

far distant; and that Jones was in fear of injury from the hands of the people at this time, which fear induced him to attempt to leave the country with stolen horses.

That in order to frustrate this scheme, which had been discovered, watchmen had been placed at the corral where the horses were kept and at Jones' house, to prevent his escape as well as to guard against surprises from Indians. That after Jones had escaped from the dugout he went from place to place in that vicinity to escape pursuit and was much frightened, and that he was shot in the arm while eluding pursuit, or in attacking an antagonist, which was alleged to be the defendant. Jones continued his efforts to escape, and early in the morning arrived at a town called Salem, or Poud Town, some three or four miles from his mother's house. That the posse, including the defendant Hancock and many others, were in hot pursuit and caught the deceased at this latter place, disarmed him and took him prisoner. Hancock seemed to be in command. A guard was placed on each side of the deceased. Hancock was a little to the rear and others about and around them. In this position they started with the deceased to return to Payson with him. This was supposed to be three or four hours after the killing of Mrs. Jones. Thus guarded, the party started for Payson. What followed is a matter of speculation, as the witnesses disagree. It appears, however, from the testimony of Wilson (a witness for the prosecution) whose testimony was discredited and impeached in many ways, that Hancock directed the posse in charge of Jones to take him to Payson. All were armed except the deceased. While walking along in the direction of Payson, and talking about stealing horses, etc., Jones remarked that he didn't want to go with them; that they had killed his brother and he was not going with them, etc. About this time Jones looked up and saw some other parties coming towards them and remarked: "There come some more of the d—d curses after me!" He then stopped and threw up his hands, at which time the prosecution claims that Hancock remarked to his companions, "Now slap it to him, boys," a gun cracked and then another, and Jones fell mortally wounded, and soon afterwards died where he was shot. There was a large party present at this killing, most of whom have since died. The next day Jones' body was taken by some one other than the defendant, and placed with that of his mother, without washing or changing the clothes. The supports to the roof of the dugout were taken down and the roof lowered to cover the remains, and they were both left thus entombed.

It also appears, under objection from defendant's counsel, that a long time prior to this killing Jones had been castrated by parties then unknown. The defendant is not proved as having any complicity in that act.

That prior to and after the killing, Hancock had been a person of good moral character. Different and contradictory accounts of the killing of Mrs. Jones and her son, and of the time when the killing took place, appear from the testimony, but enough does

appear to show that the killing of Mrs. Jones was a different transaction from that of the killing of Henry Jones, and whether Hancock was present at her death or not is left in dispute and uncertain.

On the trial defendant was convicted. Defendant's counsel assign twelve errors as grounds for a reversal of the verdict and judgment of conviction. Among them are the following:

3. The court erred in allowing Henry Gardner, against the objection of counsel for defendant, to testify that Henry Jones had been castrated and had no testicles.

7. The court erred in refusing each one of the several requests asked for the defendant, to wit, severally, each one of the twenty-one requests appearing in the record.

8. The court erred in charging the jury as to the effect of good character.

9. The court erred in charging the jury upon the facts as to the belief to be attached to witnesses who testified to the exact language thirty-two years after the transaction.

10. The court erred in charging the jury that time does not run in favor of murder, and in charging that no lapse of time washes out the stains of blood that the murderer makes; and in charging generally upon the facts of the case.

The Court erred in charging the jury as to the subject of justification, the defendant not having made or asked for justification, but denying the killing; and the charge of the subject of killing was an argument that the defendant was guilty.

We do not consider it necessary to review each assignment separately.

In the course of the trial it appears by the testimony of Henry Gardner, under objection from the defendant's counsel, that Henry Jones had been castrated some considerable time before the alleged homicide. It nowhere appears that the defendant had any hand or complicity in this transaction, or was in any manner chargeable therewith, or that that fact in any way tends to elucidate the question involved, or throws any light upon the question of the guilt or innocence of the defendant. The presumption is that this testimony was admitted for the purpose of showing malice on the part of the defendant, and that was probably the ground upon which the learned Judge admitted the testimony. If this be so, the prosecution failed in any way to connect the defendant with the act of castration. This, we think, was error. The only object for its admission, if it was admissible at all, would be to show that the defendant committed the act, or assisted in its commission, and that he must have had malice against the deceased at that time; and when the prosecution failed to connect the defendant with the act, the testimony becomes wholly incompetent. Its admission, under the circumstances, would naturally tend to awaken a prejudice in the minds of the jury against the defendant. Testimony of this transaction was foreign to the issue and should not have been allowed.

Error is assigned upon the refusal of the Court to instruct the jury as follows:

16. "In a criminal trial, evidence of the good character of a person is of value not

only in doubtful cases, but also when the testimony tends very strongly to establish the guilt of the accused. It will of itself sometimes create a doubt, when without it none would exist."

17. "There is no case in which the jury may not, in the exercise of a sound judgment, give a person the benefit of a previous good character. No matter how conclusive the other testimony may appear to be, the character of the accused may be such as to create a doubt in the minds of the jury, and lead them to believe, in view of the probabilities, that a person of high character would not be guilty of the offense charged, that the other evidence in the case is false, or the witness mistaken."

The Court refused these requests, but instructed the jury as follows:

"Proof of the good character of the person charged with the offense is always allowed in this class of cases, and the weight to be given to it is to be determined by the jury. It is all-important in doubtful cases. Where the evidence, outside of the presumption of good character, is clear and explicit, on which no doubt can be cast, good character will only cause the jury to hesitate and think about the matter. The jury will always remember that a man has to commit his first crime. He cannot commit all the crimes, if he does commit any, at once; he has to break over the rules of good conduct and good life for the first time, sometime in his life."

We think the requests numbered 16 and 17 should have been either given to the jury or embraced in the charge of the court; and that the instruction given to the jury on the court's own motion was erroneous. This charge, as given, limited the effect of good character to doubtful cases, and that in cases where the evidence was clear such evidence would only have the effect to cause the jury to hesitate and think about the matter. In other words, that in clear cases of guilt good character should have no weight, except, for the jury to stop and think, but in doubtful cases it was all important. We think the charge was misleading. In doubtful cases the jury should give the defendant the benefit of the doubt and acquit; and to do so it would not be necessary for the defendant to add proof of good character to the doubt already existing in order to be entitled to an acquittal.

It is in clear cases therefore where evidence of good character is of the most avail. There may be cases made out so clear that no good character can make them doubtful; but there may be others in which evidence given against a person without character would amount to a conviction, in which a high character would produce a reasonable doubt, or in which high character will actually outweigh evidence which otherwise might appear conclusive. "Good character is an important factor with every man; and never more so than when he is put on trial charged with an offense which is rendered improbable in the last degree by a uniform course of life wholly inconsistent with any such crime. There are cases where it becomes a man's sole dependence, and yet may prove sufficient to outweigh evidence of the most positive character. The most clear and convincing cases are sometimes satisfactorily rebutted by it, and a life of unblemished in-