J. HERMAN FEIST,

V.

THE STATE.

On the night of December 14th. 1905, Mrs. Rosa Mangrum, wife of J. O. Mangrum, disappeared from the city of Nashville. On January 25th. 1906, forty two days later, her body was discovered floating in the Ohio River, at a point, just above Cairo in the state of Illinois, and about two hundred and sixty five miles below Nashville, In a few days after this disappearance the members of her family, becoming alarmed, instituted a search for her, which extended over a considerable period of time and covered a wide area of territory. Many clues, either imaginary or real, were followed and the aid of private citizens and public officials was secured in this search. In some say, there soon grew up a suspicion in the minds of the family and friends of Mrs. Mangrum that the plaintiff in error was connected with her disappearance. After the recovery of her body, this suspicion, which in the meantime had been growing stronger, took definite form, resulting in his arrest on the 16th. of March, 1906. Subsequently, upon an indictment, duly found, charging him with the murder of Mrs. Mangrum, his trial began in the criminal court of Davidson County, and, extending through twenty four days, ended on the 16th. of February, 1907, in the jury returning a verdict of murder in the first degree, upon which judgment was pronounced visiting upon the prisoner the severest penalty of the law. The record is before

us upon appeal --- the plaintiff in error insisting, through his counsel, that in essential particulars the State had failed to make out its case, and that, in addition, serious and prejudicial errors were committed against him in the conduct of the cause.

The plaintiff in error is a physician, who had been practicing his profession for a number of years in the city of Nashville, His office was in the Wilcox Building, located on the corner of High and Church streets in that city, while Mr. and Mrs. Mangrum occupied rooms in the boarding house of a Mrs. Cullom, situated a block or square away. A year or more before her disappearance Mrs. Mangrum became a patient of Dr. Feist. The relstion between these two persons, which no doubt was simply professional in the beginning, we are satisfied, soon ripened into one that was personal and illicit. She was a frequent visitor at his office, going there often under conditions which aroused the suspicion of her husband and provoked from him protest, yet such was her influence over him that in the end his suspicions were allayed and his protests were silenced. Not only were her visits to his office, during her presence in Nashville, continued without break, save during occasional seasons of illness, which were either feigned or real, but whether one or the other he was summoned to her bed side, where Mrs. Mangrum's elaborate preparations to receive him, as well as the occasional length of his stay in the privacy of her rooms, attracted the attention of other inmates of the house.

Before coming to the incidents, nearly or immediately, connected with the disappearance of Mrs. Mangrum, it is proper to state some general facts shedding more or less light on this cause. For several years she had been engaged

in occasionally organizing and superintending public entertainments for charitable societies, receiving as compensation for such work either a fixed sum or a division of the net profits realized therefrom. In carrying on this work she visited different cities, which resulted in frequent absences from Nashville and prolonged stays in the places where she was so engaged. She kept an individual bank account, and while she indulged in dress and jewels, a taste which is shown to have been fastidious and, possibly, extravagant, yet it seems that she was sufficiently frugal to have kept as the fruit of her labors a considerable balance to her credit in bank.

Coming now to the incidents, which the State insists are established, and whicj it is evident the jury accepted as such, leading to and connected with her disappearance, we find, that on the Saturday evening or night preceding, her young brother, who boarded at the same house with Mr. and Mrs. Mangrum, cherishing for the latter unusual affection and living on the most intimate terms with her, having failed to find his sister at home, after searching for her in her rooms, on leaving the house saw her about 7:30 o'clock crossing the street which runs in front of the Wilcox Building and get into a buggy, standing on the opposite side, with Dr. Feist, who then drove west on Church street. This street crosses Spruce street, which runs north and south. Near the extreme north end of this latter street is located a house kept by a woman who is known in the record as Grace Chester. The theory of the State is, that this drive ended in a visit of several hours at this house. As to this visit, as well as its significance, the prosecution relied upon the testimony of a young woman who is indiscriminately called in the record Mrs. Mabel

McKane and Mrs. Luttrell. The career of this person, though brief, from her own confession, had been marked with much that indicated great moral degeneracy. According to her testimony, eloping at fifteen years of age, she married a young man by the name of McKane, and was only twenty when examined as a witness in this case. In the meantime she seems to have run the full scale of dissipation. She lived with her husband long enough to bear to him a child. Two years after her marriage, however, while in the home of her mother-in-law, in Birmingham, Alabama, awaiting her husband who was then absent but whose return was expected, without any apparent excuse or reason she abandoned the roof and protection of this lady and voluntarily became an inmate of a house of ill fame and then began a life of prostitution which culminated in her becoming the mistress of a young gentleman who brought her, in October or November, 1905, to the city of Nashville, where she was lodged by him under the name of Mrs. Luttrell in the same house where Mr. and Mrs. Mangrum were living. She excused her presence and stay in that city by giving out the story that she was interested in certain real estate in Nashville, which was involved in some litigation. There she came to know the deceased, between whom and herself there sprang up some degree of intimacy. While living in that home with an outside air of pripriety, she was secretly meeting her paramour at the house of Grace Chester at least two nights in each week of her stay. She testifies that on the Saturday night, before referred to, as that upon which Mrs. Mangrum's brother stated that he saw his sister get into Dr. Feist's buggy and drive west, that she was at this house occupying one of the rooms with her friend, when after a time her attention was attracted by a conversation between two persons occupying

an adjoining room. On listening, she states, that,after a time, she recognized the voice of one of these persons as that of Mrs. Mangrum, and discovered that, in a somewhat excited manner, she was discussing something with the other party - - a gentleman - - whom at first she called "Herman", and afterwards "plainly addressed as Herman Feist". As to what was then said, according to her testimony, will be best seen from the questions asked and her answers thereto, as follows:

"Q. Now just tell me all you heard in that room, just speak like they spoke, the same pitch of voice and everything?

"A. He asked her something and I heard her respond to him and they seemed to become excited, or rather she did, and she said, 'why Herman', and he said something, and she said 'why Herman Feist, there is no use in that I don't see the reason,' and he said, 'now Rosa', I distinctly heard him say Rosa, and he lowered his voice and I could not make out the words, but directly I heard her say something about an amount of money on her like that, and they were discussing a money matter entirely and seemed to be very much excited, at least she did.

"Q. Could you tell what they were saying about the money matter?

"A. No, that she didn't see the reason, that was one thing she said in talking about the money, another, she didn't feel like she ought to carry that amount of money with her. Those were the words I heard from her, 'I don't feel I should carry that much money with me'.

"Q. How long did you hear them talking there?

"A. Why possibly I heard them talking for more than half an hour, and that was the drift of the whole

conversation, and then the friend I was with said, do you know those people and I didn't want him to know, and I said, why I don't know as that is anything to you at all.

"Q. Why was it that you didn't want to tell?

"A. Him?

"Q. Yes?

"A. Because I recognized Mrs. Mangrum's voice and I liked Mrs. Mangrum as a friend and I didn't even care for this gentleman to know anything against her".

It will be seen that this evidence, if true, tends strongly to support the contention of the State, as hereinafter set out. In important particulars she is directly contradicted by witnesses for the defense and especially the proprietress of the house and her housekeeper who swears that Dr. Feist was never a visitor there save in a professional capacity. In addition, there is to be found in her testimony, when analyzed, strong indications of unreliability, yet, it is not for this Court to weigh evidence and reject that which was accepted and acted upon in the court below.

This leads us now to the circumstances which, it is insisted, immediately attended Mrs. Mangrum's disappearance from Nashville, on the night of the 14th. of December, 1905. Some two days before, she had informed her husband that she contemplated a trip to Chicago, and about noon on the 14th. she told her brother that she purposed leaving for that city that night. When her husband returned from his place of business to their rooms, about five o'clock in the afternoon of that day, he found his wife engaged in preparing for her departure, This suddenness of purpose seems not to have excited suspicion on the part of either husband or brother, In reply to a question of her husband,

she told him that she had already secured her railroad ticket and an upper berth in the sleeper to Chicago, which she hoped to exchange for a lower after boarding the car. It was raining at the time and the indication was that the night would be disagreeable, so as all of her arrangements had been made for the trip she excused her husband from bearing her company to the station. Instead, however, she later invited her brother to go with her, but after doing so, she went to the telephone and called for Dr. Feist, at the same time asking her brother to step aside while she had a conversation with him. What was said in this conversation her brother did not know, but after it was over, she told him it was unnecessary for him to take her to the train. In the meantime her trunk had been dispatched to the Terminal station, and, about seven or seven and a quarter o'clock, a cab, which her husband had sent for her conveyance, drove up in front of the house. Her husband had already bade her goodbye and gone to his place of business, and her brother, taking her out, placed her in the cab. At this time she wore, over the usual articles of a ladies dress, a long three quarter black cloak and carried in her hand an umbrella and a ladies purse. After getting into the cab it drove off in the general direction of the Terminal Station, and this was the last time either of these parties ever saw her in life. That Mrs. Mangrum reached the station is unquestionable. The driver of the cab so swears, and there is no reason to doubt his testimony. In addition, others at the station that night, who knew her well, noticed that she was there. Among these persons was the transfer agent, who occupied a small office not very far from the baggage room. He states that, about thirty minutes before the Chicago train was scheduled to leave, Mrs. Mangrum came to his office and asked

and was granted permission to use his telephone. As the office was small, when she entered he stepped on the outside while she used the telephone for a few minutes, but who was called by her, and what the conversation was, the witness could not state.

In addition, we think the testimony of Grainger, the baggage agent, not only shows that she was at the station, as was claimed by the State, but puts beyond controversy the contention of the counsel of the plaintiff in error, that Mrs. Mangrum had at the time a ticket for Chicago, and used it in checking her baggage only a very little while before the leaving of the train, at 8: P.M., for that place. This witness says, that in order to get a check for her trunk, it was essential for her to have a ticket, and exhibit it to the baggage agent. The number of this check was entered on the baggage record and was next to the last item of baggage checked that evening for that train. When this trunk was reclaimed from Chicago, some weeks thereafter, the number of the check on it corresponded with that shown by this record.

- Returning now to the theory of the State, with regard to the conduct of the plaintiff in error and his connection with Mrs. Mangrum and her disappearance that night, we find it to be that under the assumed name of Dr. S. A. Bean he hired a horse and buggy from one E. H. Mitchell, the proprietor of a small, obscure and somewhat remotely situated livery stable in Nashville, and about the hour of seven-thirty o'clock drove to the Terminal Station and there taking Mrs. Mangrum into the buggy he left the station, driving northerly and in the general direction of the Cumberland river; that he murdered her, stripped from

the fingers of her left hand diamond rings valued at from twelve to fifteen hundred dollars, and took from her some fourteen hundred dollars, which under his persuasion, as testified to by Mabel McKane, she was carrying in bank bills on her person; and these things being accomplished, at some point in Davidson county, not shown, he threw her dead body into the river, where for thirty-nine days it lay concealed in the depths of the water; and that finally rising, it floated down the Cumberland into the Ohio river, and was taken, as has been stated, on the forty-second day after her disappearance, from this latter river at a point, a short distance above Cairo in Illinois.

As tending to establish this theory, a number of witnesses were introduced by the State, Among these, and altogether the most important, was E. H. Mitchell, the livery man referred to. He testified that about six or six-thirty o'clock on the evening of December 14, 1905, he received a telephone message, purporting to come from one Dr. S. A. Bean, requesting him to send a horse and buggy to the Wilcox Building at seven-thirty o'clock to be used until eleven o'clock that night, and asking his charge for the same. Agreeing upon terms of hiring, in compliance with this request, at the hour named, he took the horse and buggy to the front of that building. At that time it was raining very hard and the storm curtains of the buggy were up. Arriving at the place designated, he states that as he drew up to the pavement curb that a man came up to the side of the buggy and asked him if that was the buggy for Dr. Bean, and upon being told that it was, thereupon the man requested him to drive to the corner on the opposite sid of High street from the Wilcox Building; that he did as

requested when the man followed him across, paid him three dollars for the hire, got in the buggy and drove north on High street. This vehicle, as described by the witness, was a piano box, top buggy with red running gear. The horse attached to it was "a big, sorrel with bald face and flax main and tail". He further testified, that on returning to his stable the next morning at an early hour, he found that the horse and buggy had not been returned as agreed upon, and feeling uneasy was in the act of calling up the police to speak to them with regard to the matter when he was called over the telephone by some one representing himself as the same Dr. Bean, who asked the over-charge on the horse and buggy, and, when witness answered that it was two dollars, the party at the other end of the wire replied that they were at the Maxwell House, and if sent for he would pay the party coming for them the amount of the over charge. The witness further testified, that he sent a negro boy at once to the Maxwell House, who soon returned bringing the money and the horse and buggy, and upon examination he discovered that the animal was greatly jaded and that the buggy was muddy, and the carpet or rug in the bed of the buggy was wet.
The record shows that on the first floor of the Wilcox Building are the offices of the Electric Light Company, with large windows opening upon Church Street, brilliantly illuminated by incandescent globes throwing a bright light across the pavement and into the street, while on the opposite corner, where the buggy was taken and accepted by the person calling himself Dr. Bean, there was comparative darkness. The witness says that he had never seen or known Dr. Feist, but that when he alighted from the buggy to give place to the person who had hired it, he sufficiently inspected him to be able to say, that he had on nose-glasses

and wore a crushed or slough hat, a long overcoat with an adjustable fur collar, and had on his hands long gauntlets, or fur gloves.

This witness further stated, that on the Sunday night following, this same man, who called himself Dr. Bean, came to his stable and hired the same buggy and horse, saying that he wanted it until about nine o'clock and paid for the hire, two dollars in advance - - - that he was then dressed as on the former occasion, that is, he wore "a crusher hat, a long dark overcoat and an adjustable collar", and took into the buggy with him a long black bag "something like those that the doctors usually carry their instruments in", and getting into the buggy he drove north. The witness states that he did not see this so called Dr. Bean, until a month and a half or two months afterwards, when at the instance of detectives Irwin and Dowd, of the Nashville police, he went to Dr. Feist's office in the Wilcox Building, to see if he could identify him as the man who had hired the horse and buggy on those two occasions. As an excuse for making this visit he called upon the Doctor for a prescription, which was given him. On that occasion the Doctor was in an office jacket and the witness seemed uncertain as to his identity. A few days afterwards he was again sent by the same parties to this office and found him as before in an office jacket, and upon his return said to the detectives that he would not be satisfied as to his identity until he saw him dressed as he was upon the night of the 14th of December, and the Sunday night following. A third time he was sent by the same parties, when he saw the Doctor entering the vestibule of the Wilcox Building, dressed as he was upon the two occasions referred to, and

he identified him then, and afterwards on the trial of this case, as the man who hired the horse and buggy on the nights in question.

An effort was made to break the force of this testimony by witnesses, called to impeach his general character. This, however, was met on the part of the State by the introduction of a much larger number of witnesses of high repute, who testified that the character of Mitchell was good, and that his statements under oath were entitled to full faith and credit. In addition, a couple of witnesses were introduced, one of them being an attorney representing the defense, and, with all, a man deservedly of fine standing as a citizen and in his profession, both of whom testified, that after the arrest of Dr. Feist, knowing that the State intended to use Mitchell for the purpose of identifying him as the party, who, under the name of Dr. Bean, had hired the horse and buggy, on the evening of the 14th of December, went to his stable and interviewed him on that subject. The attorney referred to, after the first conversation with Mitchell, returned to his office and undertook, at once, to put down in a memorandum book, as near as possible, the words of this interview. Having done this he returned, subsequently, to this stable and read over the writing to Mitchell, who said to him there were certain inaccuracies in it, which, he (Mitchell) pointed out to him. These were corrected, as this witness says, in another draft, which, when prepared, was submitted to Mitchell, who pronounced the same, in all respects, as correct. In this last draft he is made to say, "I might know him (Dr. Bean) if I were to see him again, but I doubt it - - - - - - - - - - . The officers had me stand

in front of the Wilcox Building after that and wait until Dr. Feist came out to see if I could identify him as the man who had hired the horse and buggy, but after waiting over an hour he failed to come out so I left and have never seen the man since".

The other witness referred to, one, Hunter a merchant of Nashville, stated that at the instance of this same attorney, he, in a buggy with Dr. Feist, drove to Mitchell's stable, and calling Mitchell out the witness introduced him to Dr. Feist and said to him, "this is the man who it is claimed hired the horse and buggy from you; look at him good and see if you can identify him" and that Mitchell did look at him and say in reply, that he did not look like the man at all". When recalled in rebuttal, Mitchell positively denied that he had ever said to the attorney in question that he doubted his ability to identify the man who hired the horse and buggy, and that he knew nothing whatever of either the original or corrected statements which this attorney had sworn that he had submitted to Mitchell, the last, meeting with his full approval. He also denied the interview testified to by the merchant Hunter. In this shape and under these conditions the testimony of Mitchell went to the jury. In passing, it may be said there is one fact in connection with the hiring of the horse and buggy that is worthy of observation, and it is this, if it be true that the plaintiff in error was masquerading on the night of the 14th. of December in the name of Dr. Bean, and was so anxious to conceal his identity as to have Mitchell drive the horse and buggy from the front of the building, out of whose windows such a bright light was projected, across the street, to the dark corner opposite,

where he took possession of it, it is at least strange and indicates a great lack of segacity, or a disregard of consequences on his part that he should go to the same stable three nights thereafter, dressed in the same way and under this assumed name, hire the same horse and buggy. It would seem that a slight degree of prudence on the part of the plaintiff in error would have prevented an exposure of himself the second time to the close inspection of this witness.

As has been seen, the theory of the State is, that which this horse and buggy the plaintiff in error drove to the Terminal Station, where he found Mrs. Mangrum, and taking her into the buggy drove away with her. To establish this, two witnesses were introduced, to wit, one Stone and Marshal Thompson. The witness Stone states that he had gone the night of the 14th. of December, as was his habit, to the Terminal Station for the purpose of securing, if possible, guests for a house which he and his wife conducted in Nashville; that somewhere between seven and nine o'clock while standing in the front vestibule of the station he saw a buggy and horse, with a party on the inside, drive slowly in front of the station, and in driving by, the party leaned forward and peered into the station as if looking for someone, and that after having driven the full front he then turned and, coming still nearer the curb of the pavement, drove slowly back, peering out again as if in search of some person; that after passing the station, at a distance of possibly one hundred and fifty feet east, the buggy stopped at the end of the railed walkway, running along the eastern side of the terminal station, when he saw someone approaching, with a long black coat on carrying an umbrella, who entered

the buggy. The witness was unable to say whether this person was a man or a woman, but his impression was that it was the letter. The witness was unable to identify the plaintiff in error as the person in the buggy, but stated that whoever it was, he was a white man; that he noticed he was holding the horse back as he passed in front of the station in both instances, and that he had a long driving glove or gauntlet on his driving hand. He further stated, that after the person got into the buggy it was driven in a northeast direction across Broad street, toward the mouth of Walnut street, which runs north. The witness Marshall Thompson is a hackman, who does not visit the trains at the Terminal station regularly, except the 7:25 evening train, which brings passengers from Maury county, where Thompson formerly lived. The witness states, and in this he is corroborated by a volume of testimony, that on the night of the 14th. of December, 1905, the annual ball of the firemen of Nashville occurred at the Tulane hotel, at or near which hotel he was in the habit of standing with his hack; that upon going to his stand that night he found his place occupied by the hook and ladder wagon, and thereupon he drove to the Terminal Station. Stopping, for a little while, on the Walnut street side of the station and securing no passengers he started to the Broad street front, and when at a point where the walkway along the west side of Walnut reached Broad Street, (this being the walkway referred to by the witness Stone, as the one along which he saw the person clothed in black approach and get into the buggy, standing at or near the mouth of the walkway) he saw a horse and buggy standing in front of the walkway, and as he passed the man in the buggy said, "don't run over my horse", to

which the witness replied, "back your horse up; I don't want to drive to the Custom House to get around it". Thompson states that he noticed that the party was driving a piano-box buggy with the curtains up, prepared for rain which was then falling; that he could not see the man very well, but did observe that he was wearing a long glove on the hand which reached out, apparently, for the purpose of taking the line or lines that had slipped; and that the horse attached to the buggy had a sorrel neck, a bald spot in his face and a flax main. From his voice, he said, he was satisfied that he was a white man.

The witness failing to secure passengers, after having reached the front of the station, turned around and started to drive back to his stand at the Tulane hotel, and on doing so entered Walnut street from Broad, driving north along the street, and just as he was about to turn into Payne street, which runs parallel with Broad, he observed the same horse and buggy passing him going north.

Sometime after the date in question, the horse, which Mitchell claims to have hired with the buggy to Dr. Feish, under the name of Dr. Bean, passed into the possession of one Hardison, at whose place near Nashville it was kept when this matter was being investigated, Thompson was carried out where the horse was, and upon examination he found that it had the same kind of a neck and forehead as the one he saw at the depot on the night of Dec. 14, 1905.

Mrs. Mangrum owned valuable rings, and drew in currency from the bank, during the day of the 14th. of December, the sum of $1433.00. According to the testimony of her sister, Mrs. Trousdale, she wore her rings upon

the third finger of her left hand, and her habit in traveling was to carry her paper money in her stocking. When her body was rescued from the Ohio River, it was found that a glove was on the right hand, but the left was bare and there were no rings on the fingers. On the body was a corset with an underskirt beneath it and next the skin . . a dark skirt, black stockings and shoes. The stocking on the right leg was in place, held by an elastic supporter attached to the corset . . the supporter on the left leg, however, had been cut, evidently, by a sharp instrument, and the stock turn down midway between the knee and the ankle. This condition indicated that the body had been robbed, either before or after death, and before or after it came into water.

In view of the intimate relations which, according to the evidence of the State, existed between the plaintiff in error and the deceased, it is not going far to assume that he knew her habit in carrying her money quite as well as did her sister, and if it be true that he murdered her and for the purpose of robbery, he would waste little time, not only in stripping from her fingers the jewels she wore, but in his search for her money, and, if the testimony of Mabel McKane can be relied upon, it would be difficult to resist the conclusion that he knew that his search would result in finding concealed in the usual hiding place the large sum of money, which only that day Mrs. Mangrum had drawn from the bank. As tending to show that plaintiff in error was guilty of robbing her person of this money, the State relies, among other indicia on the condition of the account which the plaintiff in error carried with the Fourth National Bank, of Nashville, a copy of which

beginning with the date of July 6, 1905, and running into January 16, 1907, is made a part of the record. This account shows that on July 6th. he deposited $45.87, against which he drew a check of $17.00, leaving a balance of $28.87, and that during the remainder of the month of July and the whole of the month of August he deposited a little over $200.00, and on the 31st day of this latter month his account showed a balance to his credit of $30.27. During September he deposited $105.00, and his balance at the end of that month was $48.27. On October 20th. he deposited $52.00, and on the same day borrowed $50.00 from Mrs. Mangrum and executed his note therefor, so that the amount depos ited exceeded the amount so borrowed only $2.00. When this deposit was made on the 20th of October, his account was over drawn $1.63, and during this month he drew against the deposit of October 20th. until on October 31st., his balance was sixty seven cents, and this was his total credit in bank until the 18th of December, 1905, save that on December 12th he deposited $20.00, which he drew out on the same day, thus leaving the balance as it was. On December 18th. 1905, the plaintiff deposited to his credit in that bank the sum of $500.00 in currency. The State insists that his deposit is significant in this prosecution not only by reason of the amount deposited as compared with the previous leanness of this account, but as it was made four days after the disappearance of Mrs. Mangrum, and on the day succeeding the Sunday night when, according to the testimony of Mitchell, the plaintiff in error, as Dr. Bean, for the second time, he procured the horse and buggy from him and was gone with it several hours. A further significant fact, as urged by the State, is that

on December 19th. 1905, Paul Denton, connected with the firm of W. R. Cornelius & Co., presented to the plaintiff in error in his office for collection a small account, amounting to $6.40, and that the plaintiff in error tendered him in payment thereof a bill of one hundred dollars, which this collector had to get changed for him.

In meeting this contention of the State, the plaintiff sought to show by one Alley that he and Dr. Feist were jointly interested in a travelling comedy company during the fall of 1905 and the winter of 1906-6, and that as net earnings were made they were divided by Alley, who accompanied the troop and looked after the finances, and when the share of the plaintiff in error was ascertained it was transmitted to him in Nashville. The witness confessed that no books were kept, but the balances, either of profit or loss, were ascertained from nightly sheets, which, having served their purpose in this regard, were at once destroyed, and that the payments to Dr. Feist were made in cash, or sent to him in currency enclosed in envelopes through the mail. No receipts were taken and nothing existed at the time that this witness was examined which enabled him to speak with any degree of certainty as to either the loss or the earnings of the company. He did testify, however, that its net earnings ran from $500.00 a week down to a minimum or loss, but that the November business and that of December up to Christmas was good. The witness speaking generally was unable to give the dates of any of his payments to plaintiff in error, save that in December, 1905, he sent him in currency, as was his habit, in an envelope by mail, $160.00, and in the same way on another day of that month $50.00. But he gives no reason

why he recalls especially these two remittances made on different days of the month in question. It developed in the testimony of this witness, that he and his wife and Dr. Feist had lived in a house on McLemore street in Nashville by themselves for three years, and that while the witness was away travelling with his company the plaintiff in error and the wife of Alley were alone in this house. She was not examined as a witness in this case, but is shown to have been absent during the trial in Jeffersonville Indiana.

In addition to Alley, the plaintiff in error offered one Aaron Bergeda, who was at one time a pawn broker, but who had become within a year prior to the trial a jeweler and dealer in diamonds, on Church street in Nashville. This witness stated that for years he had been on the most intimate terms of social relationship with Feist, and that the latter frequently kept large sums of money in his (Bergeda's) safe; that a number of times he had there as much as $450.00; that this began in 1904 and ended in August or September 1906, and that his recollection is, that Feist drew out of his (Bergeda's) safe, within a week or ten days before Christmas, 1905, something like $250.00, which left in the safe from $125.00 to $150.00. The witness does not pretend to have had any papers or books showing these transactions, but claims that all of these dealings between Feist and himself were shown by memoranda upon slips of paper or envelopes, all of which, having served their purpose, had been destroyed. The explanation of this unusual course of business is found in the statement of the witness, that there were judgments against Dr. Feist, and the implication is, that this mode of taking care of his money was

adopted by the plaintiff in error with a view to avoid these judgments. But it is insisted by the State that no reason is assigned in this record, if this was the purpose, why on the 18th of December, 1905, he should have had his apprehensions removed, to such an extent as that he would deposit on that day the sum of $500.00 in the bank, In addition, it is said that it is difficult to understand why it was, that while making Bergeda's safe a depository during 1905 she should have opened and carried an account at all, meager as it was, in the Fourth National Bank.

As against the testimony of these two witnesses, the State showed, as has already been stated, that he borrowed from Mrs. Mangrum $50.00 in October, 1905, and earlier in that year sought to make another loan with her for a hundred dollars. It is further in evidence, that upon one occasion after having invited the deceased and her sister, Mrs. Trousdale, to lunch with him at one of the restaurants in Nashville Mrs. Trousdale stealthyly passed to him a ten dollar bill to enable him to pay for the lunch.

In view of what is shown by the bank account, already referred to, and these significant facts, just stated, we are not prepared to say that the jury were unwarranted in rejecting the evidence of Alley and Bergeda, and accepting the theory of the State, that in view of all the circumstances in the case, the money deposited by the plaintiff in error, on the 18th day of December, and the hundred dollar bill offered to Denton in settlement of a small claim, came in some way from the money, which we are satisfied on the night of the 14th of December, was upon the person of Mrs. Mangrum.

Another circumstance which the State urged as cogent in its character, and strongly corroborative of its theory, that the plaintiff in error was a guilty agent in the disappearance of Mrs. Mangrum, is, that while the family of the deceased, and especially Mrs. Trousdale, her sister, were pressing in every direction and following every clue, however insignificant it might be, to ascertain whether she be living or dead, Dr. Feist sought to divert them by fabricated statements; and especially this was true with regard to the sister, who went to his office and said to him that she had exhausted herself in fruitless efforts in this search, and that she came to him as a last resort, believing he knew not only of her disappearance, but if living where she was, and after parrying her question and exhibiting great agitation he stated to her that Mrs. Mangrum had been for months afflicted with a loathsome disease and had gone away to hide her shame and seek relief, which if she did not obtain she would possibly never return. This statement was met with indignant denial and denunciation on the part of Mrs. Trousdale, and we are satisfied, from the whole body of the testimony, that this statement was a fabrication. The learned gentlemen who performed the autopsy after the recovery of the body of Mrs. Mangrum, said it showed no signs of disease, but on the contrary gave evidence that, while Mrs. Mangrum was alive, she was a woman of perfect health.

As against the case as made out by the State, touching the identity of the plaintiff in error as the party connected with the disappearance of Mrs. Mangrum, he undertook to defend by showing that he was not the party who, on the two occasions referred to, under the name of

Dr. Bean hired the buggy from the witness Mitchell; that Mrs. Mangrum not only checked her trunk to Chicago, but in fact left herself on the eight o'clock train, over the Louisville and Nashville Railroad, on the evening of December 14th, for the same city, and lastly by the establishing an alibi.

We have already considered the testimony offered by the State in support of its theory, that Dr. Feist was the party who hired the buggy on these occasions in the name of Dr. Bean, as well as that upon which the plaintiff in error sought to controvert this fact. On this point it may be further said, that it is clearly shown in the record that at the time referred to, there was no such person as Dr. Bean occupying a room or office in the Wilcox Building, and a searching examination of the hotel registers in Nashville about that time disclosed that no such person was stopping at any one of these hotels, and no such name was found in the city directory, So we think the jury were authorized to conclude that there was no Dr. Bean in the city at that time, and that the name was used by some party, whoever it might be, who desired to conceal his true identity.

Before coming to consider the other defenses, indicated above, it is not improper to make some general observations. In the first place in a case resting for conviction upon purely circumstantial evidence, the rule "that the circumstances proven must not only be consistent with the guilt of the accused, but they must be inconsistent with his innocence and such as to exclude every reasonable hypothesis but that of his guilt", while prevailing in the trial court does not obtain in this Court. Where a

jury has found a defendant guilty of the felony charged against him, whether this conclusion is reached upon direct or purely circumstantial testimony, and the verdict has been approved by the trial judge, when it comes to this Court the case is not whether every reasonable hypothesis, save that of guilt, has been excluded, but, rather, whether the preponderance of the evidence is against the verdict and the judgment. The burden is upon the plaintiff in error to show that such preponderance exists. In this Court no longer is he presumed innocent of the offense charged. That presumption has been overcome by the result of the trial in the court below, and here he can only claim a new trial, so far as the facts are concerned, by showing that the weight of the testimony is against the finding of the jury. Leak v. State, 10 Hump. 145.

Not only this, but we think it is for this Court to consider that the plaintiff in error sat mute while the State developed, fact after fact, against him. The statute, embodied in sections 5600 and 5601 of Shannon's Code, which authorizes the defendant in a criminal proceeding to be a witness in his own behalf, provides that a failure on his part to testify shall not create any presumption against him we are satisfied so far as this latter provision is concerned is to be limited to the trial below. As has been seen, until the verdict of the jury has been returned and approved by the trial judge, the presumption of innocence obtains, and we thing that this qualifying provision was introduced into the statute in order that this presumption might in no way be weakened while the case was in the hands of the jury. But that presumption having been overcome, and the defendant coming as a guilty man here challenging the weight of the

testimony in the court below, we think no sound reason can be suggested why he should be permitted to avail himself of this statute in this Court. The question may well be propounded in such a case to the plaintiff in error, who insists here that he has been convicted on fabricated testimony, why then did you not produce yourself, the one witness, by whom this fabrication could have been established? The general rule is, that the presumption is against the litigant complaining, who has failed to produce the best evidence of the facts in controversy when that evidence is under his control.

There can be doubt that if our statute had merely accorded the defendant, in a criminal proceeding, the right to testify without more, that his failure to go upon the witness stand might be counted against him and comment on such failure might properly be made in the trial court.

Wit regard to the correct practice under a statute of Maine, which gave a defendant in a criminal case the right to testify, but lacking the qualifying provision as to the effect of the failure to testify, found in our statute, in State v. Cleaves, 59 Mr. 298, it is said: "The statute authorizing the defendant in criminal proceedings to testify at his own request was passed for the benefit of the innocent . . . . . The defendant in criminal cases is either innocent or guilty. If innocent he has every inducement to state the facts which would exonerate him. The truth would be his protection. There can be no reason why he should withhold it, and every for its utterance. Being guilty, if a witness, a statement of the truth would lead to his conviction and justice would ensue . . . . But the defendant, having the opportunity

to contradict or explain the inculpative facts proved against him, may decline to avail himself of the opportunity thus afforded him by the law. His declining to avail himself of the privilege of testifying is an existent and obvious fact. It is a fact patent in the case. The jury cannot avoid perceiving it. Why should they not regard it as a fact of more or less weight in determining the guilt or innocence of the accused?"

In the State of New York the statute permitting defendants to testify is like our own. In Stover's case, 56 N. Y. 320, the defendant on the trial below testified in his own behalf, but failed to give an explanation of certain incriminating circumstances, which, if innocent, he ought to have been able to explain. The trial court, in substance, charged the jury that they were at liberty to consider as a circumstance the failure of the accused, while a witness, to give any account as to where the money found upon him had been kept in the interval between the date he claimed to have received it until it was found. This was excepted to, and in the consideration of this exception the Court of Appeals, among other things, said: "This raises the question as to the construction of section 1, of chapter 678 of the laws of 1869 (vol. 2, 1597). That section, among other things, provides, that upon the trial of all indictments charging a criminal offense, the person charged shall, at his own request, but not otherwise, be deemed a competent witness, but that the neglect or refusal of any such person to testify shall not create any presumption against him. The general rule is, when it appears that any party, charged with the commission of a crime, has the power, if innocent, to explain a fact or

circumstance tending to show his guilt and fails to give such explanation, such failure may be considered as a circumstance against him. In the present case the question is, whether his failure to give any explanation of such a fact or circumstance, which he could do if innocent when testifying in his own favor, he having requested to become a witness, comes within this general rule. The argument in behalf of the accused is, that he cannot be made a witness at all except by his own request, and that his failure to be a witness shall not create any presumption against him, and that if he request to be a witness and becomes such he need not give testimony only as to such parts of his case as he may choose, and as to other parts to which he does not request or desire to give testimony, no presumption can be created against him for his failure to testify. In this construction I cannot concur. True, it is at the option of the accused whether or not to become a witness. When he has exercised this and become a witness he is made competent for all purposes in the case; for by his own testimony he can explain and rebut a fact tending to show his guilt, if innocent and he fails to do so, the same presumption arises from his failure that would rise from a failure to give the explanation by another witness, if in his power so to give it. The reason for the presumption is alike in both cases. It arises from the known desire of parties to repel or explain excusatory evidence against them, if in their power; and the basis of the presumption is, that the case shows that it is within their power if innocent. Hence, a failure tends to show an absence of innocence". In accord with this case are Clarke v. State, 87 Ala. 71; Brasheat v. State, 58 Md. 563.

We think the reasoning of the Court in the New York case is essentially sound, and that it is authority for the construction which we now put upon our statute. For if it be true, that where the failure of the defendant, who goes upon the witness stand to deny or explain incriminating circumstances, When the existence or non-existence of these circumstances lie within his personal knowledge, may be commented on by counsel, and made the subject of charge by the trial judge, then we can see no reason why, when he has failed to exercise his statutory right to become a witness, this failure should not have some weight, when he complains here that the verdict is not supported by the evidence. If the circumstances developed in this case, pointing to the plaintiff in error as guiltily connected with the disappearance of Mrs. Mangrum, could have been explained by him in a way consistent with his innocence, it seems natural that he would have seized the earliest opportunity in the progress of the trial to exercise this right to go upon the witness stand and deny or explain them.

Passing now to the two other defences of fact, hereinbefore referred to, to wit, first, that Mrs. Mangrum took passage in the Chicago sleeper, attached to the train which left the Terminal Station over the Louisville & Nashville road at eight o'clock, on the note of the 14th of December; and, second, the alibi which was sought to be established.

The nearest approach to that train which the record discloses is found in the testimony of one Tucker, who kept the gate through which passengers, intending to embark on that train, passed. He testifies that he knew Mrs. Mangrum, and that he recalled well the fact that on the night of December 14th while other passengers were

going through the gate to the Chicago train, she came and presented to him for his inspection, a ticket with a number of coupons, the first of which entitled her to ride to Evansville, and that he punched that ticket, but he was unable to say whether she passed through the gate or turned back from it. We think, however, the evidence of this witness was affected with the jury by the contradictory statements which according to two witnesses he made soon after the fact of the disappearance of Mrs. Mangrum attracted attention. A week after this occurred, the husband of Mrs. Mangrum asked Tucker, according to his testimony, whether he saw his wife on the night in question, when he answered that he did not know her. About the same time he told Walsh, a policeman at the station, that he did not know Mrs. Mangrum by sight, but that on the night in question he saw a woman whom he did not know, dressed in a long light cloak, who went through the gate followed by a small man with two grips, and that the lady had a mileage book. During the trial of the case he stated to Mr. Reed, a locomotive engineer on the N. C. & St. Louis Railway, in the presence of Mr. Raterman, "that Mrs. Mangrum came up to the gate and he punched her ticket and she turned round and went back toward the baggage room and he did not see her any more. Mr. Raterman was examined and he corroborated the witness Reed as to this statement made by Tucker to him.

So it is, that if Walsh and Mangrum testify the truth, then Tucker is absolutely contradicted in his statement, that he knew Mrs. Mangrum and knowing her had punched her ticket, or if his latter statement made to Reed in the presence of Raterman can be relied upon, then

Mrs. Mangrum is placed but little nearer that train than she was by the testimony of Grainger, in whose baggage room her trunk was checked.

However, we are satisfied, after a careful examination of the testimony of the conductor in charge of the sleeper, bound for Chicago, and of the porter of that sleeper, that Mrs. Mangrum, even if it be true that she had, as she stated to her husband, a berth as well as a train ticket, did not enter the Chicago sleeper which left at 8 o'clk. that night. The attention of these two parties, was challenged upon their return trip from Chicago, a week after the 14th, of December, to the question as to whether Mrs. Mangrum was a passenger on the sleeper that night, and they were shown a photograph of the lady and both unreservedly said, that she was not. It is true that when their written statements were taken, nearly a year thereafter, that some discrepancies between them and their testimony on the trial are discovered, but these two parties upon the witness stand, as they had done in the beginning, state, positively that no lady answering the description of Mrs. Mangrum was upon their sleeper that night.

The triers of fact in the court below, accepted the testimony of these two witnesses, and we think they were right in doing so.

<u>As To The Alibi</u>: The insistence of the plaintiff in error, as set out by his witnesses, is that he was in his office from 2: o'clock in the afternoon, of December 14th. until a little after 6: o'clock, when he left there in company with one Arnold and Abe Bloomstein; that outside of the Wilcox Building Arnold separated himself

from the other two and went home, while the plaintiff in error and Bloomstein went to the Bloomstein home where they had supper, Abe Bloomstein leaving after supper, about 8: o'clock, and Feist remaining until some time between 9: and 10: o'clock, when he left.

Arnold stated, in substance, that he was a visitor of Feist in his office on that day, and remained there from about 2: o'clock in the afternoon until just after 6: o'clock, when in company with Feist and Bloomstein he left. He explains this long visit by saying that he and Dr. Feist were talking during that time about buying some phosphate lands in Hickman county. He states that he fixes the date of this visit on the 14th. of December because on the next day he and his wife went into Feist's office, and on the day following, December 16th, they went to Hickman county. This is the only reason given why it is he was able to fix the time of that visit. No event or incident is mentioned by him that occurred on that day which was of a character to have emphasized the date in his recollection. This lack coupled with the fact, as was suggested by the counsel for the State, that according to the testimony of this witness we have the plaintiff in error with a bank account showing on that day a balance to his credit of 67 cents and the witness out of work, and without means, so far as the record shows, discussing for hours the question of buying valuable phosphate lands; under such circumstances it is not remarkable that the jury discredited this testimony.

Abe Bloomstein testified that he went to Feist's office shortly after 6: o'clock that evening and found there two men whom he did not know and whose names he could

not recall, and after a short visit he and the plaintiff in error went to the Bloomstein home, where a little before 7 o'clock supper was served after which he (Bloomsteim) went to the Elk's Lodge. He fixes the date by reason of the fact that this was the hight of the Fireman's Ball at the Tulane Hotel. He further states that it was not raining when he and Feist left the Wilcox Building, but thinks it began to rain sometime before they reached his home.

As to the latter feature of Bloomstein's testimony, the State introduced Roscoe Nunn, who was in charge of the government weather bureau at Nashville and who testified from his records, that on December 14th, 1905, it began to rain about 11: o'clock A. M. and continued so to do until midnight. Not only does he say that it rained continuously on that day and between these hours, but he stated that between 6:o'clock and 10:o'clock P. M. of that date the rain fall was 1.13 inches out of a total rain fall for the entire day of 1.43 inches.

Miss Etta Bloomstein also testified that the plaintiff in error was at their house that night for supper, reaching there in company with her brother "Abe". She fixes the date by a suggestion made at the time by Dr. Feist, in regard to the anniversary of the date of the death of his father, which would be the 16th, of December, and the conversation which passed between them in relation to the Jewish custom in the observance of the anniversary of a parent's death. She states that this was the last time that the plaintiff in error ever ate at their house.

She further says, that he left between 9: and 10: o'clock, and she loaned him an umbrella as it was then raining. On cross examination, she stated that the plaintiff in error had been at their home a number of times for supper, but she does not attempt to give any other date. In view of this and also of the testimony of Nunn, as to the great rain fall on that night, between the hours of 6: o'clock and 11: o'clock, and her testimony that she loaned him an umbrella in leaving, we think the jury would be warranted, while accrediting her with the greatest good faith, in believing that she had confused the date of this, his last visit, with some other date.

Miss Dora Bloomstein, who was also offered as a witness on this issue, states, as does her sister, that the plaintiff in error was there that night for supper, but that she did not hear the conversation between her sister and himself in relation to the jewish custom, referred to, inasmuch as leaving these two parties in a room down stairs she went up stairs to her own room and remained there until the departure of the plaintiff in error, but says that her sister, who joined her immediately after the plaintiff in error left, told her of this conversation. On cross examination she states, that he was in the habit of visiting there home once or twice a week, but she was unable to fix the date of any other visit than the one he paid on this particular occasion.

It follows, that if the jury had regarded this testimony, as to the alibi, as trust worthy, they would have been bound to acquit the plaintiff in error. Because if the recollection of these two young ladies was correct, that Dr. Feist remained in their home from 6:o'clock until 9: or half past 9:o'clock that evening, then the whole theory of the State, with regard to his being concerned in the disappearance of Mrs. Mangrum from the terminal station, would fall to the ground. For if such was the fact, then he

did not get the horse and buggy from Mitchell, nor did he go to the depot with this horse and buggy and there taking up Mrs. Mangrum drive away from the station, as testified to by other witnesses. But the circuit judge gave to the jury, in proper and intelligible terms, the rules by which they were to weigh the evidence with regard to the defense of an alibi, and it must be assumed that they accepted the testimony of Mitchell which, being so accepted, destroyed this defense.

Possibly there is no defense more frequently relied upon in felony cases than that of an alibi. When maintained it necessarily overthrows the contention of the State, that the defendant is guilty of the crime charged against him. But so liable to abuse is this defense that at an early date the courts found it necessary to instruct juries that it was their duty to exercise scrutiny in the examination of the testimony submitted to establish it. This court in speaking of the defense has said, "it is liable to abuse not only when a design exists to practice a fraud upon the state, but even when that design does not exist by ignorance, mistakes as to the particular hour and lapse of time, and that it requires great strictness and attention on the part of the court and jury to avoid being mislead by it. Thompson v. State, 5 Hump. 538; Lemons v. State, 97 Tenn 559. Speaking on this subject, Shaw, C. J., in his charge to the jury in the very celebrated case of Commonwealth v. Webster, 5 Cushing, 295, said; "This is a defense often attempted by contrivance, subornation and perjury. The proof, therefore, offered to sustain it is to be subjected to a rigid scrutiny, because without attempting to control or rebut the evidence of facts sustaining the charge, it tends to prove affirmatively another fact wholly inconsistent with it; and this defense is equally available, if satisfactorily established, to avoid

the force of positive, as of circumstantial evidence. In considering the strength of the evidence necessary to sustain this defense, it is obvious, that all testimony tending to show that the accused was in another place at the time of the offense is in direct conflict with that which tends to prove that he was at the place where the crime was committed and actually committed it. In this conflict of evidence, whatever tends to support the one tends in the same degree to rebut and overthrow the other; and it is for the jury to decide where the truth lies".

But it is insisted for the plaintiff in error, in an argument of very great ability and ingenuity, that the State had wholly failed to make out its case in two essential particulars, to-wit, as to the corpus delicti and venue. In addition the insistense is that the trial judge was guilty of error in his charge to the jury on these subjects, and in declining special requests that were submitted by the counsel of the plaintiff in error.

As is well known, the phrase corpus delicti literally means, the body of the crime. In a case of homicide the corpus delicti, however, consists of two fundamental facts; first, the death of the person alleged to have been killed; second, that death was the result of criminal agency. Redd v. State, 63 Ark. 457; Smith vs. State, 21 Gratt. 809; People vs. Benham, 160 N. Y. 402; Pitts v. State, 43 Miss. 480; State v. Millmeyer, 102 Iowa, 692.

These essential facts must be proved beyond a reasonable doubt before the party charged with the commission of a crime can be convicted. In the absence of such proof, as was said in State v. Hall, 48 Mich. 482, "all the malice imaginable is no proof in itself tending to show that death was caused by crime". Even extra-judicial admissions or confessions by the prisoner, when these fundamental facts are unproven, will not sustain a conviction.

People v. Tapia, 131 Cal. 647; Bines v. State, 118 Ga. 320; 68 L. R. A. 33.

It is axiomatic, that every party charged with a crime, however vile he may be, has a right to inquire that the elements of his offense shall be clearly defined by law ans established by legal proof before he can be convicted, and until so defined and established he may safely assert his immunity from punishment for the offense charged against him (People v. Plath, 100 N. Y. 590; Goldman v. Commonwealth, 100 Va. 865; State vs. Parsons, 39 W. Va. 468).

In some jurisdictions the rule prevails, that in all trials for crime the prosecution must prove to the satisfaction of the jury that a crime has been committed before the jury can proceed to inquire as to who is the criminal. In Michigan, the rule in regard to proof of the corpus delicti, is, that in cases of homicide, and in others where justice demands it, the prosecution shall not be allowed to proceed until the death and its character shall have been shown, as far as the testimony can be separately given, and especially so far as can be shown by the post mortem examination. It seems that under the systems of information prevailing in that state the presecution must always have knowledge in advance of the trial concerning the case intended to be made out, and it is there assumed that there can be no good reason for giving proof in reference to the commission of the crime by the accused until there has been proof of the corpus delicti. People v. Hall, 48 Mich. 482; People v. Millard, 53 Mich. 63. People v. Aikin, 66 Mich. 460; 11 Am. St. Rep. 512.

This practice, however, has not, so far as we are advised, ever prevailed in this state, and we see no

reason why it should. It seems to us immaterial the order in which the evidence, tending to prove the different material facts essential to conviction, is introduced for when delivered, whether of a direct or circumstantial character, yet if the whole body of the proof, when properly weighed, makes out a case of death by the act of a criminal agent, and that the defendant is such agent, the law is fully satisfied and sound practice is maintained.

In a note found on page 896 of Wharton on Homicide (1907 Edition), the learned author says; "But where the corpus delicti in a prosecution for murder cannot well be proved, except by the introduction of evidence tending to show the defendant guilty of connection with the offense, the evidence tending to prove both the corpus delicti and the defendant guilty may be introduced at the same time". In support of this a number of cases are cited. As will be seen hereafter, however, the complaint is not so much of the order in which the evidence was submitted, but in what is alleged as a failure upon the part of the trial judge to distinctly bring before the minds of the jury the necessity for the consideration of the evidence which tended alone to establish the identity of the defendant as the criminal agent from that which tended to prove death by criminal agency, as well as the brobative effect of the evidence introduced on this point by the state.

In the present case it was conceded in the court below, that the dead body found floating in the Ohio river was that of Mrs. Mangrum. So one of the primary fact involved in corpus delicti was established. The second- the State sought to show by the testimony of Drs. Leroy and Bryan, medical experts of experience and reputation.

An autopsy was made by these gentlemen on the 28th, of January, 1906, immediately or within a very short time after the return of this body from Cairo to Nashville, By a process of exclusion or elimination of various causes that might have produced death, some of which were natural causes, these experts reached the conclusion that Mrs. Mangrum came to her death by the administration of some subtle poison, the character of which they were unable to discover, When they came to make the examination they found that the body had been embalmed, and on the exterior of the body there had been placed embalming paste as a preservative, and the body was then wrapped with linen carefully with. This embalming had been done in Cairo after the recovery of the body. In order that their autopsy might be as complete as possible, the bandages or wrappings were removed and the paste was washed from the surface of the body. Both these experts agree, that in order to prepare the body for embalming the undertaker had cut into it from the middle of the breast down to the pubic bone for the purpose of introducint internally embalming fluids. They found no evidence of lacerations of bruises on the surface of the body, save two small cuts at the lower margin of the lip, which they agree were made post mortem. So long had the body been in the water that the hair was gone almost entirely from the head, only a few strands left here and there and these not very long. They made a thorough examination of the abdomenal organs of the body and this disclosed that these organs were those of a woman who, at the time of her death, was in perfect health; that there was nothing in any one of them to indicate any degree of inflamation. They found no evidence whatever, that at any time Mrs. Man-

grum had been a sufferer from the laothsome sesease with which the plaintiff in error had stated to Mrs. Trousdale she was afflicted, and on account of which she had taken herself into a place of concealment. Summing up, they stated unhesitatingly, that all of the organs of the body were found in perfect condition, and that the body itself was that of a woman of splendid physique, and of extremely good health in life. Dr. Leroy further stated, that if Mrs. Mangrum had died a natural death, the cause thereof, or some associated cause, would have been disclosed in the sutopsy, and that the entire absence of any such condition lead him to the conclusion that she did not die a natural death. He further stated, that there was nothing to indicate that Mrs. Mangrum came to her death by physical violance, such as a blow, cut, shot, or anything of that king, and that there was equally lacking any evidence that she died from drowning. The only poisonous substance found in the stomach was that contained in the embalming fluid, and this in no way interfered, upon this sutopsy, with their effort to discover whether there was any poisonous substance, prior to the embalming.

He states that there was discovered no trace in the body of any of the known poisons, from the administration of which death would ensue, but that there are a number of drugs which can be administered in several ways to produce death, all evidences of which would disappear from the body within a short time, and that among these are chloroform, prussic acid, cyanide of potassium and aconitine, and that the length of time for the disappearance of these drugs will depend largely upon the quantity of the drug administered and the extent of decomposition of the body. In regard to this Dr. Leroy said: "You might in some instances

find some things a week afterwards, and other instances, such as prussic acid, it might not be possible to fine after a couple of days." He further testified that some of these drugs, such as chloroform and prussic, might be administered by inhalation; that in the case of prussic acid, if it were pure, one inhalation might produce almost immediate death and the odor disappear very quickly; that in such a case the amount necessary to produce death would be so small as to be scarcely nameable, though he concedes that the amount necessary to bring about a quick fatal result depends somewhat upon the person, as some are more susceptible to the drug than others. That with regard to chloroform administered, either by inhalation or internally, the evidence of its existence would disappear in a very short time.

He stated that cyanide of potassium could be administered in a solution internally, or through a hyperdermic syringe, and that the amount necessary to produce death varies as does the time within which death might ensue. He also states, with regard to this preparation, that it is one of the most subtle and rapid of poisons, and easily disappears from the body, and that this is equally true with regard to aconitine.

Speaking of prussic acid and its terrible effect, in producing almost instantaneour death, Dr. Leroy illustrated this by saying, that to place a drop of this drug upon the tongue of a doy "he may drop in his tracks as if he had been shot in the head - - - he may even die before he would have if he had been shot through the head, because the animal may practically live a second or two after that". He testified further, that it was not a

difficult matter to produce unconsciousness, by placing something that would produce unconsciousness in a glass containing a liquid, such as water or wine, and after unconscious administer poison so as to produce death by a hypodermic needle, which, if it was withdrawn, would leave no sign.

In the course of his direct examination, the following occurred:

"Q. Now, if I understand you, I will get you to state whether or not, from the examination of this body, this woman dies of the effects of some physical violence, I mean external violence?

A. No sir, no physical violence.

Q. You refer by that to a blow with a weapon, or anything of that kind?

A. Yes sir.

Q. I will get you to state from your examination if in your opinion this woman dies from some natural desease . . . natural death?

A. No sir.

Q. No sir?

A. No sir.

Q. Then Doctor what in your opinion produced the death of this woman?

A. Some external violence.

Q. Now explain what you mean by some external violence?

A. Some external cause or other which is not physical force and which is not a natural cause.

Q. Now explain a little further so the jury can understand?

A. It might be poisoning, it might be freezing to

death, something of that kind.

Q. What else might it be?

A. Those are the two principle things which I would say,

Q. Did you examine----you stated you made a thorough examination----I will get you to say whether she died from the effects of strangulation, produced by drowning?

A. No sir, there was no evidence of it.

With regard to the obtaining of the deadly drug, prussic acid, the following occurred in his examination.

"Q. You spoke awhile ago of getting the prussic acid pure?

A. Yes sir.

Q. Can you get that at drug stores?

A. Not as a rule, no sir. As it is dispensed in drug stores, generally, it is of 1% solution.

Q. I will get you to state whether or not you can manufacture it in your office?

A. Yes sir, it is not a difficult matter.

Q. You mean your office or your laboratory?

A. Either one-- any room.

Q. You mean any one who understands the proper method can manufacture it?

A. Yes sir, it is not a substance of dilliculT manufacture".

As to the length of time that this body had been in the water, he states, that it gave evidence of having been submerged several weeks, but that it was impossible to state the length of time with exactness. On this subject this occurred;

"Q. You could not tell within two weeks, either

way, of how long it had been in the water, could you?

A. No sir, it might have been two months, or it might have been one month, or it might have been three weeks".

At the time of this autopsy decomposition had set in and had far advanced.

On cross examination he stated, that an external examination of the body did not to any extent show the cause of the death, and that upon an examination of the internal organs they were found all in normal condition. He further stated, that he analyzed the contents of the stomach, having treated them chemically, and found no trace of any poison that was not accounted for by the emablming fluid. In other words, that in the whole body there was discovered, upon the autopsy, no affirmative trace of any poison administered or taken before death. He further stated, that an examination of the brain was made, as far as it was possible to do under the circumstances. The brain was not thoroughly dissected, because at the time of the autopsy decomposition had advanced so that it had become soft. It was impossible therefore, to go into the brain with any great degree of detail. Pieces or slices of the brain werecut or scraped off, in an examination for blood clots, but this examination was made with the natural eye and not with a microscope. No clot of blood was discovered. He states that "the outside appearance of the brain, when the membrane was removed, could be seen very nicely and its convolutions was very easily observed; the course of the external blood vessels were shown very clearly, but as soon as an attempt was made to cut it the substance was so soft that clean cuts and slices could not be made." This occurred in the course of the

cross examination.

"Q. That is, the brain had so far decomposed that it could be scraped with a knife rather than sliced?

A. Rather than sliced.

Q. The fact remains, so I understand Doctor, that a rupture of a blood vessel in the brain may produce death, and the consequent clot be only discovered by the use of a microscope, which you did not use in this case?

A. Correct.

Q. Now, I want to ask you this question, if there are not natural causes, especially causes that will affect the nervous system, cases of fright, cases of shock, cases of the patient having lost her temper . . . a violent quarrel or instance of any other great shock or fright; are not these cases of that kind in which death will result and leave no post mortem trace that can be discovered?

A. You mean mental shock, I presume.

Q. Mental shock?

A. The cases of death from fright or sorrow, or mental shock are associated in most instances with some other lesion of the body, some nervous derangement or something else. - - - - - - - - -In those cases which <u>are</u> reported it is probable that the autopsy is quite questionable. The evidence is, that some natural condition will be present when a matter of shock will cause death, that is mental shock, I mean.

Q. Then the general rule is, when the patient dies from the mental or nervous shock, caused by the things we have been discussing, that you will find some other kindred things of the body that will cause the death.

A. That will not indicate the cause of the death, but will be present, if that was the cause.

Q. Will not indicate that was the cause, but will be present if that was the cause?

A. They would also have been present even though that cause had not acted.

Q. Exactly, so those things, when you say that, have not been the cause of death.

A. No sir, but they make the death possible.

Q. That, you say, is the rule . . . are there not cases and numberless . . . . . I won't say numberless . . . . a good many, Oh, we will say numerous reported cases. A respectable group of them where the autopsy has failed to show the cause of the death, even though it was known the patient had died from natural causes.

A. In which the autopsy may have failed to show it, but in which some of these associated things making it possible would be present; the things making it possible are not the causes, but simply the associated condition which puts the patient in such a position that the shock, and so on, would make it possible. In such reported cases, in which death has occurred simply without any demonstrable lesion, the finds of the autopsy and the thoroughness of the autopsy are open to question". When asked on cross examination, if it was true that there could be blood clots in the brain, caused by the rupture of some blood vessel, that could not be discovered exception (excepting) by the dissection of the brain, and going into it, without a microscope, he answered; "That would be in the same class you referred to at first, namely, the microscopic class. One of any size at all, I would have been able to find readily, as I did simply making thin slices and pushing them aside, and of course the difference in color between the blood clot and the white

of the brain could have been recognized. There was no such clot, so the microscope, of course as you mentioned, could be excluded".

Again in the course of the cross examination, the following occurred:

"Q. Whe whole result of your examination, from one end to the other, was purely negative, and you then reason this way; that there are, for example, some poisons that could have produced this death and not have left any trace; in your opinion the chances that the death was produced by some poison preponderates over the chances that the death was produced from some natural cause?

A. Yes sir.

"Q. You say that the majority of the chances are in favor of being that this death was produced by some kind of poison, or some application of violence, but there is a minority of chances in favor of the proposition that she died from natural causes?

A. Such a possibility might be conceived".

Further in cross examination this occurred;

"Q. And you found no traces of any poison that was not to be accounted for by the embalming fluid?

A. Yes sir. (Nodding in assent to this question)

Q. You found in the whole body no affirmative trace of any poison at all?

A. No sir.

Q. You neither found in the heart, or in the brain, or in the stomach, or in the liver, or in the kidneys, or in the bladder, or in the pancreas, nor in any other organ of this woman's body any evidence of any particular poison?

A. No sir.

Q. You found in none of those vital organs and

in no part of the body any evidence that would indicate, of itself, the cause of the patient's death at all?

A. No sir.

Q. So, then, the result of your autopsy was purely negative?

A. Yes sir.

Q. That is, there was nothing either on the outside or the inside of this dead body, from the top of its head to the bottom of its feet, that was any positive indication, the one way or the other, of any particular cause of death, either artificial or natural?

A. That is correct.

Q. I want to ask you then, if you do not arrive at your opinion, that the party died from poison, or the application of external violence, by a process of exclusion?

A. Entirely.

Q. You do not arrive at that conclusion by anything that you saw in the body at all, or on the outside of the body, but you arrived at that conclusion, purely, and alone, by reason of things that you did not find?

A. On account of the absence of any other reason, yes".

Again he is asked this question;

"Q. I say, then, Doctor, when you concluded and pronounced the opinion, that this body died from some external violence (that is from some cause other than natural), you reached that conclusion by this process, that is; that you discovered nothing in the autopsy and your subsequent chemical examination. The whole result of your examination, from one end to the other, was purely negative, and you then reasoned this way; that there are,

for example, some poisons that could have produced this death and not have left any trace; in your opinion the chances that death was produced by some poison predominates over the chances that the death was produced from some natural cause?

A. Yes sir, exactly."

With regard to an autopsy and satisfactory results to be obtained therefrom, the following question was put to him, which was answered as will be seen below;

"Q. An autopsy to be thorough, and to have an autopsy that is not open to question and that is absolutely reliable, presupposes that the doctor conducting the autopsy gets hold of the dead body before putrefaction has advanced, and presupposes the state of the body that will make the autopsy practicable?

A. Yes sir.

Q. For example; that would presuppose the state of the body that would make it possible to use the microscope to try to detect the cause of death, that would be revealed by that instrument, as well as by the natural eye?

A. Yes sir."

It is unnecessary to set out in detail the testimony of Dr. Bryan, as in all material respects he agreed with Dr. Leroy as to the conditions under which the autopsy was made ------what was found of an affirmative character, and what was not found, and by a process of exclusion, or elimination of causes, he, in common with Dr. Leroy, reached the conclusion that the death of Mrs. Mangrum was the result of some subtle poison, all trace of which was lost in the intervening period between her death and the autopsy. We deem it proper, however, to make a few extracts from his testimony, as follows:

"Q. You have told the counsel for the state that there are some poisons that could have carried this woman off and left no trace; I want to ask you if there are not some natural causes that could have carried her off also, and left no trace?

A. Yes, there are some cases where patients died, and there is nothing able to be found.

Q. So, when you give your opinion that the woman died from violence rather than from some natural cause, you arrive at that by a process of exclusion, that does not exclude all the chances, does it?

A. It does not exclude all the chances. It does exclude all except a very minute number, a very minute percentage.

Q. But it does not exclude all the chances?

A. No sir.

Q. That is, you mean this Doctor, that on the external surface of this body you found nothing that could account for its death; on its external surface you found nothing that could account for its death. The result of that autopsy was purely negative?

A. Yes sir.

Q. You reason wholly by a process of exclusion, and you reason this way; that since there are some poisons that could have carried her off without leaving any post mortem trace, or track, and since there are some natural causes that could have carried her off, without leaving any post mortem trace, or track, and since the number of poisons that could have carried her off in that way, without leaving any post mortem trace, or track, is larger than the number of natural causes, that could have carried her

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off without leaving the post mortem trace, or track, therefore, you say it is more probable to conclude that she died of poison?

A. That is practically the statement - - - -; the method is this; here is a body that to all appearances is a healthy body. The method of arriving at the conclusion we did is -----there is no evidence of any disease in that body that is capable of producing death. Now, we recognize the fact, that there are poisons that are capable of producing death and find no evidence of this poison, no trace of those poisons; we recognize the fact, that in a small percentage of cases - - - - - - - that die, and there are no discoverable lesions that are capable of producing death. Usually, however, when a body dies we can find a lesion that produced it -----that is if it dies a natural death. Now, physicians further recognize the fact, that for all natural deaths there is a natural cause, and that if that cause is not discovered, it is due to either incapacity on the part of the physician, or the fact, that we have not reached a stage where we are capable of recognizing that change that has taken place and which produced death, or to an incom plete post mortem examination, to one or other of these causes."

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"Q. You arrived at that conclusion (that is that death resulted from poison) on the doctrine of probability, because the chances of death by poison exceeds in muber the chances of death from natural causes, where you do not find any post mortem tracks?

A. It is a matter of conclusion again.

Q. So then, Doctor, you do not state, and you do

not attempt to state, positively, to this jury that this woman dies from violence rather than from some natural cause?

A. In the absolute I could not state that.

Q. You state the probability in the way you have described?

A. Yes sir.

Q. Now, in order for that probability to become a well defined probability, is not a favorable autopsy necessary ---- an autopsy under reasonably favorable circumstances?

A. Yes, the more favorable the autopsy the better our opinion would be.

Q. Exactly ------ the more favorable the autopsy the more favorable the chances you have to exclude the natural causes that could have carried the body off?

A. Yes.

Q. Now, do you regard an autopsy after a patient on the 14th, of December, or near abouts, died, and the body is submerged in water until it rises and then remains in water until January 25th ---- over forty days ----- and is taken out of the water and an autopsy is held, is that an autopsy under favorable circumstances?

A. Not under the most favorable circumstances. It depends on the amount of the decomposition, necessarily.

Q. Well, if the decomposition has advanced to such an extent that the hair has come off the head and the body has remained in the water long enough for decomposition to generate the gases to make it float, and the brain is too soft to be dissected, and it is beyond the power of the microscope, is not that a condition that is unfavorable?

A. Exactly.

Q. To autopsy?

A. Yes.

Q. And will increase the chances for the death from natural causes that could not be discovered?

A. Yes, it will do that to a certain extent.

It will thus be seen, that there is much room for the contention on the part of the counsel for plaintiff in error, that the opinion of Drs. Leroy and Bryan was more or less speculative, and that their conclusion, that Mrs. Mangrum died from a subtle poison, of which they discovered no trace, was based upon the fact, that they, at the same time, found nothing to indicate that she died either from external violence, or from a natural cause, and by a process of exclusion ultimately reached the conclusion, that her death resulted from poison. That an autopsy made, as this was after the body had been so long submerged and when decomposition was so far advanced as to preclude any thorough examination of the brain cells, must necessarily have been unsatisfactory in its results, we think must be conceded by every thoughtful person, and was realized by these gentlemen and frankly confessed by them. This, however, was emphasized by the testimony of three physicians of large experience and established reputation, who were introduced as witnesses by the defense, to-wit, Dr. E. G. Wood, Dr. Frank Glenn and Dr. Brower. To Dr. Wood was propounded a hypothetical question, purporting to set out defendants view of the condition of Mrs. Mangrum's body when the autopsy was performed, and he was asked whether from the conditions stated there arose any fixed conclusion, or presumption, to the effect that she died from poison,

or from natural causes, to which he answered as follows; "I think a post martem held under such circumstances would have practically no negative value whatever; that is, I am satisfied one could not say from a post mortem, after forty two days, and after being embalmed, that the individual had not died from natural causes". He stated further, that there are a few natural causes of death which may not be discovered upon an autopsy under the most favorable circumstances, when the party who is making it has no knowledge of the history of the case. In response to a hypothetical question, Dr. Frank Glenn said; "I do not think any opinion, outside of a speculative one, could be given of that sort of a post mortem", and when asked could any opinion of moral certainty be pronounced stated, "I think not". On cross examination he stated, however, as did Drs. Wood and Brower, that the opinion of a physician of recognized skill (and that Drs. Leroy and Bryan were such physicians was conceded by these witnesses) who performed the autopsy, and therefore came in direct contact with the physicial circumstances, would be more reliable and of greater value than that of one expressed in answer to the hypothetical case. The following however, occured in the examination of Dr. Glenn. "Now take the facts as told by the very doctors themselves, and admitted on all sides to be true, that the hair was out of the head; that the body was floating in the water when it was found; that it was identified by the husband only by means of the disfigurements of the body, or the scars; its condition was such that the clothing next to the naked body could not be preserved, but had to be destroyed; it had been

embalmed to the extent that the body had been cut open for the sternam to the pubic bone, and had been embalmed, the tracks of the needly appearing ------ now all of those facts conceded to be true by every one ------ state whether or not decomposition had advanced to the extent of rendering it impossible to pronounce an opinion beyond speculative, or alone speculative, as to whether or not that patient died from natural or unnatural causes?

A. I don't think in that condition of the body any post mortem could be had, and it is impossible to testify without guessing whether she died from natural causes or violence.

In recross examination, Dr. Glenn was asked what he would say if the physician, who described the condition of the body to be as indicated, in the hypothetical question stated that they could tell the condition of all the organs of the body, and Doctor answered "I would not believe it if any body on earth stated that; I have handled so many I know they cannot be preserved".

Dr. Chas. Brower had put to him the conceded facts, with reference to the condition of the body, as told by Dr. Leroy and Bryan, and was asked whether or not a failure to find either externally or internally any natural cause of death would warrant any conclusion that the woman had died from poison, rather than from natural causes, and he answered as follows;

A. Why, in the state of decomposition and disintegration, as stated, it would be impossible to tell any pathological lesion. Possibly some chronic lesion you might have found, but no ordianry pathological lesion that would destroy her life could hardly be found.

Q. Are there any natural causes of sudden death that could not have been discovered with that kind of an autopsy?

A. Very many.

"Q. Are there any natural causes of sudden death that cannot be discovered, sometimes, at the autopsy when held under the most favorable circumstances?

A. There are a few.

Q. And the further you get away from the death with the autopsy, I will ask you to state whether or not more and more difficult to exclude natural causes?

A. It certainly is".

This testimony, both for an against the State's contention, bore directly upon the issue which the state was bound to maintain, that the death of Mrs. Mangrum resulted from criminal agency. It matters not what circumstances might point to the plaintiff in error as a guilty agent, yet, his conviction could not be maintained unless it was shown, by direct or circumstantial evidence, that her death resulted from some act of criminal agency. To sustain this contention, however, the State was not confined alone to the evidence of these expert physicians. The jury, under proper instruction of the Court, had a right to look at all the incriminating circumstances in the case, and if they pointed clearly to the fact that death did result from such agency and to the plaintiff in error as the criminal agent, then the extremest demands of the law on this subject would be satisfied. They might look to the fact of Mrs. Mangrum's sudden and mysterious disappearance on the night of the 14th. of December, the connection of the plaintiff in error with that disappearance which the

testimony tended to establish, his apparent need of money at the time this occurred, the fact that she carried money upon her person on that night, the evidences of robbery that were disclosed when her body was taken out of the river, and the swelling of the bank account of the plaintiff in error immediately thereafter ----------all these circumstances they could consider with connection with the other evidence including that of the experts in determining, not only tje issue of corpus delicti, but also as to the identity of the plaintiff in error as connected with this alleged felonious homicide.

That the jury may look to such circumstances is abundantly shown by the authorities. Mrs. Wills, on Circumstantial Evidence, on page 200, says: "But it is clearly established, that it is not necessary that the corpus delicto should be proved by direct and positive evidence, and it would be almost unreasonable to require such evidence. Crimes, and especially those of the worst kind, are naturally committed at Chosen times and in darkness and secrecy, and the human tribunal must act upon such indications as the circumstances of the case presents or admits, or society must be broken up. For it is very often that adequate evidence is not afforded, by the attending and surrounding facts, to remove all mystery and to afford such a reasonable degree of certainty as men are daily accustomed to regard as sufficient in the most important concerns of life; to expect more would be needless and absurd".

Mr. Wharton, on page 898, section 588, of his work on Homicide, says: "A large number of the more important cases, probably constituting the weight of authority, have

adopted the rule, that all the elements of the corpus delicti, including the fact of the death of the person alleged to have been murdered, as well as the criminal agency of the accused, and the identity of the deceased, may be proved by presumptive or circumstantial evidence, at least when direct evidence is not available. And in case of entire destruction or disappearance of the body of the person alleged to have been killed, as in case of drowning at sea, the corpus delicti may be proved circumstantially".

On page 904, the same author says: "The specific means by which a violent death occurred, however, need not be shown. Nor need the fact of criminal agency in the death of the deceased be established by direct evidence. Circumstantial evidence is sufficient". Continuing, on page 906, the same author says: "An evidence of robbery of the deceased and of his death, resulting from injuries which might have been caused either by accident or by criminal assault, is sufficient to go to the jury upon the question of death by criminal agency".

So it is, we are satisfied, that the trial judge properly declined a special request, submitted by the counsel of the defendant below, in which he was asked to direct the jury to return a verdict for the defendant; "first, because the state has failed to prove the corpus delicti; that is, that the death of Mrs. Rosa Mangrum was produced by the criminal agency or negligence of any person".

While all this is true, yet it is none the less certain upon the authorities, that satisfactory

proof of the corpus delicti must be made either by direct or circumstantial evidence. This is an essential predicate in order to sustain a conviction of the defendant as the criminal agent.

As To The Venue: The duty devolved upon the State to show this. The body having been found in the Ohio river near Cairo, the State was bound to rebut the presumption arising from this fact, that Mrs. Mangrum came to her death some where near the point of its discovery, and show that it occurred within the limits of Davidson county. The jury have found that this burden was successfully borne, and the question now is --------- is the weight of the testimony against this finding? To answer this question the whole body of the proof may be considered.

We agree that the testimony of the witnesses Mr. and Mrs. Collins and Miss Buchanan, as to seeing what they supposed was the body of a woman floating in the Cumberland river at Clee's ferry, on the morning of the 22d of January, 1906, is of little probative value, so far as it was offered to show the identity of the body with that of Mrs. Mangrum. These parties were at a considerable distance from the floating object, and as it passed rapidly with the current, could only say, that, from the views which they caught of a part of the body, they thought it was the body of a woman. Nor do we think that any probative weight can be given to the evidence of certain police officers, of the city of Nashville, who state, that, after a diligent investigation, they had been unable to discover that any one

else disappeared from the city during the months of December, 1905, and January, 1906, whose death was attributed to drowning in the Cumberland river, or any of its tributaries. For, if it was the body of a woman floating past Clee's ferry, on the 22d, of January, it might have been that of a person, who in some way came into the waters of the Cumberland river, or some of its tributaries, far beyond the territory contiguous to Nashville, and as far beyond the observation of these officials, however detailed their examination might have been. In addition, we think the testimony as to the backlash, or eddy, or, more properly, the whirlpool, made at the foot of the government dam, across the Cumberland river below Clee's ferry, when the river guage is from 14 to 18 feet (as it was on the 22d of January and for several days thereafter), in which objects are caught and ground with terrible force and destructive effect, and are released only when the water falls under 14 feet, or rises over 18 feet, deprives the evidence, as to the floating object, of any force whatever. So, in considering this question, we dismissed this testimony altogether. Disregarding the evidence of these witnesses, what is left?

The case, on the point of venue is, that Dr. Feist lived in Nashville, and the disappearance of Mrs. Mangrum occurred in that city, on the night of the 14th of December. On that night, by the testimony of all his own witnesses, who were introduced to prove an alibi, he was in that city; he was in his office in Nashville, according to his witness Arnold, on the 15th of December; there is nothing to warrant an inference

that he was away on Saturday, December 16th; the testimony of Mitchell places him at his stable hiring a horse and buggy Sunday night, December 17th; he was in Nashville, depositing in the Fourth National Bank, five hundred dollars in currency, on Monday December 18th; on the 19th, he tendered a hundred dollar bill to settle a small account, presented to him for payment by a collector; and on December 20th, J. O. Mangrumm to obtain information with regard to his wife, went to his office when, according to Mangrum, the following occurred; "I went into his office and spoke to him, and he said, "How do you do J. O." he always called me J. O., and I said 'how do you do Doctor'. I said Doctor, Rosa has been gone a week and I am uneasy about her. I have not heard a word from her. She was in your office that evening before leaving, what was her condition? He said "J. O. she was in fine condition, in good shape'. He just remarked, 'you need not worry yourself, you will hear from her in a day or two".

This is the entire case on the subject of venue. The mere recital, we think, indicates its weakness. That venue must be strictly proven, is the uniform holding of our cases, not that the exact spot within the county where the crime was committed shall be shown, but it must appear that it was within the limits of the county. The right of the prisoner in this case to require of the prosecution to establish, even if he was the murdered of Mrs. Mangrum, that the crime was committed in the county of Davidson, where he was indicted and tried, was a constitutional right. Proof

of venue may be made by direct or circumstantial evidence, but in case the latter is relied on, then the presumption that the offense was committed in the county where the venue is laid, must be natural and satisfactory. Upon a careful examination of the record, we feel forced to say that we are unable to find any evidence that, if Mrs. Mangrum was murdered, that the crime was committed in Davidson county.

If it had been that, at any time from the moment of Mrs. Mangrum's disappearance up to the recovery of her body, it clearly appeared that she was in the company of Dr. Feist in Davidson county, under circumstances from which it could be inferred that he had an opportunity to kill her, this, taken in connection with all the other proof in the case, might have been sufficient to warrant a conclusion, on this issue, in favor of the State. But we do not think that the testimony of the witness Stone and of Marshall Thompson, as to the episode of the buggy at the terminal station, on the night of December 14th, is of a character, even when taken in connection with the body of the proof, to warrant the finding that the venue was established.

This conclusion leads necessarily to a reversale of this case. We feel it, however, due to the trial judge, in view of the general arraignmen of his charge to the jury, in that "it is argumentative in force, misquotes and indirectly sums up the state's evidence in a manner which was unfair to the defendant and misleading to the jury", to say that we regard this criticism as unwarrant-

ed, but on the contrary, taking the charge as a whole, it is admirable in form and expression, setting out in logical sequence, the respective theories of the State and of the defendant, without coloring or exaggeration, and then laying down in clear and intelligent terms all the rules of law required by the case, for the guidance of the jury in their deliberation. As to the affirmative error in the charge, pressed with great ingenuity upon the consideration of this Court, we are satisfied that this error is more apparent than real, and that it is found in one paragraph, which is somewhat inapt, but whatever of vice there may be in it was corrected by what went immediately before, and followed immediately after the paragraph in question.

It is also proper to say, that having covered the case in its various phases so admirably in his general charge, there was no error in the trial judge declining to give the many special requests that were submitted to him by the counsel of the plaintiff in error.

Beard
C J.

Office of CLERK OF THE SUPREME COURT
FOR THE MIDDLE DIVISION OF THE STATE OF TENNESSEE

I, DAVID S. LANSDEN, Clerk of said Court, do hereby certify that the foregoing is a true, perfect, and complete copy of the Opinion *of said Court, pronounced at its December term, 1927, in case of* J. Herman Faust *against* The State *as appears of record now on file in my office.*

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the Court, at office in the Capitol at Nashville, on this, the 18th *day of* May *1928.*

David S. Lansden *Clerk*

D. C.