GARTARGAR, Appellant, *v.* REPUBLIC OF LIBERIA, Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE FIRST JUDICIAL CIRCUIT, MONTSERRADO COUNTY.

Argued January 11, 1934. Decided January 29, 1934.

1. A motion in arrest of judgment lies for defects appearing upon the face of the indictment.
2. If a child of tender years is offered as a witness in a case, the real test is not his age, but his ability to give an account of the nature and obligation of an oath.
3. A witness may be cross-examined on all matters touching the cause or likely to discredit himself, but he shall not be asked irrelevant or hypothetical questions for the mere purpose of entrapping him.
4. It is the duty of the court, especially in criminal cases, to ask such questions as appear to be necessary for the complete development of truth, but, with the sole exception of leading questions, the court has no more right than counsel has to ask an improper question; and should he do so over the objection of counsel, it is the duty of the appellate court to correct same.
5. The questions a judge or a juror propounds to a witness should be such as are suggested by the evidence given on the trial.
6. If the questions which a judge or a juror propounds to a witness are improper, counsel may object to them, and if the objection is overruled, he should except in order to save the point for review.
7. This Court will look with great disfavor upon any effort upon the part of a trial judge to prevent objections to questions propounded by himself or a member of the jury, from being made, or to hinder exceptions to his ruling upon such objections from being noted upon the record.
8. Where the testimony of witnesses given at a trial tends to throw a doubt upon the sanity of the accused, it is error for the trial court to refuse an application of defendant's attorney to send defendant to the government's medical officer in order that he may pass upon his sanity.
9. Still graver is this error when the defendant has been allowed to defend *in forma pauperis* and has been furnished counsel at public expense.

Appellant, defendant below, was convicted of the crime of murder in the Circuit Court of the First Judicial Circuit, Montserrado County, and sentenced to death by hanging. On appeal to this Court, *judgment reversed* and *case remanded* for a new trial.

F. James Bull * and *P. G. Wolo* for appellant. *The Attorney General* and *Anthony Barclay* for appellee.

* Counsellor F. James Bull, who had joined in filing the brief and arguing this case, was, by order of the Court, suspended from the bar on January 26th (see p. 58, *supra*), after which he was not again allowed to appear in Court as counsel.—Howard, Clerk.

MR. JUSTICE DOSSEN delivered the opinion of the Court.

This cause comes up upon a bill of exceptions from the Circuit Court of the First Judicial Circuit, Montserrado County, Republic of Liberia, and contains nine counts for the consideration of this Court. The appellant, defendant below, was indicted for the crime of murder at the November term of said court, 1932; and at the February term following was arraigned, tried, and convicted for the crime of murder and sentenced to death by hanging on the gallows in the County and Republic aforesaid on the 14th day of April, 1933, between the hours of six o'clock in the morning and six o'clock in the evening. To the several rulings, opinions, and the verdict as well as the final judgment of the court below, the said appellant excepted and moved the trial court in arrest of judgment predicating said motion on the following reasons, to wit:

"1. Because defendant says that there is a fatal variance between the allegations and the proof in this cause; that is to say that although the indictment preferred against him in this case charges that the said Gartargar committed the acts of murder as laid in the said indictment on the 15th day of July A. D. 1932 in the town of Bee, in the settlement of Brewerville, when [*sic*] said date, month and year have not been proven or established by any of the witnesses in this case as the day said act was committed or thereabout as mentioned in said indictment.

"2. And also because there is a fatal variance between the testimonies (sic) of witnesses for the State and that of the oath of the Grand Jury, in that the Grand Jurors upon their oath aforesaid said emphatically that said defendant, Gartargar aforesaid, in manner, form, time and place, aforesaid,

the said Bargah alias Kpahn, unlawfully, feloniously and of his malice aforethought did kill and murder.

"3. And also because defendant says that the indictment is fatally defective in that it does not conform with statutory forms and provisions governing said crime of murder, in that the concluding clause of said indictment is not framed in keeping with the form, force, and effect of the Statute laws of the Republic of Liberia in such cases made and provided as contained in said indictment."

A motion in arrest of judgment lies for defects appearing upon the face of the indictment etc. 1 B.L.D., "Arrest of Judgment." As counts one and two of defendant's motion in arrest of judgment contain matters which do not appear upon the face of the said indictment, but rather review the evidence adduced at the trial, and upon which the impanelled jury predicated its verdict, the trial judge did not err in ruling out said counts. *Ibid.,* Archbold, Criminal Pleading and Practice (24th ed., 1910) 239.

As our Revised Statute does not define indictments but simply gives forms, we shall have to have recourse to the common law for the definition of an indictment. Judge Bouvier, in volume 2, defines an indictment as "A written accusation against one or more persons of a crime or misdemeanor, presented by, and preferred upon oath or affirmation by, a grand jury legally convoked"; and he lays down as the essential requisites of a valid indictment, first, that the indictment be presented to some court having jurisdiction of the offense stated therein, and that the indictment must allege specifically that the crime was committed within its jurisdiction; second, that it appear to have been found by a grand jury of the proper county or district; third, that the indictment be found a true bill and signed by the foreman of the grand jury; fourth, that it be framed with sufficient certainty. For this purpose the charge must contain a certain description of the crime

or misdemeanor of which the defendant is accused and a statement of the facts by which it is constituted so as to identify the accusation; it should set out the material facts charged against the accused, etc. etc. 2 B.L.D. "Indictment,"—the essential requisites. From an inspection of the records in this case, we are of the opinion that the indictment upon which appellant was indicted contains all of the essential requisites of a valid indictment under the Revised Statutes of Liberia, and therefore should not be disturbed; and hence the trial judge in overruling said count in the said motion in arrest of judgment did not err. 2 Rev. Stat. 496, § 272, under "Forms."

In count one of the bill of exceptions the defense complained as follows:

> "1. Because when on the 20th day of February A.D. 1933, during the qualifying of the State's witnesses in the said case, defendant objected to witness Sehl being qualified to testify in said case on the ground that the said Sehl is under the age limit as provided by statute to give testimony; Your Honour after reserving your ruling to said objection raised by defendant, afterwards overruled said objection, and ordered Sehl qualified as a witness giving as your reason: 'that in its opinion after reserving a ruling on said objection to this stage of the case and every witness's statement having pointed to Sehl as a *prima facie* witness, . . . in its opinion it would be unfair to reject the testimony of the said Sehl in the absence of which the minds of the jury might not be clear. Said witness having been brought before the court appeared evidently not to be beyond the age of twelve years but it can be easily conceded as a fact without further investigation that he is about eight years old. The objection is therefore overruled.' To this ruling the counsel for defence excepted and the same was ordered noted."

This exception raises the point: when does a child of tender years become capable of testifying as a witness in a cause, especially one of such magnitude as the case at bar involving, as it does, the life of a human being? Our statute on the subject provides that:

> "No person shall be deemed an incompetent witness by reason of a defect of understanding, who is able to give an account of the nature and obligation of an oath. It shall be the duty of the court to examine all children under twelve years old, as to this matter, before administering an oath to them." Statutes of Liberia (Old Blue Book) ch. XII, p. 58, § 6; 1 Rev. Stat. 469, § 361.

This principle thus stated in our statutes is in harmony with the rule of the common law, which may briefly be stated as follows:

> "In respect to children, there is no precise age within which they are absolutely excluded, on the presumption that they have not sufficient understanding. At the age of fourteen, every person is presumed to have common discretion and understanding, until the contrary appears; but under that age it is not so presumed; and therefore inquiry is made as to the degree of understanding, which the child offered as a witness may possess; and if he appears to have sufficient natural intelligence, and to have been so instructed as to comprehend the nature and effect of an oath, he is admitted to testify, whatever his age may be. [The discretion of the trial Court should be allowed to control in determining whether a given child is competent.] This examination of the child, in order to ascertain his capacity to be sworn, is made by the judge at his discretion; and though, as has been just said, no age has been precisely fixed, within which a child shall be conclusively presumed incapable, yet in one case a learned judge promptly rejected the dying declarations of a child of four years of age, observing

> that it was quite impossible that she, however precocious her mind, could have had that idea of a future state which is necessary to make such declarations admissible. On the other hand, it is not unusual to receive the testimony of children under nine, and sometimes even under seven years of age, if they appear to be of sufficient understanding; and it has been admitted even at the age of five years. If the child, being a principal witness, appears not yet sufficiently instructed in the nature of an oath, the Court [may then and there instruct it or cause it to be instructed, provided the child is capable of understanding; or] will, in its discretion, put off the trial, that this may be done." 1 Greenleaf, Evidence § 367.

This gives the court a wide discretion, contingent upon the result of such examination, in determining when a child of tender years may be admitted to testify; and hence as it has not been made clear to us that the trial judge abused such discretion in the case at bar, this Court is of the opinion that he, the said trial judge, did not err in overruling the objection and admitting Sehl as a witness.

> "2. And also because when on the 20th day of February A. D. 1932, defendant's counsel through the court asked witness William David Banks 'to the best of your knowledge had prisoner had any quarrel with decedent before he went to hunt?' State's attorney objected on the ground of 'travelling beyond the scope of the direct examination'; Your Honour sustained said objection to which defendant excepts."

It was error on the part of the trial judge to sustain said objection. Our statute governing the examination of witnesses says that, "A witness may be cross-examined as to all matters touching the cause, or likely to discredit himself; but he shall not be asked irrelevant or hyperbolical questions, for the mere purpose of entrapping him." Liberian Statutes (Old Blue Book), ch. XII, p. 61, § 34.

See *Yancy and Delaney* v. *Republic*, 4 L.L.R. 3 (1933); and *Cummings* v. *Republic*, 4 L.L.R. 16 (1934).

> "And also because when on the 20th day of February A. D. 1932, one of the jurors impanelled in the case asked witness William David Banks: 'then upon your oath can you swear this is the man that committed the act?' Your Honour immediately disallowed the question, making the following notation: defendant has no right to except to rulings on jury questions."

This exception raises two important points, namely: (1) Can or cannot a party object to questions asked by a judge or juror, and if overruled can he take exceptions? (2) Was the question disallowed by the court a proper or an improper question? Examining the law on the subject the Court finds that:

> "On the trial of an action the court may ask questions which the attorneys had the right to propound, and failed to ask, but the court should not usurp the functions of counsel by prescribing the order of calling witnesses or interfering with the general conduct of the case by the attorneys, or by examining witnesses to the exclusion of counsel, nor should the judge by a dissertation addressed to a witness endeavor to get him to change his testimony. The questions propounded by the court should be such as counsel would be entitled to ask, but if they are objectionable in order to save the error for review there must be an objection and exception." 26 R.C.L. p. 1025, § 26.

Referring to another authority, we find the following:

> "The trial judge may, at any time during the progress of the examination ask the witness such questions as he deems necessary to elicit the whole truth for the benefit of himself and the jury, and in so doing he is not bound by the rule excluding leading questions." 8 Ency. of Pleading & Practice, p. 71.
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> "Indeed, it is said to be the duty of the court, especially in criminal cases, to ask such questions as ap-

> pear necessary for the complete development of the truth, but the judge has no greater right than counsel has to ask an improper question, and should he do so, against objection, the error may be corrected in the appellate court." *Id.* at 73 and note thereunder.

In the case *People* v. *Lacoste,* 37 N.Y. 192 (1867), it appeared that the trial judge asked a question which was improper and should have been asked by counsel. The Court of Appeals said:

> "It was argued by the appellants' counsel that, inasmuch as the question was asked by the court, no objection or exception could be taken to it. We do not understand that the court has any greater right to ask, against the objections of counsel, improper questions, than counsel have. And if, against objection, he asks improper questions, it is the duty of the appellate court to correct the error."

In another case it was held:

> "It is the duty of a presiding judge in all cases, civil or criminal, to give strict attention to the evidence. And it is also his duty to propound to the witnesses such questions as he may deem necessary to elicit any relevant and material evidence, . . . whether it may benefit or prejudice the one party or the other—the development and establishment of the truth is his purpose and duty. But . . . the questions a judge or a juror propounds to a witness should be such as are suggested by the evidence given on the trial." *Sparks* v. *State,* 59 Ala. 82, 87 (1877).

The Court will remark in passing that it will look with great disfavor upon any effort upon the part of a trial judge to prevent objections from being made to what a counsel might consider improper questions propounded by the judge or a member of the jury; or to prevent exceptions taken to his ruling to such classes of questions from being noted upon the record. Every such objection and exception is an effort on the part of counsel to

have the propriety or impropriety of the question reviewed by this Court, and this Court will not allow counsel to be thwarted in his effort to save such a point for our review.

With regard to the propriety or impropriety of the question under review, this Court is of opinion that the question put by the juror to witness William David Banks was one which was suggested by the other testimony that had been given, and was, therefore, a question which a juror might properly put to clear his mind of any doubt that may otherwise have existed therein.

The question put to witness Sen-Geah-Ben-John; namely, "When prisoner seized your hand, did he look to you like a man in possession of his senses?" and, upon the objection of the prosecution, overruled on the ground of entrapping, is the subject of the fifth exception. The object for which said question was put was further developed when, on that same night, appellant's counsel requested the court to send the defendant to the Liberian Government's Hospital in order that the medical officer in charge might give an opinion as to his sanity. That the court, without hesitation, promptly disallowed this request is the subject of complaint in the sixth exception.

In these two exceptions, the fifth and the sixth, the counsel for appellant raised the question of the sanity of the prisoner which had been suggested to him by some of the testimony already given. For example, in the course of the direct testimony of the said witness Sen-Geah-Ben-John, she said *inter alia* the following: "At break of day I went to my farm with my children; my husband told me that he was going to Senjeh to collect some debts; we were scratching rice when prisoner came into the farm; he sat down in the kitchen and we asked him how far was he away. Sehi always comes to my children to play; one stick was near by and prisoner sat on it; prisoner was sitting behind me whistling. I was watching the birds at my rice when prisoner took a stick and

struck me behind my neck and I fell down. Next he chopped decedent with a cutlass and he fell down dead; he made for another little boy by the name of Sehl and chopped him, however Sehl was chopped before decedent; then I began to cry and made an alarm; as I was attempting to get up from the ground, prisoner caught me by the hand and I holloed; as I was trying to wrest my hand from him he was still holding it making appeals to me to go and make friends with him when I said to him, you have killed my child, then you want us to make friends? When I said this to him, he commenced beating me in the mouth and all over my face. I pushed him off; when I pushed him off he started running into the kitchen to get something and I ran into the bush; when I went I met an old man in his farm. Sehl ran also and he and I got to the old man at the same time; the old man asked me what was the matter with my child and I told him that prisoner had killed one person and wounded myself, and I passed and went to the town called Gandama." Ques. "Had there been any fuss, misunderstanding or altercation between yourself and prisoner prior to the day of the alleged killing?" Ans. "No." The testimony of witness Sehl also tends to throw a doubt upon the sanity of defendant because of his conduct and actions on that day as testified to by said witness.

One of two hypotheses would seem to arise from the evidence given; namely, either that the defendant was contemplating a forcible attack upon the woman Sen-Geah-Ben-John with the object of ravishing her, or that he was not of sound mind.

One of the essential elements which is necessary to distinguish homicide of a minor degree from murder, is that the accused should be "a person of sound memory and discretion" who kills a human being "with malice aforethought, express or implied." 3 Greenleaf, Evidence § 130. Sanity is usually presumed, and the plea of insanity when raised is a plea which the defendant has

the burden of proving. 1 Greenleaf, Evidence §§ 42, 81a; 13 R.C.L. 712, § 13.

In the case under review defendant was allowed a defense as one *in forma pauperis,* the Republic having furnished him with counsel. Under such circumstances the trial court should have relaxed the rule requiring defendant to procure, and provide the expense of, witnesses to establish facts which he might consider as helpful in his defense. For, in our opinion, this is a case in which the constitutional provision that a person criminally charged shall have compulsory process for obtaining witnesses in his behalf would seem to be especially applicable. We are therefore of the opinion that the court below erred in its rulings complained of in the fifth and sixth counts of the bill of exceptions which prevented appellant from adducing evidence to disprove his sanity; and that this error should be corrected. It is the opinion of the Court, therefore, that the judgment should be reversed, and the case remanded for a new trial; and it is so ordered.

Reversed.