DECISIONS AND OPINIONS

OF THE

SUPREME COURT

OF THE

REPUBLIC OF LIBERIA.

APRIL TERM. A. D. 1926.

MATTHEW C. H. LEDLOW, and ABRAHAM B. MALONEY. Appellants, *v.* REPUBLIC OF LIBERIA, Appellee.

ARGUED APRIL TERM, 1925. DECIDED APRIL TERM, 1925.

Johnson, C. J., Witherspoon and Bey-Solow, JJ.

1. A plea may not for the first time be raised in the Supreme Court. It must have been first overruled in the trial court, and an exception thereto taken.
2. Any exception taken during the trial, and not embodied in the bill of exceptions, will be considered as having been waived.
3. A plea of *autrefois convict* can not successfully be raised by one who, on appeal or writ of error, has had said conviction quashed for defects in the indictment.
4. A witness, not called as an expert, may depose to facts only,—not to opinions.
5. Even if a juror be taken ill during a trial in which he was one of the panel, the verdict will not be disturbed, when after the charge said juror states that he had been able to follow and digest the evidence.
6. Circumstantial evidence is that species of evidence which tends to prove a disputed fact by proof of other facts which have a legitimate tendency, from the laws of nature, the usual connection of things and the ordinary transaction of business, etc., to lead the mind to a conclusion that the facts exist which are sought to be established.
7. The declarations of a third person in the presence and hearing of a person which tend to affect his interest may be given in order to introduce his answer, or to show an admission by his silence.
8. Courts are reluctant to set aside a verdict unless it is manifestly and palpably against the weight of evidence.

9. When an instruction to the jury embodies several propositions of law, to some of which there are no objections, the party objecting must point out specifically to the trial court the part to which he objects in order to avail himself of the objection.

Mr. Chief Justice Johnson delivered the opinion of the court.

Murder. This case was originally tried in the Circuit Court of the second judicial circuit, Grand Bassa County, when appellants were indicted and convicted on a charge of murder at the November term, A. D. 1924, of said court, Judge E. J. S. Worrell presiding by assignment.

The case was brought up to this court at the April term, A. D. 1925, and having been heard, the judgment of the court below was reversed and the case remanded to the said Circuit Court for a retrial, on account of certain irregularities which occurred in the trial of the case. See opinion of this court at its April term, A. D. 1925, p. 529, supra.

At the May term, A. D. 1925 of the said Circuit Court the case was again heard and after a lengthy trial, Judge Samuel C. M. Watkins, presiding by assignment, appellants were again convicted. They excepted to the verdict and judgment in said case, and have again brought the case up to this court by a bill of exceptions containing eleven points.

The first point that claims our attention is the plea raised in this court by appellants for the first time, that having been convicted formerly for the same offense and the judgment reversed, they cannot again be tried. This plea of *autrefois convict* was not raised at the proper time, as it was not submitted to the court below nor inserted in the bill of exceptions.

We have repeatedly held that only such rulings of the court below in the progress of a case will be considered as are excepted to in said court; and further that exceptions not embodied in the bill of exceptions for appellants will of course, be regarded as having been waived.

See *Stanley Clarke et al., v. Republic of Liberia,* decision of the Supreme Court handed down by Justice Witherspoon, November term, A. D. 1924, supra, p. 498.

We will however consider the plea, as much emphasis was laid upon it by counsel for appellants. A plea of *autrefois convict* is one made by a defendant, who is indicted for a crime or misdemeanour that he had formerly been convicted for the same offense.

It is in accordance with that provision of the Constitution that provides that no one shall be twice put in jeopardy for the same offense. (See Const. Lib., art. I, sec. 7.) A judgment of conviction is generally a bar to a subsequent conviction for the same offense.

It is held, however, that where an appeal is taken or writ of error sued out on account of a defective indictment, or for some irregularities during the former trial, and the judgment is reversed, this is no bar to a second trial on the same or a new indictment, as was decided in the case of *Ball v. U. S. A., which* has been cited by the Attorney General in his brief in support of his contention. We will now, therefore, consider the action of the said court, and its ruling on a plea of a similar nature.

That was a case tried and determined in the Circuit Court of the United States for the Eastern District of Texas.

The grand jury returned an indictment against one Millard Fillmore Ball, John C. Ball, and Robert E. Boutwell for the murder of William T. Box. Upon that indictment the three defendants were arraigned and pled not guilty; and were tried together. The jury returned a verdict as follows: "We the jury find the defendants John C. Ball and Robert E. Boutwell guilty as charged in the indictment, and we find Millard Fillmore Ball not guilty." The court thereupon ordered that the defendants John C. Ball, and Robert E. Boutwell be remanded to await the judgment and sentence of the court, and it was ordered that defendant Millard Fillmore Ball be discharged, and go hence without delay. (See 140 U. S. 118, 35 L. Ed. 377.)

Afterwards, at the same term, John C. Ball, and Robert E. Boutwell were adjudged guilty and sentenced to death; and they thereafter sued out a writ of error from the Supreme Court, assigning *inter alia* that no legal indictment was returned into court against respondents in that the indictment on which they were tried, nowhere alleges when William T. Box died; upon that writ of error the United States Supreme Court reversed the judgment against respondents, and remanded the case with instructions to quash the indictment and to take such further proceedings as to justice may appertain.

The indictment was quashed in the Circuit Court and the grand jury returned against all three defendants a new indictment. To this indictment the defendant Millard Fillmore Ball filed a plea of former jeopardy, relying upon his trial and acquittal, and the defendants John C. Ball, and Robert E. Boutwell filed a plea of former jeopardy by reason of their former trial and conviction.

These pleas were overruled by the court and the defendants then severally pleaded not guilty. The Circuit Court among other instructions, instructed the jury to find against both pleas of former jeopardy because the Supreme Court had decided that the former indictment was insufficient for murder. The jury returned a verdict of guilty of murder against all three defendants. Each of them was adjudged guilty accordingly and sentenced to death, and they thereupon sued out another writ of error.

The court decided as to the defendant who had been acquitted that the court could take no other action than to order his discharge. The verdict of acquittal was final, and could not be reversed without putting him twice in jeopardy and thereby violating the Constitution.

In considering the questions affecting John C. Ball and Robert E. Boutwell, the court said as follows:

"Their pleas of former conviction cannot be sustained because upon a writ of error sued out by themselves, the judgment and sentence against them were reversed and the indictment ordered to be dismissed. How far, if they had taken no steps to set aside the proceedings in the former case, the verdict and sentence therein could have been held to bar a new indictment against them need not be considered, because it is quite clear that a defendant who procures a judgment against him upon an indictment to be set aside, may be tried anew upon the same indictment or upon another indictment for the same offense."

The court therefore rightly overruled their pleas of former jeopardy, and cannot have prejudiced them by afterwards allowing them to put in evidence the former conviction; and instructing the jury that the plea was upheld and judgment reversed as to Millard Fillmore Ball, and bad and affirmed as to the others. (See *Ball et al., U. S. A.*, 163 U. S. 664, 672, 41 L. Ed. 301). The principle settled in this case, that where a defendant who is indicted and on trial convicted of a crime or misdemeanor, and,

either by appeal or writ of error procures a reversal of the judgment, cannot raise the plea of *autrefois convict* has been established in a large number of cases in the U. S. Supreme Court. We are therefore of the opinion that the contention of counsel for appellants cannot be sustained.

We will now consider the other points in the bill of exceptions in their order. The first exception is taken to the action of the court below in disallowing the following question put to witness J. G. Montgomery by counsel for defendant on cross-examination to wit:

"From what you have said in an answer to the last question; to your mind was it possible for any one else to have committed the said crime?"

This question was clearly in our opinion illegal, as it tended to elicit the opinion of the witness. It was therefore properly disallowed. It is a well settled rule of law that a witness shall depose to facts only and not to opinions; an exception is made to this rule where a witness in matters of science, art, or trade is called to testify because of some peculiar knowledge he may possess; such a witness is called an expert. (See Lib. Stat., ch. XII, p. 60, sec. 32.)

The second exception is taken to the court sustaining objections of the State's counsel put to witness Horace by counsel for defense:

"To the best of your knowledge was this Frank ever tried?" This question not being relevant to the issue, was properly overruled.

The question noted in the third point of the bill of exceptions was improperly allowed; it was therefore error on the part of the trial judge to overrule objections of counsel for defendants to said question.

The eighth point is stated as follows:

> "Because Your Honour continued to try said case from the 23rd day of May, A. D. 1926 up to the rendition of verdict, when one of the jurymen, Richard Williams by name, was deathly sick with stoppage of water for which two medical men were called to attend the juror whilst on the panel; and that the said juror died two days after finding a verdict. Being in great pain and deathly sick, the said juror could not follow the evidence of said case, as such, said verdict is the conclusion of eleven jurymen to which defendants except."

On inspecting the records we find that the presiding judge, im-

mediately after his charge and before they retired, asked juror Richard Williams: "Whether or not he had been able to follow the case, especially as during a part of the trial he had reported himself unwell;" to which the said juror replied: "I have heard and digested everything from start to finish." This exception is therefore, in our opinion not well taken.

The 9th, 10th and 11th exceptions are taken to the verdict of the petit jury, and the motion for a new trial, and the judgment entered against the prisoners.

The verdict is based upon circumstantial evidence, and upon admissions made by the appellant Maloney. Circumstantial evidence is that species of evidence which tends to prove a disputed fact, by proof of other facts which have a legitimate tendency, from the laws of nature, the usual connection of things, and the ordinary transaction of business, etc., to lead the mind to a conclusion that the facts exist which are sought to be established. (See Bouv. L. D., vol. I, Evidence, sub-paragraph Circumst. Evid., p. 1093.)

In the case *Wood v. The Republic of Liberia* (I Lib., L. R. 445) it was remarked by the court, speaking of circumstantial evidence: "That the greater number of crimes found upon the records of criminal courts, are established by this species of proof. It is not frequent speaking comparatively, that misdemeanors and crimes are committed before the public gaze; the natural tendency is to seek secrecy and concealment; so that if the law only recognized as sufficent to convict, that quality of evidence we call positive, the safety of society would be greatly jeopardized by miscreants who would perpetrate their diabolical acts either under cover of night or under some other cover which the eye of justice could not penetrate."

It is contended by counsel for appellants that the declarations made by decedent against Ledlow, were hearsay and were, therefore, legally inadmissable. But Mr. Bouvier says, that the declarations of third persons in the presence and hearing of a person which tend to affect his interest may be given in evidence in order to introduce his answer or to show an admission by his silence. We however admit that this species of evidence should be received with great caution.

In the above cited case, *Wood v. The Republic of Liberia,* the fact that some time before the commission of the murder, deceased

and prisoner had a quarrel about fowls which the former accused the latter of stealing, was allowed to be put in evidence in order to show prisoner's motive for committing the crime. So in a case tried in Connecticut, on the trial of a man charged with the murder of his wife, it was held that the State could show, for the purpose, it was said, of rebutting the presumption of innocence arising from the marital relation between the defendant and the deceased, that he had lived in adultery with another woman. (See *State v. Watkins,* 9 Conn. 47.)

"The conversation to which any person was a party or which was carried on in his presence or hearing shall be evidence against him." (See Lib. Stat., ch. X, p. 53, sec. 25.)

The evidence in the case must be considered from two view points: (a) how it effects Ledlow; (b) how it effects Maloney. The chain of circumstantial evidence brought out by the State which tends to connect Ledlow with the murder of the decedent may be summarized as follows:

1. The attack made upon decedent—May, 1925, and her declaration made the next morning in the hearing and presence of Ledlow that it was he who had made the attack, and the answer made by him: "Oh farce." See Evidence of L. E. Montgomery.
2. That within a month thereafter Susan Ledlow was found murdered in her house under circumstances which showed that a desperate struggle had taken place. See Evidence of Dr. Dingwall.
3. That simultaneously with the time of the murder Ledlow became crippled, which he attributed to Lumbago; but which Doctors Dingwall and Pierre who examined him after his arrest and imprisonment, said were due to blows and injuries inflicted on him, probably, in the course of a fight. See Evidence of Doctors Dingwall and Pierre.
4. Witnesses saw Ledlow in Lower Buchanan on Tuesday afternoon although he claims that at that time he was at his farm on the Mechlin River.

See Evidence of Emma Bernard, Etta Payne, James N. Redd, and J. J. Prosser.

5. The alibi set up by Ledlow and which was not proved to the satisfaction of the jury.

See Evidence of Vamble, Maier, Musa, and Gaspah.

The case against Maloney rests mainly on his admissions and his possession of a gold ring which was found to have been previously seen in the possession of decedent.

That the day decedent was found murdered in her house, Maloney went to the shop of one Edward T. Davis, hatless, to credit a cap and asked the said Davis to change a gold sovereign. When asked how he had lost his hat, he accounted for the loss by saying that he had lost it the night previous when he was coming from Edina during a storm; and he further said that he had seen Davis that night with his lantern and his boys also coming from Edina. At the trial of the case the said witness Davis testified that he had not been to Edina that night, but that after the storm he and his boys with a lantern passed by the residence of the late Susan Ledlow, where Maloney might have seen them. See Evidence of Edward T. Davis. Maloney's statement made to Morgan and James George is as follows:

> "If they want to find out who killed old lady Susan Ledlow, they should ask Maloney. I am in all these kind of things; nothing is the matter with Ledlow only the old lady gave him a good blow."

This statement was also made to Caroline Payne Diggs and others.

These repeated declarations tended to show that Maloney had a guilty knowledge of the crime, and therefore the jury, no doubt, arrived at the conclusions that Maloney was *particeps criminis* to the murder. See Evidence of Morgan, James George and Caroline Diggs.

It must be admitted, however, that the declaration of Maloney could not legally be taken against Ledlow, unless the jury were convinced that they confederated together in the commission of the crime.

Coming back to the case against Ledlow, it will be well for us to make some excerpts from the evidence of Dingwall one of the medical experts who examined prisoner Ledlow, and who afterwards testified to the cause of decedent's death, and the condition in which he found her body and his diagnosis of Ledlow's illness. the latter having complained that he was suffering from lumbago.

Q. What is your name and where do you live?
A. James A. Dingwall, I live at Lower Buchanan.
Q. Are you a medical doctor?
A. Yes.
Q. Are you acquainted with the late Susan Ledlow?
A. Yes.
Q. Do you know where she is now?
A. Yes, she is dead.

Q. Do you know when she died?
A. I saw her dead on the afternoon of the 4th of June, 1924, it was on a Wednesday.
Q. Did you examine her for the purpose of discovering what was the cause of her death?
A. Yes.
Q. Tell in detail the condition in which you found the room, in which you found the dead body; the premises, the body itself, and the conclusions which you as a medical man, deduced therefrom.
A. The room in which I found her body was her bedroom, the door was open, there was a bed with a pillow on it, near the edge of the bed in front with blood stains; the wall towards the head of the bed and in front of it was bespattered with blood; the vessels in the same locality had blood on them; and one, especially the night mug, had more blood than all; the floor also had blood upon it, a good deal where her head was lying; there was a basket on the bed that had some clothing in it that seemed to have been searched, there was a hatchet under the bed near the front not far from her body; her clothing was ordinary, not a night dress; there was blood on her arms, her right arm was on her clothing; the hair was all matted with blood on the head; there were cuts on two or three of the outer parts of the fingers of the left hand, the right arm was broken at the elbow, a blow was evident on the outer part of the right lower jaw which punctured the cheek, wounds on the fingers were apparently done with an instrument with an edge to it being sharp, a wound on the right frontal bone produced by a very heavy and severe blow, fracturing the skull which probably was the last and fatal blow producing concussion of the brain and very profuse hemorrhage of the brain both in and out; that was the state of the body. My deductions were that she was murdered and that there was a combat before the murder; that with her left hand she held something, which to be freed required something sharp to be used to strike or cut the outer part of three fingers to force her to turn it loose; and the fracturing of the arm at the elbow might have been in defending herself with a weapon in the right hand, when she was struck on the right arm by combatants; from the kind of wounds on the cheek and the head, the instrument used must have been heavy and blunt.
Q. Among all these wounds received by decedent which one do you think was the immediate cause of her death and how do you arrive at that conclusion?
A. The blow on the skull or cranium inflicted in the right frontal region, was so severe that it fracured the skull and produced such a hemorrhage externally that it was im-

possible for such an injury to be sustained without an attendant internal hemorrhage in the brain.

Q. Was the brain affected?

A. Yes.

Q. How?

A. By the pressure of the fractured bones on the brain matter occasioned by the blow and the resulting hemorrhage and shock, called concussion of the brain.

Q. How did that affect the eyes?

A. The eyes were staring, showing that there was flooding of the brain near the optic nerves, the base thereof, causing an inability to control musculature of the brow and balls of the eyes.

Q. After the examination, did you furnish a protocol to the Government?

A. Yes.

Q. If you were to see that protocol, would you be able to recognize it?

A. Yes.

Q. Is that it (the paper you now hold in your hand)?
(Protocol passed to witness to identify.)

A. Yes.

The witness identified protocol and his signature thereon as being genuine; and the court marked same "J" as an identification mark.

Q. Since the death of Mrs. Susan Ledlow, have you at the request of the Department of Justice, examined any one of the prisoners in the dock?

A. Prisoner Ledlow.

Q. Where did you examine him?

A. In the common jail.

Q. When?

A. I made two examinations of Prisoner Ledlow, the first date I can not remember, the second examination was on the 6th of August, 1924, the previous one was sometime in July. When former County Attorney Worrell told me to go to Hartford to examine Ledlow, I refused to do it, because I could not examine an ordinary citizen without his consent as he was not then in custody, and hence I did not make any of the examinations until he had been put in prison.

Q. When you made the first examination, what did you find?

A. I found a network of enlarged lymphatic glands in the inguinal regions, I also discovered a sore on the coccyx and that prisoner had very much difficulty in using his lower limbs.

Q. Was anything wrong with his bladder, or injury done in the regions of the bladder?

A. The condition of the lymphatics was evidence that injury had been sustained in the regions of the bladder.

Q. In addition to the sore on the coccyx, did you notice any other scar or bruise on the lower parts of his body?

A. Yes, I saw a scar on the buttocks but did not pay any attention to it as it was already healed.

Q. From the condition in which you found the body of prisoner Ledlow do you agree with the statement said prisoner made to divers persons that he was suffering from lumbago?

A. No. I do not agree with that, that he was suffering from lumbago. That lumbago that is talked about so much came in the latter part of February, whilst he was busily engaged in getting lumber for me that went on into a part of March when all of our transactions terminated so that all of the developments subsequent to about the middle of March, had nothing whatever to do with my diagnosis I made in February.

Q. If a person is suffering from lumbago, where will be the principal seat of the pain?

A. It would principally be in the lumbar region.

The witness showed the jury where the dorsal-vertebræ stopped, and where the lumbar begins; continuing he said:

The lumbar-vertebræ starts where the dorsal-vertebræ stops and the coccygiæ vertebræ begins; in that region we have five vertebræ and five nerves, which form the lumbar-plexus, and give the trouble in cases of lumbago. When one suffers from exposure, acidity of the blood, traumatic injuries in that neighborhood, can excite the lumbar nerves to that condition known as lumbago.

Q. In the examination of prisoner Ledlow, after the death of Mrs. Susan Ledlow, did you discover any injury in the dorsal or lumbar-region?

A. No.

Q. In your opinion as a medical man was the injury to the lymphatic glands of the inguinal region, sufficient to have caused the knot described by Mrs. Martha Sharpe on yesterday, which led to the stoppage of water, explained by David Adday today?

A. The lymphatic glands were inflamed from their absorbtion of the blood and pus, and other detrimental matter occasioned by the blows received in the region between the navel and the bladder as described; whenever resolution is taking place these lymphatic glands are the scavengers. After Ledlow had received the blows, hot fermentations were applied, that tended to relieve the immediate injury and scatter the trouble into the lymphatic glands, which glands at the time I examined prisoner felt like peas in a bag when tightened.

Q. In the examination of a human being who has not received traumatic injury in the inguinal regions, will a

person be able to feel the lymphatic glands as hard as peas in a bag?

A. In cases of suppurative infection in those regions these glands will also assume some hardness.

Q. Did prisoner Ledlow suffer from suppurative infection?

A. No.

Q. What is the difference between stoppage of water caused by traumatism and stoppage of water caused by venereal disease?

A. In the case of stoppage of water caused from venereal trouble, there is usually either a stricture of the uretha or a swelling caused by gonococci irritating the lining membrane, rendering the passage too small for ordinary evacuation of the bladder.

The witness again explained this matter fully to the jury; continuing he said:

When the stoppage of water is due to traumatism as a result of the blow in the inguinal region, there is bleeding from the bladder due to the hypertrophy of the organs and if it is severe the bleeding will also pass from the anus; sometimes the bloody urine clots in the uretha, and clogs the passage which prevents the urine from coming down.

Q. Did anyone assist you in either of the examinations of prisoner Ledlow, if so, who? and upon what authority?

A. Yes. Dr. A. A. Pierre, upon the authority of the Department of Justice, assisted in the second examination.

Q. From the condition of the dead body of the late Susan Ledlow, and from the injuries you discovered upon prisoner M. C. H. Ledlow, and from the condition of the room in which Mrs. Susan Ledlow was found murdered, is, or is it not probable in your opinion as a medical man, that prisoner Ledlow was the assailant and received these wounds in the course of the combat?

Question objected to by defense counsel, upon the grounds, hyperbolical, and being a question of law, it should not be asked the witness. Argued and cited: Lib. Stat., p. 61, sec. 34. State resisted and cited: 1 Greenleaf on Evidence, pp. 441 to 550, second paragraph. The court overruled the objections to which defense excepted, and the court ordered same noted.

A. Yes, it is probable that anyone who had the wounds as discovered on prisoner Ledlow could have been the assailant.

Q. From your observations on the dead body, were all of those wounds inflicted by one person or not?

A. I don't think so, because I know that prisoner Ledlow uses principally his left hand, and to inflict such heavy blows in the right side of decedent would not have been quite

possible unless she was lying down on the left side; and from the position of the pillow and the bed, she would have to be with her face towards the wall quietly receiving her blows, which was not the case, from evidence of the struggle, hence it is my opinion if he is connected with this, it was not all done by himself, but some of the blows could have been inflicted by a left-handed man like Ledlow.

Q. In your opinion why were some of the fingers of the late Mrs. Susan Ledlow cut?

A. My opinion is, that either she held something, or some parts of the body of her assailant, that they wanted to get loose from her, that was done to break her hold.

Q. In your opinion was it during said combat that another person gave her the blow on the left side of her frontal bone?

A. Yes.

The State rested. This evidence was supported by that of Dr. Pierre who was the other expert that examined Ledlow.

In support of the alibi set up by appellant Ledlow, several witnesses were called and testified to wit: Ledlow, Garkpah, Vamley, Musu, William DeShield, and William Liles.

The judge charged the jury that it was the duty of the defendant in proving an alibi to reasonably satisfy the jury that he was elsewhere at the time of the commission of the offense. This, in our opinion, is a correct view of the law.

The witnesses for prisoner Ledlow testified to facts which tended to show that Ledlow at the time of the murder, was at his farm on the Mechlin River, 25 miles from the City of Buchanan where the crime was committed.

On the other hand, a number of witnesses testified that they saw him in Lower Buchanan on the afternoon of the 3rd of June. It was for the jury to decide what credit to give to said evidence; and the result shows that in their opinion the evidence for Ledlow was not satisfactory.

As to the other point raised with regard to the motion for a new trial, we will observe that the verdict will seldom be disturbed in cases where it is based upon circumstantial evidence.

It is the duty of the jury to determine the guilt or innocence of the person accused, in criminal cases. The credibility of the evidence is with the jury, they may believe one witness or set of witnesses, and disbelieve the other. Hence courts are reluctant to

set aside a verdict unless it is manifestly and palpably against the weight of evidence.

It is said that where some evidence has been given which tends to prove the fact in issue a new trial will not be granted merely because the court, if upon instructions would have given a different verdict to warrant a new trial, in such cases the evidence must be plainly insufficient to warrant the findings of the jury. And this restriction applies, as well as to an appellate court. (See 2 Archbold Criminal Practice and Pleading.)

We will now consider the question raised in the motion for a new trial, but not embodied in the bill of exceptions with reference to the charge of Judge Watkins.

It was contended by the Attorney General that the court can not legally consider same; because the bill of exceptions gave no notice of appellants' intentions to press said point.

This view of the law is, in our opinion, the correct one. Mr. Bouvier makes the following observations on this subject: "When an instruction to the jury embodies several propositions of law, to some of which there are no objections, the party objecting must point out especially to the trial court the part to which he objects, in order to avail himself of the objection." (See Bouv. L. D., vol. I, under Charge.)

This point is open to two objections: (a) it was not raised at the proper time. (b) It was not embodied in the bill of exceptions.

See *Stanley Clarke v. The Republic of Liberia,* where it was held: "all exceptions not embodied in the bill of exceptions are regarded as waived."

In view of the fact, however, that much emphasis was laid upon the charge of Judge Watkins, and the opinions expressed therein, we will refer to the case of *Starr v. U. S. A.* (153 U. S. 614) an authority cited by appellants in their brief, where on a similar point being raised the court made the following observations: "It is true that in the Federal courts, the rule that obtains is similar to that in the English courts; and the presiding judge may, if in his discretion he thinks proper, sum up the facts to the jury; and if no rule of law is incorrectly stated, and the matters of facts are ultimately submitted to the determination of the jury, it has been held that an expression of opinion upon the facts is not reviewable

on error; Rucker v. Wheeler, 127 U. S. 85, 93; Lovejoy v. U. S., 128 U. S. 171, 173. But he should take care to separate the law from the facts and to leave the latter in unequivocal terms to the judgment of the jury as their true and peculiar province."

In many of the American States, it is held that a presiding judge may express to the jury his opinion of the weight of evidence. In the case of Starr above cited, the court said, when there is evidence upon a given point it is the duty of the judge to submit it calmly and impartially. And if the expression of an opinion upon such evidence becomes a matter of duty under the circumstances of the peculiar case, great care should be exercised that it should be so given as not to mislead, and especially that it should not be one-sided. (See *Starr v. United States supra.*)

In our opinion, the charge of Judge Watkins was, on the whole, a fair and correct expression of the law applicable to the conditions of the facts. The repeated emphasis of the fact that the jurors are the sole judges of the facts.

See charge of Judge Watkins.

It results from the above reasoning that the judgment in this case should be affirmed; and it is so ordered.

Mr. Justice Witherspoon read and filed the following dissenting opinion: At the trial of this case during the April term of this court, 1925, I dissented to the order of the Supreme Court remanding the case for a new trial, first, because the Supreme Court was without legal authority to do so, secondly, that to do so would be in violation of the organic law of the country, and of the Criminal Code of 1914.

We admit that in most if not all of the States of the United States of America, statutes have been passed altering or amending the common law definition of the term jeopardy to suit the situation of the people of each individual State; but these statutes do not concern us, it is the common law that we are to seek our definition from.

Mr. Bouvier defines jeopardy to be the situation of a prisoner when a trial jury is sworn and empanelled to try his cause upon a valid indictment, and such jury has been charged with his deliverance. "It is the peril in which a prisoner is put when he is regularly charged with a crime before a tribunal properly organized

and competent to try him. This is the sense in which the term is used in the United States Constitution; and in the statutes or constitutions of most, if not all, of the States." He further says "a person is in legal jeopardy when he is put upon trial, before a court of competent jurisdiction, upon indictment or information which is sufficient in form and substance to sustain a conviction, and a jury has been charged with his deliverance." (See Bouv. L. D., Jeopardy.)

Neither the competency nor the sufficiency of the indictment, nor that of the trial court seems to have been questioned either in the trial or appellate court. It must be admitted that the trial of the case below was erroneously conducted by the trial court, in many instances, such as for example continuing the trial after notice having been given by the defense counsel, that there were only a few minutes of the clock to twelve o'clock Saturday night, after which notice the court ordered arguments in the case, then proceeded to instruct the jury who retired for deliberation after which they returned with their verdict; and also in refusing to allow witnesses to testify on part of the defense who had been sworn and were in court. Also in refusing to continue the case over upon the lawyer's request, they having sat from the opening of the court Saturday morning, the latter of which the Honorable the Attorney General in open court disapproved of. But none of these acts can be traced to the misconduct of the accused persons, neither can they give the trial court, nor this court, under any pretense of law the right to order a new trial, except upon the sole motion of the prisoners in the court of original jurisdiction.

This court has made an elaborate comment upon the legal definition of the term jeopardy; it says "the question as to what is jeopardy and at what stage of a legal proceeding it may be technically said to begin, is one which has afforded a wide field for legal discussion and research."

In the American courts the express enactment of the several statutes have declared what shall, and what shall not be regarded as jeopardy in criminal prosecutions before the courts of the respective States. And so divergent and technical are the shades of opinion expressed in these statutes upon this great subject that a comparative study of them is rendered in a large degree per-

plexing, though exceedingly interesting and instructive. But it is the common law definition of the term jeopardy which interests us in the consideration, and not the *lex scripta* of the American States. And we shall therefore proceed to discuss the principles laid down on the point by some of the ablest and most profound common law writers whose works have been admitted as text books in the courts of the Republic.

And firstly, Mr. Bouvier defines jeopardy to be the situation of a prisoner when a trial jury is sworn and empanelled to try his case upon a valid indictment, and such jury has been charged with his deliverance. And, after outlining some of the legal technical exceptions to the foregoing definition, the court said in handing down its decision on this most disputed provision of the Constitution, "the court desires to have its premises, which it thinks are well upheld by law and reason distinctly and clearly understood."

Jeopardy, as this court understands the law, attaches when, upon a valid indictment, the prisoner is arraigned and pleads, and the jury empanelled and sworn to try the issue raised by the plea. (See *Wood v. Republic,* I Lib. L. R. 445.)

Our statutes giving this court the right to remand cases for a new trial reads thus: "Where it does not appear to the appellate court from the records, on account of the mixture of questions of law and fact, for which party the judgment ought to have been given, it shall be the duty of such superior or appellate court, to remand the case to the court in which it was originally tried to be tried over again." (See Lib. Stat., p. 79, sec. 13.)

It can not be contended that this section is intended to apply to criminal prosecutions, when compared with the prohibitory clause against a second jeopardy. (See Const. Lib., art. I, sec. 7; see also *Spiller v. Roberts,* Lib. Semi Ann. Series, No. 5, p. 30.)

Acquittal or verdict and judgment a bar regardless of validity of indictment. (3 Ency. Supp., p. 798, sec. 591. State cannot secure a new trial after jeopardy has attached. Id., p. 796, sec. 584, also note 6. 17 Ency., pp. 583-4, sec. 5, notes 1 and 2.)

Lord Ellenborough, Chief Justice, speaking upon the subject of new trials says "A new trial can not be granted in a case of felony even by the Court of Queen's Bench. That court may have granted

it in cases of misdemeanors; but they have always refused to do so, where the defendant has been acquitted; and this even in the case of an indictment for non-repair of a highway. In these latter cases, indeed, instead of granting a new trial, the court stayed the entry of judgment, until the prosecutor should have an opportunity of preferring a fresh indictment, to prevent the parish from pleading the former acquittal in bar; and even this they have done in a very few cases." He continues: a court of oyer and terminer or general jail delivery, however, or the court of quarter sessions, has no power to grant a new trial; at least such is generally understood to be the case. And where upon an indictment for the non-repair of a bridge, being tried on the crown side at the assizes, and the defendant was convicted, they moved for a certiorari to remove the records into the Court of the King's Bench in order that they might move for a new trial, the court refused it. Lord Ellenborough, Chief Justice, saying: "I would not have the motion for a moment entertained, that we have the power of entering into the merits of verdicts, and granting new trials in proceedings before inferior jurisdictions." (Archbold Criminal Practice and Pleading [8th ed.], pp. 582-3.) Under the head of Title, a grant of a new trial, the law is stated. Although there seems to be some conflict of opinion upon the question, the great weight of authority sustains the view that by virtue of the inherent power of the trial court, it has authority on its own motion, or for causes other than those assigned in a motion, to set aside a judgment and grant a new trial, unless such power of the court has been limited by statute, and the appellate court will not interefere except in a just cause of abuse.

It has been held that even a justice of the peace has power to grant a new trial on his own motion, where he believes his previous findings erroneous. It is otherwise, however, in the case of appellate courts. The power of such courts is confined to exceptions actually taken at the trial. This power of the trial court should, however, be exercised with great caution and in aggravated cases only. This question arising in the trial court, and where the prisoner fails to motion the trial court for a new trial, the trial judge should proceed to impose sentence which was done in this case. (20 R. C. L., pp. 300-1.) This author goes on upon the subject

of a new trial thus: it is a privilege offered by the law to the accused in addition to the guaranty offered by the Constitution. In the absence of a statute permitting, it is an established and fundamental principle that a new trial in a criminal case will not be granted on application of the State after a verdict of acquittal, except possibly where the acquittal has been procured by fraud or trick.

This principle has been incorporated into the Constitution of the United States, as well as into the constitutions of most of the States, in the provision that no person shall be subject for the same offense to be twice put in jeopardy of life or limb. The common law rule applies to prosecutions for misdemeanors as well as felonies. But where the question is rested solely on the above mentioned constitutional provision, it has been held that the rule does not apply to an offense, the punishment for which does not extend to jeopardy of life or limb. (20 R. C. L., pp. 219-221.)

In the 7th section of the Bill of Rights of the Liberian Constitution, it is provided that no person shall for the same offense be twice put in jeopardy. It is clear that this is a case of life hence the prisoners can not be held to stand a second trial. It was contended that this Supreme Court remanded the case *Lawrence v. Republic, Murder,* for a new trial; but in that case the Supreme Court said, in its comments upon the law and the evidence before it, that none of the essential requisites to prove the prisoner guilty had been proved and therefore judgment was reversed and the case remanded to said court with direction to grant a new trial.

In my opinion there was nothing by way of direction for the court below to do; first, because the Supreme Court had already said nothing with which the prisoner had been charged had been proved; the only thing that could be done under a new trial was for the judge of the trial court to only say to the jury you are called to render a verdict acquitting the prisoner; there being no evidence, which was the duty of the Supreme Court. There is another aspect to be noticed; this decision was handed down, A. D. 1912; two years later, A. D. 1914, the Legislature enacted a Criminal Code which reads "Acquittal or conviction bars prosecution for the same crime or any degree thereof. Where a prisoner is acquitted or convicted on an indictment for a crime, he cannot thereafter be indicted or tried for the same crime, nor of any degree

thereof." If the practice of remanding murder cases for new trial were in vogue at the time of the trial of the case *Lawrence v. Republic* in 1912, which I am unable to so conclude, it was certain the Criminal Code passed two years since has repealed or set aside the practice; nor are courts given the power to repeal, amend nor make law; but to simply interpret the law of the land, and they are as much bound by the law as the citizen or subject.

It is conceded by the writers of the common law, that according to the theory adhered to by some jurists, a prisoner is not put in jeopardy until he has been tried, and a verdict of guilty or not guilty is rendered. They further say that no one shall be twice put in jeopardy for the same offense is an ancient and well established doctrine. It is a part of the universal law of reason, justice and conscience. (17 Ency. of Law, p. 581.)

Though in strictness the constitutional provision securing the prisoner's right against a second jeopardy applies only to felonies, the courts have generally been guided by the spirit rather than the letter of the law, and have applied the doctrine to all indictable offenses including misdemeanors. (Id., p. 582.)

Where the defendant has once been placed in jeopardy, unless he waives his right not to be put in jeopardy the second time, as by moving for a new trial, any other prosecution is barred. As we before mentioned, the prisoners made no motion for a new trial, nor did the bill of exceptions nor the records raise the question of new trial in the trial court where alone the question could be considered. It not being made an exception in the bill of exceptions this court in keeping with the law above cited could not give a ruling upon a point not found either in the bill of exceptions, nor in the records of the case.

The Supreme Court of the United States of America in *Ex-parte Lange* said "In criminal law, jurisdiction is exhausted by one judgment; a second judgment on the same verdict is under such circumstances void for the want of power, and it affords no power to hold the party a prisoner, and he must be discharged. (Russell and Winslow Syl. Dig., vol. 2, p. 2211.) The prohibition of the ancient principles of the common law, and the constitutional provisions declaratory thereof, against a second jeopardy, apply only to a second prosecution for the identical act and crime both in law and

fact for which the first prosecution was instituted. In determining whether both indictments charge the same offense the test generally applied is that when the facts necessary to convict on the second prosecution would necessarily have convicted on the first, a final judgment on the first prosecution will be a bar to the second.

Therefore if there was one act, one intent, and one violation, no subsequent charge can be based thereon. (8 R. C. L., pp. 143-4, sec. 128.) It is generally conceded that a person convicted of a crime may waive his constitutional protection against being twice put in jeopardy by asking for a new trial, and the same being granted but in no other form. (8 R. C. L., p. 160, sec. 152.) Upon the principles of the common law the Constitution, and the Criminal Code of 1914, the courts of Liberia are without legal authority to order a second trial of any criminal case in which life or limb is concerned.

This case was continued on the second trial from the November term, A. D. 1925, upon the application of both parties, and is therefore before us at this term for a second review. As the exceptions taken in the bill of exceptions refer principally to the evidence I shall consider the evidence and final judgment.

Witness J. G. Montgomery states only what decedent told him, and in all she said he at once told her he did not believe it. He also said that after counting decedent's money she said she would not keep it in the house any longer. That he could not identify any of the articles of goods shown him as being the property of Mrs. Susan Ledlow; and could not say prisoners murdered her, that he knew nothing of the matter except what decedent told him. The deceased commonly charges every person she meets with as having committed crime of some kind.

Witness Lucretia Herron states that she heard decedent say that prisoner Ledlow struck her and she saw the body and the blood, but could not say who killed her. She also heard decedent calling one night, she inquired of her what was the matter; she said someone had got into her house and put her lamp out and struck her, but it is strange she did not know then who it was to be able to say who he was. Not until next morning was she able to tell all who passed that it was Ledlow.

Witness Harris states that he knew nothing but what was told him by decedent.

Witness L. E. Montgomery states that she knew nothing but what decedent told her, except that decedent told her that she was struck with a stick instead of a door bar as stated by others.

Witness Emma Bernard stated that she got her information from decedent and that she saw prisoner Ledlow in Lower Buchanan on the morning of the third of June walking straight and not limping. That she went to Hartford on the third of June after 10 o'clock with Mrs. Caroline Payne Diggs.

Witness Caroline Payne Diggs states: that prisoner Maloney told her that prisoner Ledlow killed her mother. That on the third of June, 1924 she went up to Hartford after the first attack was made on her mother, there she received a letter informing her that her mother was murdered. When asked to look at the articles handed to her (teacups), whether she could identify them, she said these are some of my mother's quilts, counter-panes and napkins were presented to her, but she could not identify them.

Witness Mary Atte Payne stated: that she was commonly called by decedent to assist her in sunning her clothing and cleaning up her house, but could not with certainty identify quilts, counterpanes, unquilted quilts and napkins. That she saw prisoner Ledlow at three o'clock prior to the day of the death of decedent, sitting on Mrs. Wray's veranda. She could not recognize the teacups as being the property of decedent.

Witness Caroline Payne Diggs states in conclusion: that the teacups were the same presented to her at the first trial of this case, and are the property of decedent. At this first trial she could not identify the cups with certainty but said they looked like decedent's cups and saucers.

Witness E. L. Davis states: that on Monday the second of June prisoner Ledlow passed his place, he stopped and that he went on to his farm, this was about 3 o'clock p. m.; that he was in canoe; he also asked prisoner would he be returning, he replied, if it did not rain he would do so, but he did not see him return. That he saw Maloney the first Thursday after the murder was committed, and was told by Maloney that he saw him in his horoscope. That prisoner Ledlow generally lands his canoe at his wharf when he comes down the river.

Witness Martha Sharpe says: that prisoner Ledlow sent for her

twice to make medicine, that she took his complaint to be rheumatism. The first time he went one hip and the whole side were completely numb. She made a strong hot water bath of herbs and with a towel bathed them, then rubbed it with medicine. She worked on him a week or more when he began to have a sensation of feeling about the affected parts. For her services he promised to get her a pair of shoes. That he spoke about going to his farm but she told him not yet, because if he took cold with his illness the second attack would be worse than the first. He said he was compelled to go as he had no one on his farm to look after his rice, and the native people would steal it. She worked on him about two weeks. That this was about the first of March. She could not say what time she commenced working on him the second time. His wife sent for her on a Monday morning to Mrs. Scott's and Ledlow told her how bad off he was, that the well side seemed to sympathize with the ill side and in a worse condition; she did not care to work on him again, however, after certain explanations were made, and finding his troubles were about his bladder, and the stoppage of water, which caused him not to pass water freely. She took his clothing down sufficiently to discern a knot, she then concluded that it was hernia. She told him the stoppage of water was gravel. The knot was as large as her fist; she then made a pitcher of tea for gravel. This she did until he could pass water; that prisoner Ledlow told her he returned home to try to gain a little strength to go and put himself under Dr. Dingwall, and she told him he had better do it quickly, as in her opinion he seemed to be bordering on to hernia. The next day she informed he was no better, but had got Dr. Addy to work on him.

This witness' evidence shows that whatever prisoner Ledlow's illness was it had seized upon him the first of March. On the 6th of May two months later decedent claimed she struck prisoner Ledlow with a door bar and that was what caused his illness. The statement of witness Sharpe is corroborated by Mrs. Scott and witness Georgia Ledlow. Said witness further stated that she told Ledlow not to go to his farm but he did not follow her instructions.

Witness Montgomery was called, and identified one gold ring as being the ring of his son-in-law, and that he saw it last about six months ago with the deceased, he also saw the second ring with

her but cannot say how she came in possession of it. This evidence falls short of identifying the rings as being the property of decedent as I expect to be able to better show later on.

The testimony of physicians, if it may be correct, the fact is that the illness of prisoner had been shown to have existed about two months before decedent is claimed to have struck him. .Therefore it cannot under such circumstances be the lick of the door bar, but from other causes.

Witness Liles said: prisoner left Hartford on a Monday and went to his farm, that he was not walking strong (sic) one leg was troubling him, he was told it was lumbago. That he went to prisoner's farm on Thursday of the same week and met him in a hut. He also said he had not seen the counter-panes and quilts before the day they were taken by a search warrant from Mrs. Scott's place.

Witness Glaypoo states: that he carried prisoner Ledlow from Lower Buchanan to Hartford; he then had a case in court. At that time he remained in Lower Buchanan one week. That they went back early Sunday morning, he was at that time carried to Hartford; and they both came back to Buchanan on Monday. Prisoner did not go down to Lower Buchanan that day, but stopped to (sic) Sheriff White's place; after finishing his business with Mr. William Johnson, they both went to his farm. That he put a man ashore at Edina, further up the river he stopped at William DeShield's factory and received some powder. On arriving at his farm Ledlow said he had fever, and his feet were hurting him. He asked him to take him back to Hartford to his wife but he refused to do so. That himself, Maier, Garpoo, and another boy took Ledlow to Lower Buchanan.

Witness D. J. Peters: identified the finger ring as being a ring pawned to him by prisoner Maloney for sixteen shillings (16/-) who had promised to redeem it in one week's time, otherwise it would be forfeited; since then he had not applied for it.

Witnesses James George and Morgan said: prisoner Maloney had said in their presence that if they want to find out who killed old lady Susan Ledlow, they should ask Maloney; nothing is the matter with Ledlow only the old lady gave him a good blow.

Witness Sheriff White stated: that he identified the ring marked

"I" as being the ring left with the officer (Kailor) by Maloney at the jail house when Maloney was being taken to Monrovia.

Witness J. G. Montgomery brought back to the stand stated: that decedent remarked in his presence that Charlie Dunbar had stolen certain things from her.

Witness W. A. E. Wray states: that on the 31st of May, Saturday, prisoner came to her place and credited certain goods from her. She further said that the statement made by Mary Etta Payne that prisoner Ledlow was at her house on the 3rd of June is not true.

Witness Prisoner Ledlow stated: that it was impossible for him to be at Lower Buchanan on the 3rd of June when he was at his farm at Gurhyah about twenty-five miles from Lower Buchanan. That on the 31st day of May, A. D. 1924, he made a credit of Mrs. Wray and has not been to Lower Buchanan since, that the money he carried on his farm with, he received from Mr. Greaves, with whom he had contracted to saw a number of planks as will appear by the account left with him. That he left Buchanan on the afternoon of the 2nd of June, and stopped to (sic) William DeShields, and received some powder left with him, that he went straight to his farm, but his leg became so painful that he at once tried to go home to his wife but the boys refused to carry him; that from that time until the 7th of June he remained at his farm to safeguard his rice being planted, etc.

Witness W. F. Parker stated: that on Monday the 22nd of June he arrived from Monrovia and met Eliza Redd in Lower Buchanan; she arranged to take passage with him on Tuesday morning the 3rd; he sent for her Tuesday morning about nine o'clock; the next day, two of Ledlow's boys came there with salt herrings carrying them to his wife, she inquired of Ledlow and they said he was at Gurhyah sick saying his leg was dead.

Witness D. B. Greenfield stated: that prisoner has a room rented in his house at six shillings per month where he stops when he is in Lower Buchanan; that the last time he was there was on the first of June. On Sunday morning when, a little before day, he left that he saw him he was really brought to his place in a hammock. That he saw him limping, and was told by him that he had lumbago which caused him to be riding up and down the streets in a hammock.

Witness Addy identified the two boxes, he remembered giving Miss Gertrude Scott and her sister each a box like the two he identified.

Witness C. Harmon stated: that she credited prisoner Ledlow at his request certain goods which he named that this credit was made on the 31st of May, Saturday, 1924, that she did not see him with a trunk while at her place.

Witness A. J. Scott states: that prisoner Ledlow was taken ill the first week in March, 1924 with his complaint, and Mrs. Sharpe attended him at that time. She identified the box as one given her daughter by Mr. Addy, the quilt as having been made by herself, the cloth of which it was made was purchased from Mrs. Green, that the quilt had been to Monrovia and other places and had been used in entertaining President Howard, certain Bishops, etc. That prisoner's boy came to Hartford and told them that prisoner was sick, but his wife being a member of a certain society which was making preparation for its celebration, she did not go down then. The boy returned the next day, etc. That the counter-panes were given to her daughter by her husband, John M. Allen, as a wedding present with another one. (sic)

Witness E. L. Page states: that the counter-panes were given her when she was married to Mr. John M. Allen. That they were taken by Mr. Willie Ross and a constable at Hartford, and that the box was given her by Mr. Addy. That Ledlow came to Hartford on Sunday from Lower Buchanan and was sick, that his wife was up with him during the course of the night, but at early dawn next day he was up and prepared to go to Edina to his farm. It also seemed that the wine he drank affected him.

Witness S. Reuben Hill for the defense, stated: that he had a writ from the Native African Commissioner on the 25th day of June, 1924 to arrest prisoner Maloney and bring him before said officer. He went and arrested him; in that case he was to pay a certain amount, or be put into prison. He carried a deputy officer with prisoner to get this money at prisoner's request, and failing to pay they took him back to the Commissioner. A commitment was issued by the Commissioner to have him put in jail. On their way to jail he escaped, that was the last time he saw him until he was brought by the police from Monrovia.

Witness Dagbe for defense states: that he accompanied Mr. Hill when he went with Mr. Maloney to get the cash and other amount (sic); on (sic) the second time he went, Maloney requested as it was raining (sic). Maloney gave him bowl (sic) when they arrived at his place he said he was going to look for his keys, but he did not understand Kru. They returned to his house. He went upstairs saying he was looking for his keys, he then came down and went (sic) back of the house, he told him Maloney was trying to run away, but if he run (sic) he would shoot him. He came back and went in (sic) the house and burst through the mat, saying: I am looking for jewelry to pawn to the Commissioner until I can go and bring my cow from my brother. This was about three o'clock in the evening, on our return he said I will run away but not before you as you are a stranger here. When we returned the commitment was given him to take prisoner to jail, on our way there Maloney stopped and took off his shoes, jumped into the bush and ran off.

Witness Nathaniel Bull states: that he identified the ring marked "H" as being the property of A. M. E. Rauls put in pawn to his father.

Witness Sarah P. Carter states: that the prisoner stopped at time to (sic) place in Upper Buchanan. (ALIBI) (sic) that himself and wife were stopping at her place the night when decedent was struck in the face. She was told by Mrs. Scott of the striking of decedent. That she has seen Ledlow in hammock (at times and walking on foot at times.)

Witness George Cain identified finger ring marked "I" as being his (witness's) own property. That the post master sent him some time ago from the office to know if there was a boat coming. While Maloney had the ring the post master called for him, he went to him the post master, and on his return for the ring Maloney had gone, from that time he had not seen Maloney until he heard he had been arrested and sent to Bassa. That he then had this ring in Cape Mount.

Witness Varmley states: that Ledlow sent to call on him. On his arrival prisoner said he wanted him, Varmley, to bring his three women and plant his rice; he charged him three pounds, and received certain goods against the amount charged which he named. That he met prisoner sick both days that he went. He carried the

women the next day to start the work; he met prisoner in a helpless condition both days.

Witness Maier states: that he went up in the canoe with prisoner Ledlow. That Ledlow called one of Varmley's boys and said something about planting his rice; this boy was fishing. That himself, prisoner and others went to Ledlow's farm together; he met one woman, Garkpeh and Willie Liles there. That he slept until the next day. Ledlow slept in his little hut. That he slept out-of-doors. That this hut was kept open the whole night, and prisoner was calling them through the night; that he called witness to hand water and food. That he saw the tin trunk that they carried up in the canoe, and he could tell it if he saw it though trunks are alike. Some trunks was (sic) presented him, he said he never saw three handles on the trunk they had carried up in the canoe, hence he could not say it was the trunk.

Witness Musu says: he heard Ledlow calling Varmley for the palm wine. The answer was: "no one here." He then left a message for Varmley; and also sent for him. The next day he came and planted his rice. The whole time he was sick they observed that he was crying, also when they inquired the cause of his crying he said his aunt was dead, and he could not go down.

Witness Jehu King states: that he faintly remember (sic) seeing a ring like that in the late post master's possession. It was pawned by Mr. Thomas Williams to the late post master in June last year; he was asked by the late post master to dispose of the ring that is (sic) pawned to Mr. Williams for one pound sterling (£1.-.-). Mr. Peters did not then give the money, but he was told since by Mr. Williams and Mr. Peters that the ring was pawned to Mr. Peters. Mr. Williams asked me to arrange with Mr. Peters and take delivery of the ring because it did not belong to him, hence he would not like for the ring to get out of his hands. As to whether the ring was ever given to Mr. Williams he did not know.

Witness T. S. Williams states: that in the year 1919 when Lieutenant Rauls of the L. F. F. was in Gio they went to an expedition to open the road between Gio and Saniquelle; on their return he said he would make as a memorandum (sic). He made a ring like this one, and when he was in trouble his wife brought the ring he had made to my father-in-law, C. C. Bull, to get a credit, or loan,

then my brother-in-law Johnny Bull came in possession of it, after the death of my father-in-law. It got into my possession from Johnny Bull. I gave it to Mr. Jehu R. King on a loan for some money. He gave it to the late post master Redd for a definite time; before the expiration of the time I gave Mr. King a pair of trousers to liquidate the debt, failing to do so, Mr. Redd told me he gave it to one Mr. Maloney to fix some medicine for him as he did not have the ready cash money to give. We afterwards found out that the ring was with Mr. Peters, asking him where he got it from, he said from Maloney. He then asked would he Peters allow him to redeem it? He said when the time is up (sic) if Maloney fail to come for it he would let me (sic) have it, but Maloney pawned it again to him. On asking him again to allow me to redeem it he has not until now replied.

Witness Georgia Ledlow says: that on the 2nd of May, 1924 she met prisoner Ledlow on the Dutch wharf in Buchanan, that they stopped at Mrs. Carter's place. On the 3rd of May, she went with others to Lower Buchanan to see Mrs. King. On leaving, Ledlow told her he would go up to his farm that day, and on her return that afternoon, he was gone. He returned on Monday about six o'clock a. m.; about nine o'clock he left Mrs. Carter's place and went to Lower Buchanan. On the 5th of May, he returned about seven o'clock. That Mr. Ledlow went to Hartford on Sunday morning being the 1st of June, he was sick during the whole night up and down. He told her that the wine he drank at the supper table made him sick, that he had been told not to drink anything acid, etc.

Witness Garkpeh states: that himself, Maier and Glaypoo were in the canoe with Ledlow, that they stopped at William DeShields's wharf, and Ledlow received some powder; that they met Varmley's boys at the wharf, and told them to tell Varmley he must come to Ledlow's farm next morning. Maier was sent to call him, it was on Tuesday Varmley went to Ledlow's farm. Ledlow slept in his little hut, that night they went up with him. The remaining part of the statement corroborates the statement made by the other witnesses for defense.

Witness J. J. Prosser states: that he saw Ledlow and Maloney in Lower Buchanan during the week prior to the death of decedent. That he saw Ledlow on Monday before decedent's death and

not Tuesday talking with Mrs. Emma Bernard; that he was upon his oath, and when asked which of the statements was true his or hers, he said he is not responsible, except for his, that he did not see any of the prisoners in any suspicious form nor about decedent's premises.

It can clearly be seen from the above evidence that the circumstances surrounding this case are in favour of innocency.

In the attempt made to prove stolen property the evidence propounds in favour of the defendants. Nothing has been identified as being the property of decedent; to have seen the goods in decedent's possession is not satisfactory, it is necessary in identifying one's property to show how they came in possession of it. Not in one instant did the State show how decedent came to possess the articles claimed to be the property of decedent, but on the other hand the defense clearly showed how their claim of possession came about. It was shown, link by link leaving no doubt in a reasonable mind. The teacups could not be identified by Mrs. C. P. Diggs with certainty at the first trial, but she did so at the second trial. See question: "Are these the same cups you identified at the first trial?"

Answer: "Yes."

A witness said at the first trial all the people up the river have teacups like these.

The evidence of physicians, with all due deference given, the fact is that: The complaint or cause of the illness of prisoner Ledlow existed two months before decedent's death, at the same place in his body that the physicians located it. It matters not what it was thought to be by prisoner.

The lady that attended him observed the knot on his side before the death of decedent. That the statement made by Maloney was neither an admission nor a confession, it was a mere statement and has not the tendency to prove the charge as laid in the indictment for the murder. Maloney said if you want to know who killed Aunt Susan Ledlow ask Maloney, that decedent gave him a good blow.

Decedent said she was struck with a door bar, but it must be remembered that this was not on the night of her murder, it took place on the 6th of May in the act of larceny said to be committed, and not the 3rd of June the day of the murder, and cannot legally

be received or admitted as evidence in the case of murder. It is clear that no one asked him at his request to tell who killed the deceased, at least it is not shown in the records. Again the Attorney General said that Maloney goes for a fortune teller and a soothsayer. Maloney said he saw him in his horoscope. Whether it is by this science Maloney's knowledge comes should have been brought out at the trial.

The law makes it strictly requisite that the State prove the presence of the defendants at the time and place of the murder. This the State has failed to do. Not one question of the kind was asked by the State. The deceased was not murdered in the day time but at night, and the question whether prisoners were in Lower Buchanan on the fourth or fifth of June was not pertinent to the issue.

It would be a bad practice to establish the precedent that because a man was seen in Lower Buchanan on the day a crime was committed, or a day after, he was the criminal.

There were many others in Buchanan on the day before and after Mrs. Susan Ledlow was murdered that could be equally charged with the murder. Mrs. C. P. Diggs, identified teacups at the second trial as being some of her mother's things, when asked if they were the same teacups she identified at the first trial she said yes; but the Attorney General in his arguments said the teacups were never put in evidence because they were found out to be another set of teacups, though upon her oath she had identified them as being some of her mother's things.

The State claimed that evidence in the case on the part of the defense, was very contradictory, and so it was on part of the State, even in M. A. Payne and Mr. Prosser's statements, and Mrs. Wray all of whom state that Miss M. A. Payne's evidence of seeing Ledlow in Lower Buchanan was not true. Mrs. Georgia Ledlow says upon oath that Ledlow did not leave Mrs. Carter's place on the night of the 6th of May after returning from Lower Buchanan about seven o'clock that evening, because they slept together all that night and not until seven o'clock a. m. were they up. Throughout the evidence nothing has been identified with any certainty as being the property of the deceased. The defense identified all the goods before the court with certainty to be theirs, and gave to the court link by link, how they came in possession of them; in this

the State made a fair breakdown, or failure, which operated strongly in favour of the defendants. The charge of flight was not established; the witness showed that Maloney's flight happened by a commitment being placed in the hands of the officer to take him to jail, in a matter tried by the Native African Commissioner.

We come now to consider the plea of alibi. This is a plea not resorted to until the State has proved her case, or in other words made out a *prima facie* case; and need not be so strongly proved as to leave no reasonable doubt. That it is necessary that the evidence state or show that the defendants were not present at the time mentioned in the charge; even if there be only one that can make this statement, it is sufficient.

In the case *Eddie Capps v. Republic of Liberia, Grand Larceny,* the State's witnesses proved that Eddie Capps was present in the store yard of the place when and where the larceny was being committed. The watchman said he saw Eddie Capps and held him in conversation while the theft was being committed, that he knew Eddie Capps, and that the moon was shining. This statement was corroborated by others together with one of the accomplices; Eddie Capps then proved that during the whole time as stated by the witnesses he was at home with his family. And this was proved by those only in the house with him that night. The court discharged Eddie Capps.

In this case prisoner Ledlow has shown by more than one witness, that they slept with him all night during the night of the murder committed upon the deceased viz.: Maier, Garkpeh, etc., the variance, if any, in the other questions is not sufficient to upset the point of alibi. Again decedent alone said prisoner Ledlow struck her in the face in the act of stealing her belongings on the night of the 6th of May, but prisoner and his wife said upon their oath that Ledlow returned from Lower Buchanan at seven o'clock that evening and went upstairs ill, and he did not come out again until seven o'clock next morning; that they slept together. The question arising then is, where does the weight of evidence rest? Most decidedly with the defense. The Attorney General laid much stress in his arguments upon the point that the State had proved her case so fully that the alibi should not be considered against the evidence of the State, he has pictured the defendant exactly after decedent's evidence, but it is the court's duty under the laws of this country to follow closely the whole evidence in the case.

He also emphasized with force the judgment in the case *Ball v. the United States of America,* and other citations confirming that case, but it seems that he lost sight of the decision handed down by the court in the case *Wood v. Republic of Liberia* where this court said that various states of the United States have enacted statutes defining or declaring what shall constitute jeopardy but it is not from these we are to get our definition, but from the common law. Since that opinion, the Legislature of Liberia has enacted a Criminal Code, and it has set aside the common law in criminal matters; and very fortunately these statutes were revised by His Honour the present Chief Justice, the Honourable Secretary of State and the late Attorney General Haynes. The first section of this Code reads thus: "This act shall be known as the Criminal Code of the Republic of Liberia, and it is intended to abolish all common law offenses." The courts of Liberia, under this mandatory clause are forbidden to put any common law definition on any offense declared by this Code. They are to act strictly within the limits of this Code. The jeopardy clause reads as follows: "Where a prisoner is acquitted or convicted on an indictment for a crime, he cannot thereafter be indicted or tried for the same crime nor of any degree thereof."

That the revisers of the Criminal Code had before them the error committed in remanding the case *Lawrence v. Republic* is demonstrated in the clause above cited, as this case was tried in 1912 and the Code was enacted in 1914. And if there was a law on which this court based its rulings at that time, the clause of jeopardy enacted two years later has set aside such law or practice. (See Criminal Code, 1914, p. 6, sec. 30.)

Furthermore the Attorney General objected to the defense's raising the plea of jeopardy, stating that: they should have raised it in the lower court, and failing to do so in the trial court they could not raise it in this court. My two colleagues really sustained the objection to which I excepted, upon the grounds that the plea of jeopardy was a plea of jurisdiction, which could be raised at any stage of the action even in the appellate court. They then said that they withdrew the above said ruling. Now the law requires that the plea of jurisdiction, when raised in a case, must first be heard and decided by the court, and if the court finds that it has jurisdiction it will then enter upon the trial of the case, but if it

finds that it is without jurisdiction it will dismiss the entire proceedings. The reason is this: if a court acts without jurisdiction all of its actions are a nullity and cannot be enforced. The records kept will not show that this court has heard and decided the plea of jeopardy as raised and approved by it. Again it is doubtful whether the judges of any of our courts would entertain a plea of jeopardy if it had been raised in this case in which the Supreme Court, under its mandate, had ordered that a new trial be granted. As to whether they could rightly and legally do so is a point I am not disposed to comment upon here.

The evidence of Mrs. Susan Ledlow should not have been allowed to go to the jury, it being hearsay. Mr. Greenleaf on Evidence (vol. I, ch. 9, under hearsay) says, "The first rule of moral evidence and that which is most satisfactory to the mind, is afforded by our own senses; this being direct evidence of the highest nature. Where this cannot be had, as is generally the case in proofs of facts by oral testimony, the law requires the next best evidence; namely the testimony of those who can speak from their personal knowledge of the main facts in controversy for this may not be provable by direct testimony, but only by inference from other facts shown to exist. But it is requisite that whatever facts the witness may speak to, he should be confined to those lying within his own knowledge, whether they be things said or done, and should not testify from information given by others, however worthy of credit they may be."

For it is found indispensable, as a test of truth, and to the proper administration of justice, that every living witness should, if possible, be subjected to the ordeal of a cross-examination, that it may appear what were his powers of perception, his opportunities for observation, his attentiveness in observing, the strength of his recollection, and his disposition to speak the truth.

But testimony from the narration of third persons, even where the information is known, cannot be subjected to this test; nor is it often possible to ascertain through whom, or to how many persons, the narrative has been transmitted, from the original witness of the fact. It is this which constitutes that sort of second hand evidence termed hearsay. The term hearsay is used with reference to that which is written as well as that which is spoken; and in its general sense, it denotes that kind of evidence which does not derive

its value solely from the credit to be given to the witness himself, but rests also in part, on the veracity and competency of some other person. Hearsay evidence as thus described, is uniformly held incompetent to establish any specific fact, which, in its nature, is susceptible of being proved by witnesses who can speak from their own knowledge. That this species of testimony supposes something better, which might be adduced in the particular case, is not the sole ground of its conclusion. Its extrinsic weakness, its incompetency to satisfy the mind as to the existence of the fact, and the frauds which may be practiced under its cover, combine to support the rule that hearsay evidence is totally inadmissible. Subject to these qualifications and seeming exceptions to be later examined, the general rule of law rejects all hearsay reports of transactions whether verbal or written, given by persons not produced as witnesses. In this I note below he quotes the language of Mr. Justice Fuller: "If" says he, "the first speech were without oath, another oath, that there was such a speech makes no more than a bare speaking." (Hawk. P. C., vol. 2, p. 596.) And so of no value in a court of justice. He continues, "the principle of this rule is that such evidence requires credit to be given to a statement made by a person who is not subjected to the ordinary test enjoined by the law for ascertaining the correctness and completeness of his testimony, namely, that oral testimony should be delivered in the presence of the court or a magistrate or under the moral and legal sanction of an oath, and where the moral and intellectual character, the motives and deportment of the witness can be examined, and his capacity and opportunities for observation, and his memory, can be tested by a cross-examination." Such evidence moreover, as to oral declarations, is very liable to be fallacious, and its value is, therefore, greatly lessened by the probability that the declaration was improperly heard or was misunderstood, or was inaccurately remembered, or has been perverted. It is also to be observed, that the person communicating such evidence is not exposed to the danger of a prosecution for perjury, in which something more than the testimony of one witness is necessary in order to sustain a conviction; for where the declaration or statement is sworn to have been made when no third person was present or by a person who is since dead it is hardly possible to punish the witness, even if his testimony is an entire fabrication.

To these reasons may be added considerations of public interest and convenience for rejecting hearsay evidence.

The greatly increased expense and vexation which the adverse party must incur in order to rebut or explain it, the vast consumption of the public time thereby occasioned, the multiplication of collateral issues for decision by the jury, and the danger of losing sight of the main question and of the justice of the case if this sort of proof were admitted, are considerations of too grave a character to be overlooked by the court or the Legislature in determining the question of changing the rule.

The truth seems to be that, among the preceding reasons for rejecting hearsay assertions, the vital and determinative one is that stated at the beginning of this section, viz.: the desirability of testing all testimonial assertions by the oath and by cross-examination. Thus a favorite passage, found in several works in the last century, is: "It seems agreed that what another has been heard to say is no evidence, because the party was not on oath, also because the party who is affected thereby had not an opportunity of cross-examining;" and the hearsay rule is constantly expounded as "the general rule of not receiving evidence unless upon oath and with the opportunity of cross-examination;" thus Swift, C. J., in *Chapman v. Chapman:* "It is a general principle in the law of evidence that hearsay from a person not a party to the suit is not admissible; because such person was not under oath and the opposite party had no opportunity to cross-examine." Ewing, C. J., in *Westfield v. Warron*: "The declarations were made without oath, in no judicial proceeding, and in the absence of the present practice. They are only declarations of persons not sworn and not cross-examined. The evidence then is purely of the kind denominated as hearsay;" Shaw, C. J., in *Warron v. Nichols:* "The general rule is that one person cannot be heard to testify as to what another person has declared in relation to the fact within his knowledge and hearing on the issue. It is the familiar rule which excludes hearsay. The reasons are obvious, and they are two: first, because the averment of fact does not come to the jury sanctioned by the oath of the party on whose knowledge it is supposed to rest; and, secondly, because the party upon whose interest it is brought to bear has no opportunity to examine him on whose supposed knowledge and veracity the truth of the fact depends."

The hearsay rule, then, is encountered whenever a testimonial

assertion is offered in evidence without being subjected to oath and cross-examination.

Our statute is full in its definition of hearsay evidence and in perfect accord with Mr. Greenleaf. It says: "hearsay is not evidence except in particular cases." (Ch. X, sec. 10). Section 11 qualifies section 10. It reads, "hearsay from deceased persons of ancient facts, of which they, from their situation, were likely to have knowledge, such as marriages, births, deaths and pedigrees, may be received as evidence, but it is evidence of a low grade." Sections 11 and 13 provide the only legal hearsay evidence recognized in courts of justice. It is clear therefore that manifest error was committed by the trial court in admitting the declaration of Mrs. Susan Ledlow as evidence in this case.

The statute of Massachusetts, giving the Supreme Court of that State the right to remand criminal cases, seems to be the law relied on by this court for remanding this case at the last session of the court for new trial, but it must be remembered that this statute is not in force in this country, but rather conflicts with our statute which reads thus: "Where a prisoner is acquitted or convicted on an indictment for a crime, he cannot thereafter be indicted or tried for the same crime, nor any degree thereof." (Criminal Code, 1914, p. 6, sec. 30.) Mr. Blackstone in the fourth volume of his Commentaries says: "better that ten guilty persons escape than that one innocent suffer." There is no doubt left in a reasonable mind that the entire evidence brought by the State to corroborate decedent's statement has been absolutely broken down. The goods, said to constitute the fruits of the crime; the presence of the prisoners; the flight of Maloney; have all been shown to be unfounded. Therefore instead of the State proving the case beyond a reasonable doubt, the prisoners have proved their innocence beyond a reasonable doubt. In the case *Lawrence v. Republic* this court after considering the evidence said that nothing with which the prisoner had been charged was proved, it also stated what should have been proved, under the circumstances as laid in the indictment.

See also the decision in the case *Milton J. Marshall v. Republic of Liberia,* based on circumstantial evidence.

The case should therefore have been dismissed, and the prisoners discharged.