full discussion of the question in the course of which the court said:—

"Was it an intent to commit murder in the first degree? The answer to this is surely in the negative. Such a general intent could only be shown by evidence of a deliberate and premeditated killing in one of the ways pointed out by the statute, or otherwise. Besides, this question, like the other, seems to be fully answered by the charge. The jury were told that the evidence is open to your consideration, if at all, only so far as it may seem to you to bear upon the character of the homicide of Josie Langmaid; only as it may bear upon the question whether she was murdered by the prisoner in perpetrating or attempting to perpetrate rape. The intent, then, which it is claimed this evidence was admissible to establish, was an intent to perpetrate or attempt to perpetrate the crime of rape upon Josie A. Langmaid at the time he murdered her. But an intent to perpetrate rape, or to attempt the perpetration of that crime, is not what the statute requires to make the killing murder in the first degree. The most that can be said is, that intent may constitute an element in those crimes, as in most others. To meet the requirement of the statute, the act as well as the intent must be shown. The whole crime of perpetrating or attempting to perpetrate rape must be made out, and that includes all questions of intent that may be involved. Was he in the act of perpetrating or attempting to perpetrate rape at the time he did the killing? To this the state said Yes; the prisoner, No. Here was a clear and distinct issue; just as clear and just as distinct as though there had been nothing else in the case. The state charged rape, or

an attempt to commit that crime, as the basis of their claim that the verdict should be murder in the first degree. This charge they must prove, or the claim based upon it fails. The question is, How is it to be proved? What is the rule of evidence to be applied? Is evidence to be received upon the trial that would be inadmissible if the charge were rape alone? If so, upon what ground? What principle of law, or logic, or humanity, will admit evidence to prove rape when the consequence of a finding against the prisoner is death, and exclude the same evidence when the consequence is only loss of liberty?"

In People v. Molineux, 168 N. Y. 264, 62 L. R. A. 193, 61 N. E. 285, a leading case on this subject, the Court said:—"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 proven to have been committed by a person charged therewith, the question of motive may be of little or no consequence. 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 willful intent or knowledge must be proved before a conviction can be had.— 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."

Let us apply these principles to the case in mind. If the evidence of this act was admissible to show intent for the purpose of showing that the crime was not innocently done, how is it possible for a person to kill another or to rape another and do it innocently. If there is any class of cases where the intent may be inferred from the act it is precisely in a case of this kind. The evidence shows conclusively that Miss Gullivan met her death from a human agency; that a series of brutal blows were struck upon her face and head, twelve in all. Could such an act have been done innocently?

Nor was the evidence admissible to show the respondent's "presence at different places that night." The Court in its charge did not instruct the jury that the evidence might be used for that purpose, but did instruct the jury that it might be used for the purpose of identification, to show motive and intent, and as, characterizing the respondent's act in killing Miss Gullivan, if he did kill her.

EXCEPTION NO. VI.

The State offered the evidence regarding the Pandjiris assault on the ground that it showed an assault with intent to commit rape. The witness testified that she was awakened by someone moving in her room, that she saw a man moving from her bed toward the bed occupied by Miss Evarts, that the man turned and made a dash for her bed and struck her a blow on the head, seized her arms and said "Don't you make a sound," "If you make a sound I will choke you." That the witness then screamed as loud as she could for help. That the man pulled her off the bed and they struggled on the floor, and the man choked her and said that if she made a sound he would kill her, and further said, "I am going to blow your brains out" and made a motion as if he was going to get a weapon out of his pocket. That he whispered "Shoot her Jack" and "Search the place Jack." That she asked what he wanted and he said there was all kinds of money and diamonds in the house, that he choked her, gouged her eyes and her mouth. That in the struggle her night dress came up over her body and the man inserted his hand in her vagina and asked her "Do you want it?"

The respondent moved that this evidence be stricken out because the evidence did not support the offer in that it did not show an intent to rape taken in the light most favorable to the respondent. Four inferences might be drawn from the testimony:—

1. An intent to commit an assault.
2. An intent to commit larceny.
3. That the act was that of an insane man.
4. An intent to commit rape.

The evidence was offered to show motive to rape (Tr. p. 558) and to show the respondent's presence at different places that night, and to show intent (Tr. p. 559) and the offer was expressly limited to those purposes (Tr. p. 559). It was not offered for the purpose of identifying the respondent as the man who broke into the Gullivan house. The State had already introduced evidence to show that the motive of the slayer of Miss Gullivan was not robbery (Tr. p. 208 and 274) and an issue of robbery was not submitted to the jury. The evidence was offered and admitted to show motive and intent to commit rape.

The intruder was wrestling about with Mrs. Pandjiris on the floor. No inference could be drawn from what Mrs. Pandjiris says he did with his hand as this is something that would naturally happen under the circumstances. Nor do the words spoken necessarily bear that construction. It should be borne in mind that Mrs. Pandjiris was under great mental strain and would naturally ascribe to the intruder the motive of rape. The offer did not include all the facts in connection with what took place in the Evarts house, but Mr. Trainor assembled in his offer the facts which would tend to show the rape motive. While we think the Court was in error in receiving the evidence on the offer made on the ground that it did not show motive or intent, we have not briefed our exception on that point as the case made after the evidence had been admitted shows error more clearly.

Where a fact is susceptible of two interpretations, that interpretation should be given it which is most favorable to the respondent.

Burton v. Commonwealth, 108 Va. 892, 62 S. E. 376.
State v. Rogers, 166 N. C. 388, 81 S. E. 999.
State v. Marston, 82 Vt. 250, 72 Atl. 1075.

The Court in this case recognized the rule and applied it to the offer made during the examination of Stephanie Cole (Tr. p. 499) when it said:—

"We will exclude that. While it is rather a close question I think in a case of this kind the construction the jury should draw should be

innocence rather than the guilty construction, because the respondent is always entitled to the benefit of a doubt; and I don't think that language is such that a jury would be justified, except in a process of reasoning, to draw the inference that you ask them to draw. The words themselves do not contain such inference. We will exclude the offer."

EXCEPTION NO. VII.

The State introduced evidence that the respondent, after the murder of Miss Gullivan, had blood on the clothing which he wore the night of her death. There was no evidence tending to show anything more than the presence of blood upon his clothing. The respondent likewise offered to show that the respondent had some time prior to the murder, while wearing the same clothing, cut off a finger. The Court indicated that if the offer was to show that he got blood upon his clothing from the wound it would be admissible, otherwise not. The two classes of evidence were exactly the same. The State offered as a basis of inference the fact that the respondent had blood upon his clothing which might have been the blood of Miss Gullivan. The respondent's explanation was based upon the same inference. On this point we quote from Wigmore on Evidence, Second Edition, Par. 149:

"The presence upon the person or premises of articles, fragments, stains, tools, or any other resulting circumstance, is constantly employed as the basis of an inference that the person did an act with which these circumstances are associated. In general, however, few questions of relevancy arise. There are innumerable instances in the records of celebrated trials; but their relevancy is so patent that no occasion is given for rulings of law:—It is to be noted that the opponent may always explain away the indication by showing other hypotheses for the presence of the trace,—as where, on a charge of murder, the presence of blood stains is explained by the killing of a chicken, or the presence of a weapon by the owner's previous loan of it to another person."

This principle is so elementary that it is difficult to cite precedents.

B. EXCEPTION TO ARGUMENT.

EXCEPTION NO. VIII.

Counsel for the State argues that there was no evidence produced to show suspicion of guilt on the part of anybody except the respondent. This was reversible error. The issue was the guilt or innocence of John C. Winters. It was not the duty of John C. Winters to show who committed the crime, or to show that he did not commit the crime. The burden of proving the respondent's guilt, beyond a reasonable doubt, was upon the State throughout the trial. This was the only issue. The argument was very prejudicial to the respondent as it tended to give the jury to understand that it was the duty of the respondent to show who committed the crime, and also that the innocence of all persons who might have committed the crime had been established by a process of elimination. It will be noted that the remarks were not limited to the witness produced by the State. There is no denying the fact that the minds of the jury would tend to inquire as to who in Windsor might have done this act if not the respondent. This argument was outside the issues in the case and constitutes reversible error.

Hall v. Fletcher, Vol. 136 Atl. No. 4 Advance Sheets.

State v. Fitzgerald, 68 Vt. 125, 34 Atl. 429.

C. EXCEPTIONS TO CHARGE.

Exception IX is fully discussed under the exception relating to the Pandjiris testimony.

D. CONCLUSION.

For errors shown in the exceptions, the Court should reverse the judgment below and remand the case for another trial.

Respectfully submitted,

FRED G. BICKNELL,

HERBERT G. TUPPER,

Respondent's Attorneys.

NO. 1227a

STATE OF VERMONT

v.

JOHN C. WINTERS

SUPREME COURT

WINDSOR COUNTY

JANUARY TERM 1928

STATE'S BRIEF

Robert R. Twitchell, State's Attorney

J. Ward Carver, Attorney General

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STATE'S BRIEF

by

Robert R. Twitchell, State's Attorney

J. Ward Carver, Attorney General

STATEMENT

On Monday morning, November 8th, 1926, the dead body of Cecelia Gullivan was found in her bed on her sleeping porch at her home in the Village of Windsor. Her head had been struck with some cutting instrument. The appearance of the head indicated that two different implements were used, one on the neck and face, and the other upon the scalp. There were many cuts upon the head which were made with an edged instrument bevelled on one side. The victim was found lying with her face toward the ~~right~~ left as she lay in the bed. She was undressed, and wore a nightgown.

There was considerable blood upon the bed and sheets. At the foot of the bed, below her body, were found gravel, coal ashes, cinders and particles of fine coal or dust, and near where this material was found were two scuffs of dirt, one on each side of her body, on the lower sheet itself, which were apparently made by a person's feet. There were also found

in the bed burdocks and pieces of burdocks. The bed pillow was gone. Nothing in the room except the bed was disturbed. The couch cover was nearer the body than the quilt. The bed was a couch. The covering on the bed consisted of two sheets, a quilt and couch cover.

In the bathroom there was carefully placed clean and unsoiled clothing in one place, and soiled clothing in another. Her pocketbook, watch, diamonds and pearls were found on the table in the living room, in plain view.

The victim owned the bungalow in which she lived. She built this bungalow about two years prior to her decease. She was a single woman and lived there alone.

The deceased was treasurer of the Cone Automatic Machine Company, and as such treasurer worked in the office of the company continuously and took active management in the affairs of the company. She was a woman of considerable executive and business ability. She was forty-four years of age. The autopsy revealed that she had a vaginal tumor, sometimes described as a fibroid uterous, which extended down in such proportions and was of such size that it was impossible for her to have sexual relations with a male person; that this condition had existed in all probability for from five to ten years prior to her decease.

She was killed on Sunday morning, November 7th, between two and four o'clock. Admission was gained to the house by the removal of a cellar window on the north side, and the window frame was found below the house a short distance, on what is known as the Kennedy Mill Pond dam, shortly after the homicide; that in going from the house to the dam, there is a high barbed wire fence with an opening where a person can go through by spreading the strands of barbed wire; that the pillow and pillowslip

used by the victim on her bed were found tucked under a float which was in the water at the Kennedy Mill Pond dam; that there were evidences of blood on the pillow and pillow-slip.

It was the claim of the state that the person who perpetrated the crime went down from the house, and across the dam where her pillow and pillow-slip and cellar window were found; that the pillow-slip had in it tears indicating that they had been made by some sharp prick, like that of a barbed wire fence; that respondent lived a short distance from the Kennedy Mill Pond and for him to go to his home, the most direct route on foot would be to go down through the fence and across the Kennedy dam to his home.

On the same morning, shortly before two o'clock, the respondent entered the house and home of one Margaret Evarts and assaulted a Mrs. Pandjiris, who was a nurse in the employ of Miss Evarts, and who was sleeping in the same room with her in another bed; that the respondent was seen by Mrs. Pandjiris leanng over Miss Evarts' bed, watching her; that at the right of Mrs. Pandjiris' bed as she was lying therein, was a floor lamp, and that she could turn the light on without getting out of the bed; that all she had to do was to reach up and turn it on; that she did so, and saw a man at the head of Miss Evarts' bed looking at Miss Evarts; that he at once put his hand in front of his face and started toward her bed; that she then turned the light off, hoping that the intruder, seeing that he was discovered, would leave the house; that he did not do so, but struck Mrs. Pandjiris a blow on the head; that she grappled with her assailant, and that in grappling with him, she felt something prickly on the arms of his overcoat.

That the intruder had on a brown overcoat and wore a sweater that had a band around the bottom of it; that the intruder was upon Mrs.

Pandjiris' bed; that he pulled her to the floor and got on top of her; that he put his thumb in her mouth and she bit it; that she struck him with all the strength she had in the chest; that he inserted his hand in her vagina; that while so doing, he asked her to have intercourse with him; that after a severe struggle, Mrs. Pandjiris succeeded in calling two other women, inmates of the house, who came downstairs, frightening the intruder away; that the assailant made his escape through the dining room, tearing the screen of the back kitchen door and breaking out the glass.

The police were called and neighbors summoned, whereupon it was found that on her bed were materials of the same kind and character as were later found upon the Gullivan bed, including burdocks. Mrs. Pandjiris positively identified her assailant as the respondent. It appeared that the witness knew the respondent and that at one time he had worked for Miss Evarts; that Mrs. Pandjiris was acquainted with him, she having nursed at the Evarts' house at the time the respondent worked there. It was not, however the house in the village, but a farm situated out of Windsor village.

On Monday afternoon following the murder, the respondent was detained on suspicion. He was found in his bed at his home with only B. V. D's. on for clothing; that when he started to dress, he picked a burdock from his stocking and threw it upon the floor. His trousers and overcoat which he wore on Saturday night and the Sunday morning of the murder, were turned over to the state, and on the overcoat were found different patches of burdocks. There were also burdocks found on his trousers. The cuffs of his trousers were emptied and the material found therein was preserved and shown to contain the same kind of material

that was found on the Gullivan bed and on the bed of Mrs. Pandjiris.

Near the Evarts house, across the road, there is a tree at the foot of which is a bunch of burdocks. There were foot prints around this burdock bush, and tracks leading from it, up the bank, toward the Evarts house. There was also blood on the respondent's overcoat and trousers which he did not and could not explain, and also an irregular tear above the knee on the back of the left leg of his trousers, corresponding to some scratches on his leg underneath this tear. The material, including burdocks, which was found on the clothing of the respondent, on the Gullivan bed, and on the Pandjiris bed, was examined microscopically by Dr. Kent and Dr. Whitney at the laboratory, and there was nothing found in one but what was shown and found in the others. This material was also produced in court and examined by the jury with the same microscopes during the progress of the trial, to show that the material found upon the respondent was of the same kind and character as that found upon the Gullivan bed and upon the bed of Mrs. Pandjiris, all of which tended to identify the respondent as the perpetrator of the crime.

The respondent denied that he assaulted Mrs. Pandjiris, yet the mark showed upon his thumb where she bit it, and the mark showed upon his chest where she struck him. The person who assaulted Mrs Pandjiris had been drinking intoxicating liquor, and the respondent admitted having drunk intoxicating liquor that night, prio rto the time of the assault on Mrs. Pandjiris. The respondent, on various occasions prior to the murder of Miss Gullivan, when she had come into his presence in connection with her work at the Cone Automatic Machine Company plant, had done and said certain things showing thoughts of a lustful nature which her presence aroused in his mind toward her. The respondent worked at the

Cone Automatic Machine Company, and had for some time prior to the murder.

The respondent reached home about four o'clock on the morning of November 7th. There was a chisel which could have made the wounds upon her scalp, and a spring which could have made the wounds upon her neck and face, found hidden underneath clothing and other articles upon an old couch where a soda bottle containing alcohol was found on the Winters' premises; that the chisel, at the time found, had indications of fresh iron rust on the cutting edge. No blood was found upon the chisel or upon the spring.

The respondent failed to properly account for his whereabouts at the time the murder was committed, claiming to have driven to Hartland to attend a dance and to have passed over a new cement bridge which had not been opened for travel at the time; finding no dance hall open, returned to Windsor and went in another direction about three miles to steal apples and stole two. He claimed that he made these trips alone in his Ford truck. On other occasions he stated that he had recollection of anything that happened after midnight on Saturday, November 6th and that everything was a blank.

The respondent was also unable to account for the marks upon his thumb, the tear in his trousers, except that he said he lied to the officers about it, and the scratches on his leg and the marks upon his chest. It is apparent that the person who killed Miss Gullivan was on her bed. The marks on the sheet and wall indicate it, and the the circumstances indicate that the purpose was to commit rape.

The respondent denied having been in the poolroom on the evening of the homicide, and later admitted it. Miss Gullivan's whereabouts on

the evening preceding her murder were traced, and she was shown to have ridden with her associate, Mr. Cone, in his automobile; that she had made purchases, had her hair cut, and gone to the poolroom to get a pair of shoes which were there to be repaired; that while she was there, the respondent saw her, stared at her, and did not take his eyes from her as long as she was in his sight.

EXCEPTION NO. 1

This exception refers to the testimony of Dr. F. S. Kent, who performed the autopsy on the body of Miss Gullivan and who it appeared examined carefully the condition of her body and the marks upon her person and upon the sheets and bedclothes in the bed in which she was lying when discovered after the homicide. The doctor noticed two marks on the lower sheet about the size of the palm of the hand. These marks were dirt color at the foot of the bed and on each side of the body of Miss Gullivan.

He described those marks as being foot marks or marks made by feet. The objection made to this evidence was that the question which called for the doctor's opinion was leading, and further, that it did not appear that the witness was qualified any more than anyone else to express an opinion on this point. (Tr. 152-153). The grounds stated in the respondent's brief are that the doctor was asked to express his opinion on a matter not confined to the facts about which he testified, and because of this, there was error, and the cases cited by the respondent are cited to show that the opinion given must be based upon the testimony of the witness as to the facts and circumstances testified to by him in order that the jury may give his opinion its proper weight.

The witness had already testified with respect to these marks, without objection, as follows:

Q. Where were the foot marks on this sheet?

A. Down at the lower part on each side. They were not foot prints. They were just scuffs of foreign material, not blood.

Q. And were they on each side of the sheet?

A Yes. (Tr. 141)

During the cross examination of Dr. Kent, he was asked relative to these marks as follows:

Q. You spoke yesterday about some marks that you discoverd on the under sheet. Are those marks now on the sheet?

A. I don't believe they are, Sir.

Q. What became of those marks?

A. They were brushed off.

Q. Who brushed them off?

A. We did at the laboratory.

Q. Were there any foot marks on that sheet?

A. No foot marks.

Q. Won't you describe those marks a little more fully?

A. They were a blotch of dirt-like material.

Q. And this blotch of dirt-like material was brushed off, you say? Was it saved?

A. No.

Q. Can you describe that a little more fully?

A. I don't believe I understand just the question.

Q. Can you tell any more about those marks on the sheet which were brushed off?

A. Why, they were those blotches that looked like a scuff of dirt upon the sheet; they were not loose particles of dirt. (Tr. 149)

Then again in re-direct examination, the witness was further interrogated as follows:

Q. You have referred to some material that was at the foot of the bed on the sheet. That we may not have any mistake and that we may understand each other, you stated further, if I heard correctly, that there were marks at the foot of the sheet that were not loose material, is that correct?

A. Yes.

Q. Will you give us an idea of the size of those marks at the foot of the sheet, that were marks on the sheet itself?

A. Why, the size of my hand possibly. The palm of one's hand.

Q. What color were those marks?

A. Dirt color.

A. Yes.

Q. How many were there?

A. There were two.

Q. Where were those marks at the foot of the sheet with reference to the body of Miss Gullivan as she lay on the bed?

A. On each side.

Q. Did you form any opinion at the time as to whether those marks were made by foot-scuffing or whether they were foot marks or not?

A. Yes.

Q. Whether in your opinion,—what is your opinion as to whether those two marks at the foot of the sheet which you say were about the size of your hand on each side of the bed were marks which were made by feet or otherwise?

A. They were made by feet. (Tr. 152-153)

While we do not think that it can be fairly said that the testimony of the doctor was that of a lay witness regarding the marks which he observed on the lower sheet at the foot of the bed on each side of the body of Miss Gullivan, yet the witness, in his examination with respect to those marks, had fully described them, and was inquired of respecting them both in direct and cross examination, without objection, and after having fully described the marks, the witness stated that in his opinion they were made by feet. In this there was no error. The witness gave his opinion based fully upon the appearance, character, size and location of the marks in question, and only after these facts had been fully testified to by him.

In any event, the admission of this evidence was harmless, as several witnesses testified, wthout objection, in both direct and cross examination, as to the marks, some referring to them as foot marks or foot prints.

Chief of Police M. H. Degnan was one of the first to observe conditions after the body of Miss Gullivan was found. Respecting these marks, he was interrogated as follows:

Q. On that first visit, did you notice any marks on the wall?

A. I did.

Q. What did you observe?

A. I see a dark mark about the size of a foot—of the sole of the foot, on the wall right at the height of the bed.

Q. Where, with reference to the top of the mattress?

A. Just above it.

Q. At the foot of the bed?

A. Yes.

Q. On that visit, the first time you were there, did you notice any other marks on the bed?

A. Yes, we did.

Q. What did you observe? What did you see?

A. There were two black marks about half the size of the tap of a shoe from the toe down. (Illustrating)

Q. Where were those marks?

A. One was about nine inches from the foot of the bed and the other was probably very close to it, with the smallest point, I would call the toe—facing to the back part of the bed.

Q. And you say it was very close to the first mark?

A. Very close.

Q. Where were those marks with reference to Miss Gullivan's body?

A. Down near her feet and a little way from her feet.

Q. Which way?

A. From the door east of her body.

Q. That would be the inside toward the door?

A. Inside.

Q. Which door do you mean?

A. The door from what I woud call the sewing room or temporary bedroom.

Q. The door from the sewing room into the sleeping porch?

A. Yes, sir, the inside door.

Q. You say both marks were toward that door from the body?

A. No, they were pointing toward the body.

Q. What color were the marks?

A. They looked like a shoe. Like a smooch of coal dust would make.

Q. How did the color of those marks compare with the color of the mark that was on the wall at the foot of the bed?

A. Similar. (Tr. 189-190)

In cross examination, the witness was inquired of relative to the print on the wall of the room (Tr. 250-251), and the witness in cross examination was further inquired of:

Q. When you got into the room, you first looked around, I suppose?

A. Yes.

Q. And you say at some time you observed these foot prints on the bed?

A. I did.

Q. Were they on the upper or lower sheet?

A. I would say the lower sheet.

Q. And were the marks as you observed them—I think you testified yesterday that they pointed toward the wall?

A. Just like a toe, pointed toward the wall.

Q. They were at right angles to Miss Gullivan's body?

A. They were.

Q. And not parallel with the body?

A. Not parallel—those on the sheet?

Q. Yes, I refer to the marks on the sheet. You say you also observed a considerable amount of dirt, gravel and burrs on the bed?

A. Some.

Q. You said yesterday a lot, didn't you?

A. I didn't mean that, if I did say it, say a lot; there was some. They were prominent there.

Q. And what part of the bed did you see this accumulation of dirt?

A. In the lower part.

Q. Were those marks that you observed on the sheet that looked like foot prints, were they very dark.

A. About the same as was on the wall, distinct.

Q. Did they stand out very distinct on the sheet?

A. You could see them.

Q. Did they stand out more distinctly on the sheet than the print did on the wall?

A. Probably a little different.

Q. Probably that was because the sheet was white and the wall was of a darker color—that is right, is it not?

A. That might express it.

Q. You discovered those prints on the sheet and the dirt on the wall, or the print on the wall and the dirt on the bed before Dr. Kent came, didn't you?

A. The prints on the sheet, I did, and the prints on the wall, but the dirt I didn't see that until someone called my attention to it, I think after the doctor came.

Q. How far from the foot of the bed were prints on the sheet?

A. In the vicinity of a foot.

Q. And somewhere near the lower part of Miss Gullivan's body?

A. About where her feet may have been or reached.

Q. In order to observe those marks, you had to remove a portion of the covering of the bed, didn't you?

A. No, they was plain.

Q. That is, you mean to say they were not covered; that the marks on the sheet at that point the covering was off?

A. Was off.

Q. So it was visible from the outside of the bed?

A. Yes. (Tr. 251-252)

Deputy Sheriff E. D. Lombard, one of the first witnesses to view the body and observe conditions after its discovery, testified respecting the marks as follows:

Q. In looking at the under sheet of the bed, did you notice anything upon it?

A. Yes, sir.

Q. What did you observe?

A. A sort of sand, gravel and specks of coal and cinders and burdocks, I saw.

Q. Where was this material on the sheet?

A It was at the foot on the back side of Miss Gullivan, and some on the front.

Q. Whether the material was on both sides of the bed?

A. It was.

Q. Did you touch that material?

A. I did not.

Q. Did you notice anything else on the under sheet?

A. Yes.

Q. What?

A. Foot prints at the foot of the bed on the sheet.

Q. And where were those marks of feet with reference to her body?

A. They were just below her feet.

Q. How many?

A. Two.

Q. Did you notice anything else about the bed?

A. The smooch on the wall of the room.

Q. Which wall?

A. The south end of the room.

Q. What wall with reference to her bed as it was situated there?

A. It was the plastering and the bed was up against the plastering.

Q. The foot or side of the bed?

A. The foot.

Q. How many smooches on the wall?

A. I only saw one.

Q. How big was that?

A. It mght have been three inches long and perhaps half an inch wide.

Q. How was that on the wall wth reference to the top of the mattress?

A. I should say about even with the top of the mattress. (Tr. 272-273)

In cross examination, the same witness testified as follows:

Q. You said in your direct examination that you saw foot prints just below the feet of Miss Gullivan?

A. Yes, sir.

A. Yes.

Q. Was that a plainly marked impression of a man's foot?

A. Not in the center. Just the outline of the top of the shoe.

Q. Would it be the outline of the bottom of the tap?

A. Yes, sir.

Q. As though somebody stood on those sheets?

A. Yes, sir.

Q. Is that exactly as you saw it, that somebody stood on those sheets?

Q. Leaving their marks which you plainly saw?

A. Yes, sir.

Q. What was the color of those marks?

A. Smutty color, dirt, black and grayish color.

Q. I don't know the color of smut. Was it coal dust?

A. Yes, sir.

Q. And sand?

A. No, there was no sand. Just those marks. The mark of the tap, that is all.

Q. And marked in black from coal dust?

A. Yes.

Q. Did you see at any time any other foot marks of the same color and shape that you have described?

A. I did not.

Q. None of those downstairs.

A. I didn't see any.

Q. You were looking for that kind of thing?

A. I was not looking for any foot marks. (Tr. 304-305)

In direct examination, Sheriff Fairbanks, who made observations of the room where Miss Gullivan's body was found, testified as follows:

Q. Did you note any marks on the lower sheet or mattress?

A. Yes, on the sheet.

Q. How many of those marks did you notice?

A. One.

Q. How far from the foot of the bed was it?

A. I should say about a foot.

Q. Can you describe that mark to the jury?

A. It was a black mark.

Q. Did you make some observations of it?

A. Yes.

Q. And from your observation, did you draw any conclusion as to what had made it?

A. Yes.

Q. What did it look like?

A. Looked like a foot print.

Q. You say a foot print? Was it the foot print of a whole foot?

A. No.

Q. How much of a foot print was it, or a foot mark?

A. About half of a foot print or a foot mark.

Q. And you mean half of the whole foot?

A. Yes.

Q. Which half was it?

A. The sole of the foot.

Q. Sole of a shoe?

A. The sole of a shoe, yes. (Tr. 463)

Rutland Sash & Door Co. v. Gleason 78 Vt. 215.

Murray v. Nelson 97 Vt. 101 and cases cited therein.

Lowell v. Wheeler Est. 95 Vt. 113.

State v. Ward 61 Vt. 153.

EXCEPTION NO. 2

In showing the movements of the respondent on the night of the homicide, it appeared that he went to certain places with the witness Put-

nam and that some time during the evening, a few hours before the homicide, while talking with the witness Putnam, he went across the street and had some talk with a Mrs. Cole. This talk was had with Mrs. Cole right after he had left the witness Putnam and after having talked with him; that immediately after talking with Mrs. Cole, he returned to the witness Putnam and had further conversation with him, and in that conversation he stated to the witness that he had told Mrs. Cole that he had tweny dollars and would like to go out and spend it with her in a good time; that he was willing to spend it on a good time with her; and that she told him, the respondent, that it wasn't enough; that after that the respondent and the witness waited until after the train came in. It further appeared from the testimony of this witness that the respondent had been drinking intoxicating liquor and also tended to show a desire on his part to have sexual relations with Mrs. Cole.

It was the right of the prosecution to trace the movements of the respondent that evening preceding the murder and to show what the respondent was doing and saying. Other evidences tended to show that the respondent wanted to go to a dance and that he did not dance or know how to dance; that he wanted to play poker; that he was craving excitement of some sort during the entire evening.

EXCEPTION NO. 3

The question and answer objected and excepted to of the witness Wallis L. Fairbanks was with respect to the marks upon the wall of the room at the foot of the bed, which marks had been testified to without objection by various witnesses, including the witness Fairbanks, and some of this testimony appears in the evidence already cited under exception

No. 1. The witness was asked to tell what the marks were, and the court stated that the witness might say what the marks appeared to be. The objection by the respondent was that the witness should not tell what they appeared like, but should tell what they are. This was merely a statement of the witness as to the appearance of the marks after he had described them. The question was not objected to except that counsel stated that he thought the witness should tell what the marks were. All we have said in respect to exception No. 1 applies with equal force to this exception. The admisson of the evidence was not error.

State v. Ward 61 Vt. 153.

EXCEPTION NO. 4

This exception was to the witness Fairbanks, one of the persons who first viewed the body of Miss Gullivan, arranging before the jury the bed, mattress, sheets, quilt, couch cover and screen in substantially the position which the witness found them when he first viewed the scene. It was not an attempt to reproduce the room with everything contained therein in the exact position and location as observed by him. The bed, mattress, sheets, etc., which were arranged by the witness were all admitted without objection, and there was nothing in the nature of an experiment about it. After these articles had been identified by the witness and received in evidence, the court permitted the witness to arrange them according to his recollection as they were when first observed.

The jury could in no way be misled by the arrangement of these exhibits. There was no attempt to show the walls of the room or to show the size of the room by the arrangement of these exhibits, and the arrangement of these exhibits did not attempt to show the position of the doors in the room and did not profess to be a rearrangmement of all the

articles in the room. It was pertinent and material to show these various exhibits, some of which were covered with blood and had been covered with burdocks and other materials. This matter was wholly within the sound discretion of the trial court. There was no error in permitting the witness to arrange the exhibits in the positions he found them, after the exhibits had been received in evidence. We can not see how the jury could have been misled by the arrangement of the exhibits by the witness. The arrangement of the exhibits by the witness was done solely for the purpose of aiding the jury in seeing the exhibits as they appeared to him when entering the room.

The cases cited by the respondent in his brief are not in point because there was no experiment attempted and nothing by way of experiment done. It was simply the arrangement of the exhibits as they appeared to the witness, and nothing more. Miss Gullivan was found in this bed with various wounds upon her. There had been considerable evidence as to how she lay, where the blood was, how the wounds could have been infflicted, whether there was evidence that the perpetrator of the crime was upon the bed. The arrangement of the exhibits gave the jury the opportunity to see the bed, matress and bed-clothing in the position found by the Sheriff before the body had been moved, all of which was to aid the jury, if possible, in the solution of how the crime was perpetrated.

To be sure, photgraphs had been taken of the bed with the victim lying therein, but that of itself did not render the exhibits inadmissible, nor in any way prevent one who saw the body and the arrangement of the bed and other exhibits, from reproducing them in the same position, as best he could, in which they were when first observed. We feel that this arrangement aided the jury in arriving at the true situation of the bed, bed-clothing, etc. shown by the photographs, and was proper and legitimate under the circumstances.

EXCEPTION NO. 5

The assault at the Evarts House on Mrs. Pandjiris and the murder of Miss Gullivan are so closely connected that the evidence of one furnishes evidence of the other, and the evidence of the Pandjiris attack tends to support the charge for which the respondent was being tried, and should not be excluded on the ground that it tends to show another offense.

In other words, the evidence offered by the prosecution tends to prove a relevant and essential fact in the Gullivan murder and is competent for that purpose. It is always competent for the prosecution to put in evidence all relevant facts and circumstances which tend to establish any of the constitutive elements of the crime of which the respondent is charged in the case on trial, even though such facts and circumstances tend to prove that he has committed another crime.

This evidence was admitted on the question of motive and intent and to show the whereabouts of the respondent on the night in question, to identify him as the person who killed Miss Gullivan, and as bearing upon the character of the homicide of Miss Gullivan. It tended to show the existence in the mind of the respondent a motive or passion which might render an attempt to commit rape on Cecelia Gullivan more probable than it otherwise might seem to the jury. The court limited this evidence and the use of it as the law limits it.

See charge Tr. 1017, 1018, 1019, 1020.

State v. Donaluzzi 94 Vt. 142 and cases cited, including State v. Kelley 65 Vt. 533—State v. Sargood 77 Vt. 80.

Where evidence tending to prove another offense is offered, the same considerations arise with respect to its admissibility as upon the offer of other testimony. The controlling question is: Is the evidence relevant?

Does it tend to prove any fact material to the issues in the case? If the evidence is admissible on other general grounds, it is no objection to its admission that it discloses other offensives even though they are indictable. The special difficulty disappears if the evidence is considered strictly upon the ground of its relevancy to the issues on trial regardless of the fact that it may incidentally show the commission of some other offense.

It should be observed in this connection, however, that the evidence of other acts is not admissible to prove the commission of the act complained of * * * * * *the Corpus Delicti. But, speaking generally, such evidence is admissible in a proper case as a means of identifying the respondent as the perpetrator of the crime; or to show motive, intent, or guilty knowledge on his part, when in issue; or as tending to illustrate, characterize, or explain the act when capable of more than one construction.

State v. Donaluzzi 94 Vt. 142. Note 105 A. S. R. 980.

People v. Jennngs 252 Ill. 534; 43 L. R. A. (N. S.) 1206.

Kahn v. State 182 Ind. 1. This doctrine is also recognized in State v. Williams 94 Vt. 423.

EXCEPTION NO. 6

What we have said with respect to Exception No. 5 applies with equal force to exception No. 6. On the respondent's motion to strike out the evidence of the assault on Mrs. Pandjiris, we note on page 21 of the respondent's brief that counsel say: "While we think the court was in error in receiving the evidence on the offer made on the ground that it did not show motive or intent, we have not briefed our exception on that point, as the case made after the evidence had been admitted shows error more clearly."

The state claimed that the assault upon Mrs. Pandjiris was an assault with the intent to commit rape, and while we cannot cite the testimony of Mrs. Pandjiris in full, some portions of it would indicate that rape was the purpose of her assailant. There was but one man who entered the Evarts house and assaulted Mrs. Pandjiris, although the assailant endeavored to make it appear that he had an accomplice with him. After the assailant had been discovered and had attempted to cover his face when Mrs. Pandjiris turned on the electric light by her bed, she testified as follows:

Q. When he put his hand up and you turned out the light, what happened?

A. He made a quick dash for my bed and struck me a blow on the side of the head. (Indicating)

Q. Are you indicating now where the blow was struck?

A. It was struck right here. (Indicating)

Q. That is on the left side of your head?

A. Yes.

Q. What did you do?

A. With all my might I struck him a blow in the chest.

Q. What did you do then?

A. I grabbed his arms,—something pricked my hand—I said: "You get out of here." He said: "Don't you make a sound! If you make a sound I will choke you." I screamed just as loud as I could for help. He choked me.

Q. Did he do anything else to you there while you were in the bed?

A No.

Q. What happened next?

A. He took me by my arms and pulled me out of bed and I fell on the floor.

Q. You show the jury where he took hold of your arms.

A. Right here and right there (Indicating above elbow on each arm.)

Q. You say he pulled you out of bed? You go on from there, from that point and tell what happened.

A. I had a hard struggle with him on the floor; finally he got my face down with my hands underneath me and he on my back.

Q. Where did you land with reference to this chest of drawers that you have described, as being in the room at the time?

A. I landed on my feet, near the chest of drawers and my head near Tottie's bed.

Q. You were face down on the floor?

A. Yes.

Q. How far were you then from Miss Evarts as she lay in her bed?

A. I was about three feet from the head of her bed.

Q. Could you hear her at the time?

A. I heard her faintly call "Banche",—after that she made no sound.

Q. Who is Blanche?

A. Miss Fowle, a friend, who rooms with us.

Q. The one you have described as rooming upstairs?

A. Yes.

Q. When this fellow got on your back, what did he do to you?

A. He choked me.

Q. Go ahead and tell everything he did to you or tried to do to you.

A. He choked me and he told me if I made a sound he would kill me. He says: "I am going to blow your brains out." And he made a motion as if he was going to get a weapon out of his pocket.

Q. Did you feel that motion as you lay there?

A. Yes, I felt him put his hand back but I felt no weapon. He whis-

pered "Shoot her, Jack!"—I listened carefully but heard no one else in the room. In a few minutes he said: "Search the place, Jack." I asked what he wanted. He said there was all kinds of money and diamonds in the house. I told him to take anything he wanted but not to kill me. I offered to show him, to tell him where everything was; I promised not to make any sound; he choked me until my mouth filled with blood and when he would give me a chance to swallow I could taste the blood. I have long hair, and I did not braid it that night, it was down by back; he took his hand like that (grasping a handful of hair on side of head) and got a fist full and pulled it right out.

Q. You show the jury where he pulled the hair from your head.

A. Right here is where he pulled it out (witness removed hat and exhibited place to jury).

Q. Have you kept that hair?

A. Yes.

Q. Have you it here? Has is been given to the prosecution, did you bring it somewhere?

A. I brought it to the grand jury.

Q. Now proceed with your description of the assault.

A. In the scuffle with this man my night dress had got well up over my body—

Q. Before you come to that point—did he do anything else with his hand? You say he choked you and you felt your mouth filled with blood.

A. Yes, he put his thumb in my mouth, in my lower jaw I have two teeth missing, and he put his thumb in that place—when he put his thumb in my mouth I tried to bite him and I think I pinched his thumb because he pulled it out; then he put his hand like this and gouged my eyes in—

Q. When he gouged your eyes in as you have indicated the gouging, did he try gouging both eyes?

A. Yes.

Q. What did you do when that happened?

A. Then I thought I was going to lose consciousness, but I didn't.

Q. Did he strike you?

A. Only the blow on the head in the bed.

Q. Go on from that point and tell what he did, what else he did.

A. My nightdress was well up over my body and I felt this man shift his weight to his left elbow and with his right hand he felt of my body; he felt of my buttocks, and he made a vaginal insertion with his hand. I said "What are you going to do?" He asked me "Do you want it? You can't do very much to defend yourself . . . . "

Q. Never mind, we know all about that. When did he make that statement with reference to the time that he made the insertion with his hand,—at the same time or another time?

A. No, the same time.

Q. You tell what happened then from that point.

A. I said to him: "You must let me up"—because I wanted to get use of my hands. So he let me get into a sitting position, and I braced myself against the chest of drawers and he stooped down and took hold of my left hand and tried to bend my wrist back, but my left wrist is stiff (exhibiting same to jury) and you can't bend it back, but he bent my fingers back until I thought they were going to break.

Q. What happened then?

A. He told me not to scream. He put his face right down to mine and said: "Mind you, don't you make a sound or you will be a dead woman." I knew better than to scream, but I wanted to make some kind of a noise;

I wanted to get help; I wanted the people upstairs to hear me, so I said to him, "Look out, I am deathly sick, you have got to let me vomit." Instead of vomiting or screaming, I gagged and I made all the noise I possibly could gagging and they heard me upstairs.

Q. That is, someone came down?

A. Yes, Miss Fowle and Miss Stack came down; they opened the door into Tottie's room, there was a light in the hall,—this man took a quick look, he turned quickly and darted through the dining room and as he went he left a smirch of blood on the white woodwork. I watched him, —there was a dining room chair on his left . . . .

Q. Could you see him when he went through the door?

A. Yes. There was a dining room chair on his left and he threw that back of him; then I saw him knock the lamp off the table and I scrambled to my feet and closed the dining room door. (Tr. 576, 577, 578 and 579)

We submit in view of this testimony that there was evidence that the assault upon Mrs. Pandjiris was an assault with the intent to commit rape.

EXCEPTION NO. 7

There is no error shown by the record. The overcoat and trousers of the respondent were admitted without objection in connection with the other evidence in the case, and it appeared that there were blood spots upon these exhibits.

The respondent in his statement which he made, on the second page of his statement (tr.757), was asked:

Q. Were you shown some blood on your overcoat Monday night at the State's Prison by Mr. Brown?

A. What was said was blood.

Q. Do you know how those spots that were said to be blood came on your overcoat?

A. No.

Q. Have you any explanation at all about them?

A. No.

In the respondent's direct examination, it appeared by his testimony that the latter part of April 1926 he cut off a finger on his left hand; that he went home and called a doctor. This was objected to as immaterial, after which respondent's counsel stated that this was merely to show that at the time he cut that finger off, when he went to have it dressed, he wore the trousers that are in this case, and the overcoat. Whereupon the court asked respondent's counsel if he offered to show he got blood on his trousers and coat at that time. To which, counsel replied that he could not, but could show his opportunity to have done it. The question was properly excluded under the offer made, because there was no offer to show that the respondent got blood on his trousers and coat in April 1926 or that there was blood on his finger. Under the circumstances, there being no offer made to show that the respondent got any blood upon his trousers and coat even at that remote time, the exclusion was within the sound discretion of the trial court.

The respondent's quotation from Wigmore on Evidence, Second Edition, paragraph 149, does not include the whole text of the section quoted, and it will be noticed from an examination of this paragraph that the language used by the author has reference to and applies to different conditions. Had there been any offer made to show how the respondent got any blood upon these exhibits, the court would have admitted the evidence, as it fairly appears that the court, by the inquiry, sought information as to whether or not the respondent offered to show that he got blood on his trou-

sers and coat at the time in question. But when cousel for the respondent informed the court that they could not make that offer, but only to show an opportunity to have done it, it was properly excluded.

We might further add that the respondent stated in his cross examination that he did not know of and could not explain the presence of this blood upon his clothing the Monday night following the murder. He was inquired of respecting that matter as follows:

Q. The matter of blood on your clothes was brought to your attention Monday night, was it not?

A. Yes.

Q. You knew you were detained Monday night, didn't you?

A. Yes.

Q. And you knew you were under suspicion, didn't you?

A. Yes.

Q. And you knew from your information for what you were under suspicion Monday night, didn't you?

A. Yes.

Q. The matter of this blood was a matter of some importance to you then, wasn't it?

A. Well, I don't know what you mean by importance to me.

Q. Well, you thought it was something that you should explain if you could, didn't you?

A. Yes.

Q. Friday night you said in your statement you couldn't explain it, didn't you?

A. I don't know where I got it.

Q. Dd you wear that coat Saturday night?

A. Yes.

Q. And trousers?

A. Yes.

Q. Did they look all right when you put them on?

A. Yes.

Q. You had your working clothes on during the day

A. Yes.

Q. Those was the clothes you wore for your best?

A. Yes.

Q. You changed from your working clothes Saturday night after supper and put on these good clothes?

A. Yes.

Q. To go downstown?

A. Yes.

Q. You wanted to look as neat as you could, didn't you?

A. Yes.

Q. The clothes looked good, didn't they, when you put them on?

A. Yes.

Q. You didn't see anything wrong with them, did you?

A. No. (Tr. 960)

EXCEPTION NO. 8

The argument by the attorney for the state was proper in referring to the evidence, that there had been none to show any suspicion of guilt on the part of anybody except the respondent. It was simply an argument based upon facts and circumstances which the attorney was attempting to explain to the jury, and properly so. It was not an attempt on the attorney's part in any way to give the jury to understand that it was the respondent's dut yto prove that somebody else committed the crime.

There can be no question that the attorney was well within his rights and the jury could not have been misled. The court in his charge, on many

occasions called the jury's attention to the duty of the state to prove its case beyond a reasonable doubt. In calling the jury's attention further to the rule required in cases where proof is by circumstantial evidence, the court instructed the jury:

"In order to convict, you must be satisfied beyond a reasonable doubt that each fact and circumstance upon which you base your verdict is true; and that such facts and circumstances are inconsistent upon any theory consistent with the innocence of the respondent, and incapable of explanation upon any reasonable theory other than that of his guilt. It is not enough that all the circumstances proved are consistent with and point to his guilt. To authorize a conviction, the circumstances must not only be in harmony with the guilt of the accused, but they must be of such a character that they cannot reasonably be true in the ordinary nature of things and the respondent be innocent. Mere probabilities are not sufficient to warrant a conviction, nor is it sufficient that the greater weight of the evidence supports the indictment. To warrant a conviction of the respondent, his guilt must be so clearly and conclusively proven that there is no reasonable theory upon which he can be innocent, when all the facts and circumstances proven beyond a reasonable doubt are considered. If the facts and circumstances thus established satisfy you of the guilt of the respondent beyond a reasonable doubt, then such evidence is sufficient to authorize you in finding a verdict of guilty." (Tr. 1006 and 1007)

The cases cited by the respondent under this exception are not in point. The case of Hall v. Fletcher was where the attorney for the plaintiff criticized the fact that the defendant was not in the court room to listen to his argument when it had appeared that the defendant had been in court and submitted to cross examination by the plaintiff's attorney. This comment the court held improper.

The case of State v. Fitzgerald cited by the respondent was where the State's Attorney commented upon the absence of a witness and the respondent's failure to call the witness, when it appeared that the witness was equally available to the state. We submit that there is nothing in the cases cited which tends to support the claim that the argument of the attorney in the case at bar was improper. We submit there is no error.

EXCEPTION NO. 9

What we have said with respect to exception No. 5 and exception No. 6 applies to exception No. 9; as the question raised in exception No. 9 to the Judge's charge pertains to the admission of the Pandjiris evidence and the motion to strike it out. We think this matter has been covered by what we have already stated in exception No. 5 and exception No. 6.

CONCLUSION

No error appearing in the record, we respectfully submit that the judgment below should be affirmed.

Respectfully submitted,

ROBERT R. TWITCHELL, State's Attorney

J. WARD CARVER, Attorney General.