

HOW THE UNCHARGED MISCONDUCT RULE WAS BORN  
PEOPLE v. MOLINEUX AND THE JURISPRUDENCE  
OF SIMILAR CRIMINAL BEHAVIOR

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INTRODUCTION

The current version of the rules governing admission of good and bad character evidence in criminal prosecutions are embodied in the Federal Rules of Evidence, and in their Uniform Rule counterparts. The basic rule is that evidence of the bad character of the accused is inadmissible.<sup>1</sup> However, there are exceptions. First, if the defendant chooses to prove that the defendant is a person of good moral character, the prosecution can rebut with evidence of bad moral character.<sup>2</sup> Second, if , in a crime of violence, the defendant claims that the defendant acted in self-defense due to the propensity of the victim to commit acts of violence, the prosecution can rebut with evidence of the defendant's propensity to engage in violent acts.<sup>3</sup> Third, specific instances of the defendant's bad conduct not charged in the indictment are admissible to prove an intermediate issue such as motive, intent, knowledge, lack of mistake or accident, plan, preparation or identity (the uncharged misconduct rule).<sup>4</sup> Fourth, reputation, opinion or specific instances of bad conduct may be admitted to prove the defendant habitually committed some act.<sup>5</sup> Fifth, if the defendant becomes a witness, the defendant's credibility may be attacked by reputation or opinion evidence that the defendant is untruthful or by cross-examination on specific instances of

the defendant's bad conduct that affects credibility.<sup>6</sup>

These rules serve several ostensible purposes: e.g., protecting the jury from evidence alleged to be of low probative value and great prejudice to the accused, while permitting the prosecution at the same time to offer circumstantial proof of the accused's bad character by proof of other acts of uncharged criminal misconduct if that evidence also proves some intermediate issue in the case, or the existence of a habit of behavior.<sup>7</sup> Almost all evidence gurus and pundits approve of the current structure of the character evidence rules, although all admit that evidence of prior similar behavior is relevant to predicting whether the defendant will act the same way in similar circumstances. The commentators rely on the presumption of innocence accorded the defendant, or the belief that Anglo-American criminal justice is fundamentally culturally different from criminal justice on the European continent to justify their conclusion that this system is, if not the best system for handling proof of cross-situational stability of human conduct in criminal prosecutions.<sup>8</sup>

The Federal Rules were modified ten years ago by the addition of special rules permitting the prosecution to prove that the accused in a sex crime prosecution had a propensity or predisposition to commit sex crimes.<sup>9</sup> That modification was made by Congress over objections by most of the leading evidence commentators. A few states, notably New York, have followed suit and have adopted special rules admitting other similar criminal acts of alleged sex criminals.<sup>10</sup> In the view of some commentators, the shift to permit proof of other bad sexual acts of the offender in sex crime prosecutions is an anomaly that attacks the constitutionally protected

presumption of innocence. New York writers are outraged that the sex offender provisions threaten the continued viability of *People v. Molineux*,<sup>11</sup> the case that is most often-cited by the remaining common law evidence jurisdictions<sup>12</sup> in support of the current uncharged misconduct rule.

This essay examines the original *Molineux* decision and its influence on present-day character evidence. Part II is a brief summary of the story behind the 1899 trial of Roland Molineux for the murder of Katharine Adams, the trial which was the platform that launched a synthetic rule for the admission of uncharged misconduct in criminal prosecutions.<sup>13</sup> Part III is the story of the first trial.<sup>14</sup> Part IV is a summary of the state of the law relating to admissibility of evidence of the bad character of the accused prior to 1899. The courts recognized a general exclusionary rule loosely based on the collateral fact rule or the presumption of innocence that kept out direct evidence of the bad moral character of the accused, but a network of common law decisions allowed evidence of the bad character of the accused to put its nose under the tent in a variety of seemingly unrelated situations.<sup>15</sup>

Part V examines and analyzes the New York Court of Appeals' *Molineux* opinion. The majority opinion was a masterpiece written by a judge not noted for his scholarship that established a general rule allowing specific bad acts of the accused that necessarily demonstrated the bad moral character of the accused into evidence if an intermediate issue could be thought up that the specific bad act could be used to prove.<sup>16</sup> The concurring opinion of Chief Judge Alton B. Parker would become the basis for section 411 of the 1942 Model Code of

Evidence, the precursor of rule 404(b), thanks to a well-written Harvard Law Review article advocating Parker's viewpoint.

Part VI is a very short account of the second Molineux trial in which Roland Molineux was acquitted after a 13 minute jury deliberation. The second trial was conducted in a way that completely excluded all the evidence of the killing of Henry Barnet, with predictable results: the accused was exonerated.<sup>17</sup>

Part VII is the story of the development of the Molineux rule into Rule 404(b) of the Federal Rules of Evidence. *Molineux* became one of most cited decisions in the history of the United States. However, legal scholars did not like Judge Werner's pigeon-hole formula. Professor Edmund Morgan was reporter for a blue ribbon panel of experts brought together by the American Law Institute in 1939 to write a Model Code of Evidence. Morgan approved of the version of the uncharged misconduct rule put together by Prof. Julius Stone in two articles published in the HARVARD LAW REVIEW in 1936-38. Stone, in turn, preferred Chief Judge Parker's version of the uncharged misconduct rule in his concurring opinion. Rule 411 of the 1942 Model Code of Evidence was the result of Morgan's decision to follow Stone. This formula became Rule 55 of the 1953 edition of the Model Rules of Evidence which served as the basis for Rule 404(b) of the Federal Rules. Chief Judge Parker's concurring opinion in *Molineux* became Rule 404(b) of the Federal Rules of Evidence.<sup>18</sup>

Part VIII summarizes the results of this investigation and its implication for future inquiries

into the legitimacy of character evidence. Rule 404(b) is the most litigated rule in the Federal Rules of Evidence. Rule 404(b) was supposed to make admission of uncharged misconduct easy and simple. Instead it has made admission and exclusion more difficult and much more time-consuming. Rule 404(b) has taken up far too much judicial time and effort since 1975. It has become an example of insanity: repeatedly trying to do the same thing over and expecting different results. Part VIII advocates a character evidence rule that honestly authorizes admission of character evidence to prove action in conformity therewith.

## II. THE MOLINEUX AFFAIR

### A. BACKGROUND FACTS

On February 17, 1900, Roland Molineux was convicted of the murder of Mrs. Katharine Adams. During the course of the three month long trial, the prosecution also tried to prove that Molineux had murdered Henry C. Barnet using a similar unique criminal *modus operandi*. In both homicides, the victim was poisoned by ingesting cyanide of mercury that had been concealed in a sample of patent medicine. In all recorded criminal history up to that time, only five prior cases of homicide via cyanide of mercury poisoning had been recorded. The patent medicine samples in each case had been sent to a private letter box in New York City that had been rented by an unidentified man under an assumed name. The dose of patent medicine laced with cyanide of mercury that killed Mrs. Adams, had been mailed to Harry Cornish, an avowed enemy of Molineux. Henry Barnet had dated Molineux' fiancé, Blanche Chesbrough in 1899 when Molineux had broken off his relationship with Chesbrough.

This trial set the stage for the appeal that produced the Molineux rule and eventually led to Rule 404(b) of the Federal and Uniform Rules of Evidence. It is impossible to understand the dynamics of the Molineux case without knowing a great deal about the principal characters.

## 1 Roland Molineux

Very few New Yorkers had the eminent social credentials possessed by Roland Molineux. The Molineux family was an old armorigenous English family, which meant a great deal in Anglophilic late 19<sup>th</sup> century New York. His father was a Civil War General and industrialist<sup>19</sup> He also continued his military career, being appointed Major General in the New York National Guard in 1885.<sup>20</sup> Molineux attended Brooklyn Polytechnic Institute and Sedgewick Institute, Great Barrington, Massachusetts before finishing his formal education at Cooper Union.<sup>21</sup> He was an industrial chemist, first with C. T. Raynolds & Co. in New York and beginning in 1893, with Morris, Hermann & Co., Newark, New Jersey, a manufacturer of dry paint colors. According to detective Arthur Carey who investigated the two homicides, Molineux was assigned to the design and production of tinting colors, with access to a variety of chemicals including prussic acid.<sup>22</sup>

Roland was a sportsman, a body builder, and an eligible bachelor. He was a member of the Knickerbocker Athletic Club, one of the city's elite amateur athletic organizations. He was also a yachtsman, elected to membership in the Atlantic Yacht Club in 1897.<sup>23</sup> He was a member of the "house committee" of the Knickerbocker, responsible for overseeing the conduct of the managers, including Athletic Director Harry Cornish.

In August, 1897, Molineux took a summer cruise on the steam yacht *Viator* owned by A. J. Morgan.<sup>24</sup> He met Blanche Chesebrough in Portland, Maine. Chesebrough was part of another group of pleasure sailors aboard the sailing yacht *Mohican*.<sup>25</sup> The two young people were taken with one another at once and promised to meet again in New York City. Chesebrough aspired to become an opera singer. Molineux belonged to an opera club and wanted to help her make an entrée into the profession.

## 2. Blanche Chesebrough

Blanche Chesebrough,<sup>26</sup> was a “poor relation.” Her father James Chesebrough, did not fit the family mold.<sup>27</sup> According to Blanche’s memoirs, he moved frequently to avoid his creditors. Blanche was taken in by her older sister, Isia Stearns.<sup>28</sup> After spending a year in Boston, she went to live with her parents in New York City. Both parents died within a year, leaving her without a home or financial support. She wanted to be an opera singer, but did not have a source of steady income to support vocal lessons. Isia Stearns helped her younger sister financially, and Blanche was hired to sing in two choirs in New York City.<sup>29</sup> Blanche had two assets: her voice and her remarkable good looks.

Detective Arthur Carey described Blanche:

Her beauty was remarkable. People spoke of her as the true Gibson girl, a living replica of the Junoesque creation of Charles Dana Gibson’s artistic pen. Her beauty was

the more striking because though one of her eyes was glass, nature had made ample compensation for this blemish by accentuating other factors that go to create womanly charm.<sup>30</sup>

Blanche Chesebrough had a room in Mrs. Bell's house at 251 W. 75<sup>th</sup> St. after her return from New England in the summer of 1897.<sup>31</sup> She saw a great deal of Roland Molineux, who escorted her to dinner at the Waldorf-Astoria, and took her to the opera. During intermission at a performance of Gounod's *Faust* in November, 1897, Roland introduced her to his chum, Henry Barnet, a commodities broker. Something electric passed between Blanche and Barnet. As the weeks passed, Roland and Blanche had more contact with Barnet, known as "Barney" to his friends. The three dined together at the Knickerbocker Athletic Club. Barnet escorted Blanche to the Knickerbocker Club's Amateur Circus in which Roland was a performer on the parallel bars. Shortly after the circus, Roland proposed to Blanche. She refused.<sup>32</sup>

As the relationship between Roland and Blanche cooled, Barney slowly began to take Roland's place in Blanche's plans for a happy life. One problem troubled her: Barney was not well-to-do. He owned little more than the clothes on his back and his reputation as a lady's man. According to Jane Pejsa's recounting of Blanche's own memoirs, Barney seduced Blanche (a willing victim) in a friend's apartment during an after-opera party of the Opera Club. Following that episode, according to Pejsa, the two started meeting on a more or less regular basis while Molineux was out of the country on an extended trip.<sup>33</sup> Blanche moved to 257 West End Ave. in January, 1898, and rented a room from Mrs. Alice Bellinger. "Barney" was a frequent visitor to



the Bellinger household and spent many evenings in the drawing room with Blanche.<sup>34</sup>

### 3. Henry C. Barnet

Henry C. Barnet was a pudgy, unmarried 37 year old New York City stockbroker who lived at the Knickerbocker Athletic Club. His great friend happened to be Roland Molineux..<sup>35</sup> They were fellow members of the Knickerbocker Athletic Club and the Atlantic Yacht Club.<sup>36</sup>

Blanche Chesebrough's affair with Barnet did not survive her summer trip to the country. That fall, Molineux again asked her to marry him. Blanche accepted this second proposal and put on a mitzpah ring that Roland gave her as a token of affection.<sup>37</sup>

Late in October, 1898, Barnett fell ill. Doctor Wendell Phillips, another Knickerbocker member, treated Barnet for an unknown illness that caused the sufferer to endure burning pain in the throat and in the stomach. Doctor H. Beaman Douglass, a renowned specialist in diseases of the throat, was called in to look at Barnet on October 30, 1898, and concluded he had a very bad case of diptheria.<sup>38</sup> Douglass took two throat cultures. Neither culture showed Klebs-Loeffer baccili (diptheria).<sup>39</sup>

Barnet told Dr. Douglass that he had received a free sample of Kutnow Powder in the mail and had fallen ill after using it. He had not saved the wrapper.<sup>40</sup> Doctor Douglass also noted the patient had mercurial burns in his mouth. On November 4, 1898, Douglass delivered the Kutnow Powder to chemist Guy Ellison, who smelled the Kutnow Powder box and detected the odor of bitter almonds. The chemist tasted the substance and noted it had a bitter metallic taste.

Ellison added hydrochloric acid to a small sample from the box precipitating out some form of metallic salt of cyanide. He added iodide to the precipitate and iodide of mercury formed in his test tube. He heated the stuff, which gave off the bitter almond scent and the peculiar crackling sound of cyanide of mercury.<sup>41</sup> He communicated his findings to Douglass, who knew that calomel, which contained mercury, was often used by other physicians to treat diphtheria.

Blanche Chesebrough sent a note to Barnet with a bouquet of flowers when she heard he had fallen ill:

I am distressed to learn of your illness. I arrived home Saturday and am exceedingly sorry to know you have been so indisposed. Won't you let me know when you are able to be about? I want *so much* to see you. Is it that you do not believe in me? If you would but let me prove to you my sincerity. Do not be cross any more. And accept, I pray, my best wishes.<sup>42</sup>

Barnet seemed to be recovering from diphtheria when he developed congestive heart failure and died on the night of November 10, 1898. Doctor Douglass signed his death certificate and listed his cause of death as "cardiac asthenia caused by diphtheria poisoning,"<sup>43</sup> despite the fact that Douglass knew Barnet had mercuric burns on his mouth and mercuric stomatitis, and the spurious box of Kutnow powder contained a mixture of cyanide of mercury and Carlsbad salts..<sup>44</sup>

C. Harry Cornish

Harry S. Cornish was the Athletic Director of the Knickerbocker Athletic Club, and an authority on body building, who had studied medicine at Harvard Medical School.<sup>45</sup> The Knickerbocker Club's chief rivals were the athletes of the older New York Athletic Club. Molineux and Cornish clashed over Cornish's attempt to bar Georgetown University track star Bernie Wefers from AAU competition in the fall of 1897. Wefers competed for the rival New York Athletic Club.<sup>46</sup> The captain of the New York Athletic Club team, attorney Bartwo Weeks, was a close friend of Molineux's. Weeks defended the challenge to Bernie Wefers' amateur status before the AAU credentials committee in November, 1897.<sup>47</sup> Cornish sent a letter to Wefers indicating that he had nothing personal against him but "was out to get Weeks."<sup>48</sup> This letter was published by the newspapers.<sup>49</sup>

To make amends, brewer George Ballentine, the owner of the Knickerbocker Athletic Club's clubhouse, scheduled a dinner for Weeks at the Union League to show the collective appreciation of the top management of the Knickerbocker Club for Weeks. Ballentine apologized to Weeks for Cornish's attack, but the lame apology was not sufficient for Molineux, who condemned Cornish's prosecution of the grievance against Wefers in a letter to a friend as a means "for personal advertisement and to get even with gentleman who displease him."<sup>50</sup> Cornish then told C.C. Hughes, another club member, that Molineux had made his money rum running, and followed that accusation up with another disparaging remark that Hughes reported to Molineux. Molineux promptly brought up charges before the House Committee to dismiss Cornish as athletic director, but the Committee refused to do so.<sup>51</sup>

Following this defeat, Cornish met Molineux on the steps of the Knickerbocker Athletic Club and said” You son of a bitch, you didn’t do it, did you?”<sup>52</sup> Molineux said, “No, you win,” and passed his adversary. That night, Molineux resigned from the Knickerbocker Athletic Club.<sup>53</sup> Within a few weeks, Roland Molineux had been accepted by the New York Athletic Club, and was elevated to a position on the Board of Governors of the club.<sup>54</sup>

On Christmas Eve, 1898, Cornish received a package in the mail addressed to “ Mr. Harry Cornish, Knickerbocker Athletic Club, Fourty-fifth (sic) Street and Madison Avenue.”<sup>55</sup> The package bore a General Post Office Manhattan post mark. Cornish opened it and discovered a cardboard box containing a sample bottle of Bromo Seltzer and a silver bottle holder. The box also contained a card envelope but no card was found inside the envelope. Cornish took the box home with him, where he showed it to his landlady and cousin, Katherine Adams, a 52 year old New York City widow, and to her daughter, Florence Rogers. Cornish put the bottle and bottle holder on his bureau where it sat unopened for four days.<sup>56</sup>

#### B. THE POISONING OF MRS. ADAMS

On December 28, 1898, Mrs. Adams, awoke with a severe headache. Cornish mixed her a dose of Bromo Seltzer from the bottle that he had received in the mail Christmas eve. Mrs. Adams doubled over with cramps and fell on the bathroom floor after drinking the mix.<sup>57</sup> Cornish then took a taste of her medicine from the same glass she used and became violently ill. With acute presence of mind, he had the hall boy call the nearest doctor , Dr. E. F. Hitchcock.

Despite his own severe stomach cramps, Cornish staggered out on 68<sup>th</sup> Street to the nearest drug store and showed the druggist the blue bottle. The druggist said the bottle looked genuine and gave Cornish a drink of spirits of ammonia as an antidote.<sup>58</sup>

Hitchcock was unable to resuscitate Mrs. Adams, but managed to keep Cornish alive by insisting that he keep moving until the poison wore off.<sup>59</sup> Hitchcock examined Mrs. Adams after death and concluded that she had not been the victim of strychnine. He examined the Bromo Seltzer bottle which was dark blue but did not appear to him to be the same as the factory bottle because the name of the product had not been blown into the glass.<sup>60</sup> Something was wrong with the label. It was soiled and “gave the bottle a second-hand appearance.”<sup>61</sup> He could not conclude what substance had been in the bottle. He then tasted the contents which had the odor of almonds and prussic acid. Hitchcock identified the poison by taste and smell as cyanide of mercury, a deadly poison<sup>62</sup>

The New York City coroner’s physician, Dr. Albert T. Weston, performed an autopsy on Mrs. Adams’ remains. Dr. Weston smelled hydrocyanic acid upon removing the victim’s brain, and detected the same odor from the Bromo Seltzer bottle recovered from the scene.<sup>63</sup> Mrs. Adams’ internal organs were sent out to Dr. Rudolph Witthaus, a toxicologist, for confirmation<sup>64</sup> On January 5, 1899, Dr. Witthaus reported that Mrs. Adams had died from poisoning by cyanide of mercury, a compound used in manufacturing dry colors such as Prussian Blue.<sup>65</sup>

Doctor Weston delivered the blue bottle, and its silver holder to Captain McCluskey of the

New York City Police Department, who gave it to Detectives McCafferty and Carey, the investigatory team that would develop a case against the prime suspect. The detectives bought a genuine Bromo Seltzer bottle from a nearby pharmacy and compared it to the bottle received by Cornish. They discovered that a regulation Bromo Seltzer bottle would not fit the special silver holder.<sup>66</sup>

Carey and McCluskey interviewed Harry Cornish at the Knickerbocker Athletic Club who told them that he received the Bromo Seltzer via a package in his mailbox on Christmas Eve. Cornish took the discarded wrapper out of the waste basket at the suggestion of Patrick Finneran, his assistant because Finneran thought that Cornish might be able to identify the mysterious gift-giver from the handwriting on the wrapper. Cornish took the address out of his desk drawer and gave it to the detectives.<sup>67</sup>

Cornish told the detectives that he had no enemies, but he had a disagreement with a number of club members about the conduct of club parties in 1897. There was also a disagreement about Cornish's attack on Bernie Wefers, and Cornish's letter to Wefers that later made the newspapers and precipitated the apology to Bartow Weeks. Cornish told them the club member who tried to get him fired was Roland Molineux.<sup>68</sup>

The detectives learned that Molineux was a chemist employed by a Newark, New Jersey, plant that made painters' dry colors. He had access to prussic acid used to make various shades of blue tinting colors. A skilled chemist could turn prussic acid and mercury into cyanide of

mercury,<sup>69</sup> Victims of a heavy dose of prussic acid poisoning suffered from nausea, vomiting and excessive drooling of saliva, followed or accompanied by anxiety and confusion, even vertigo. Shortness of breath sets in with shallow rapid breathing that gradually slows down. The victim's eyes become nonreactive to light and death follows unless prompt treatment for the poison is administered. The victim's breath and vomit smells like bitter almonds. Mrs. Adams' and Cornish's symptoms matched that of the victims of cyanide poisoning.<sup>70</sup>

The silver toothpick holder had been manufactured by Lebkeucher & Co., a Newark, New Jersey, firm.<sup>71</sup> The holder was sold by C. J. Hartdegen jewelers in Newark on December 21, 1898, three days before the package arrived at the Knickerbocker Athletic Club. The detectives questioned Emma Miller, the stenographer and saleswoman who had sold the holder. She described the purchaser as a man in his thirties who had a red beard. The man had asked for a silver holder for a Bromo Seltzer bottle. The store manager suggested that he try a silver toothpick holder and the man accepted the alternative.<sup>72</sup>

McCluskey and Carey also talked to Detective Farrell of the Newark Police department, who knew Roland Molineux. On December 21, he was on duty in downtown Newark near the Hartegen Jewelry Store. Farrel told the New York policemen that he saw Molineux walking up from Hartdegen's store around 2:00 P.M. on the afternoon of December 21 and spoke to him.<sup>73</sup>

On January 2, 1899, the *New York Journal* ran a banner headline in its morning edition: "Police Want Roland Burnham Molinuex in Poisoning Case--Chief McCluskey and Cornish

Hunted the City for Him All of Yesterday--He May Be Able to Solve the Mystery--Cyanide of Potassium was the Poison Used.”<sup>74</sup> Within an hour of the release of the *Journal*, Roland and his father, General Molineux, presented themselves at Captain McCluskey’s doorstep and stated that Roland was ready to help the police in any way he could. Captain McCluskey said that he did not want to arrest Roland, and the interview ended.<sup>75</sup>

Detective Carey concluded that Barnett had been poisoned in the same manner. Carey made a trip to Dr. Douglass’ office to interrogate him. Douglass stuck to his original diagnosis, although he admitted Ellison told him that Barnett’s box of Kutnow Powder contained cyanide of mercury. Carey took possession of the Kutnow Powder box and found out that it was a free sample from the patent medicine company’s New York home office.<sup>76</sup> John Adams, secretary of the Knickerbocker Athletic Club, saw a fac-simile of the poison package address in the newspapers. Adams believed that the handwriting was that of Roland Molineux. Adams, pulled out Molineux’ letters protesting Harry Cornish’s misdeeds and his resignation letter. Molineux had mis-spelled “Forty” as “Fourty” in his correspondence: the package had been addressed to Cornish with “fourty” mis-spelled.<sup>77</sup>

The *New York Journal* offered a \$5,000.00 award to anyone providing information that would lead to the conviction of Mrs. Adams’ killer. The *Journal* and the *World* also offered cash premiums for exclusive stories about the Adams homicide. This attention brought in Nicholas Heckman, the owner of a private letter box agency at 257 W. 42<sup>nd</sup> Street, who began dickering with both newspapers for a price for his story: he knew the man that had rented a private letter



box from Heckman. The man had given the name of “H.C. Barnet” to him, then paid for one month’s rental. “Barnet” received free patent medicine samples that included Calthos, an impotence remedy, and a box of Kutnow Powder. Heckman identified Molineux as the man who posed as” Barnet.”<sup>78</sup> The *World* spread the identification across its front page. Later, the *Journal* demanded that Governor Theodore Roosevelt indict Molineux without waiting for an inquest into Mrs. Adams’ death.<sup>79</sup>

Joseph Koch, proprietor of another private letter box business at 1620 Broadway, came forward with a story that a man had rented a private letter box from him using the name “H. Cornish” around December 12 or 17, 1898. Koch knew Molineux by sight. He said Molineux approached him between the 12<sup>th</sup> and 17<sup>th</sup> of December about rental rates. Molineux told him he had a friend who wanted a private box for a small amount of mail. Koch quoted a price to Molineux and Molineux left without renting a box. On December 21, another man, using the name “H. Cornish” rented a mail box from Koch. He received samples of patent medicine which he called for on a regular basis. The samples included Calthos and Kutnow powder.<sup>80</sup> Koch promptly sold his story to the *Journal* for \$500.00.

New York County Coroner Edward W. Hart started an inquest into Mrs. Adams’ death on 9 February 1899. Assistant District Attorney James Osborne had been handpicked by District Attorney Col. Asa Bird Gardiner to handle the inquest. He was assisted by John A. McIntyre, a friend of Mrs. Rodgers and of Harry Cornish.<sup>81</sup> During the course of the hearing, Roland Molineux took the stand on 10 February, after waiving his right to refuse to testify in the

proceedings.<sup>82</sup> He agreed that he had a number of disputes with Harry Cornish over Cornish's conduct as athletic director, and confirmed Cornish's story about the Wefers letter. Osborne was much more interested in Molineux's relationship with Henry C. Barnet. He probed into their supposed friendship, and suggested that Barnet had been in love with Molineux's wife. Molineux did not deny that Barnet might have been in love with Blanche Chesebrough. Osborne also suggested that Molineux did not become engaged to Blanche Chesebrough until after Barnet's death. Molineux insisted that his engagement was known to his parents and brothers well before Barnet's death. Molineux also authenticated a number of his letters and handwriting samples for the Coroner.<sup>83</sup>

Finally, the District Attorney brought on the two letter box shop owners, Joseph Koch, and Nicholas Heckman. Koch was unable to swear that the man posing as "H. Cornish" was Molineux. However, Heckman identified Molineux as the man who rented a mail box as "H.C. Barnet." Molineux rose from his seat and called Heckman a liar and Weeks asked for cross-examination of Heckman because he had offered to sell his identification story to the newspapers. Coroner Hart threatened to cite Weeks for contempt and order was eventually restored.<sup>84</sup>

The District Attorney's handwriting expert had compared several examples of Molineux's handwriting provided by John Adams and by Molineux with the address on the poison package sent to Cornish and opined that the same person had written all the documents. The grand jury retired after Colonel Gardiner summed up for the People, proclaiming that General Molineux

was his friend, nonetheless “. . . duty made it necessary for me to show that Blanche Chesebrough Molineux was the woman for whom Molineux had murdered Barnet.”<sup>85</sup> That provoked another outburst from Molineux who insisted that Gardiner refer to his wife as “lady.” Gardiner continued his vitriolic attack on Molineux as a degenerate who consorted with Chinese opium sellers and the kind of man who was such a degenerate that having been insulted by a social inferior, walked away from a manly fight to redeem his honor.<sup>86</sup> The grand jury came back with the following verdict:

We find that the said Katherine J. Adams came to her death on the 28<sup>th</sup> day of December, 1898, at No. 61 West Eighty-sixth street by poisoning by mercuric cyanide administered by Harry S. Cornish to whom said poison had been sent in a bottle of bromo-seltzer in the mail by Roland B. Molineux.<sup>87</sup>

Weeks turned the Coroner’s court room into Bedlam when he noted that the verdict did not exonerate Cornish and asked for an arrest warrant for Cornish. One of the jurors jumped up and agreed with Weeks that the jury did not intend to let Cornish off. The jury was dismissed among pandemonium in the court room without retiring to straighten out its verdict and Coroner Hart issued an arrest warrant for Molineux. Cornish was discharged by the Coroner.<sup>88</sup>

### C. THE GRAND JURIES

Although the Coroner had the power to examine a person accused of homicide and

determine if there was probable cause to hold the perpetrator, Coroner Hart failed to show up on March 1, 1899, to examine Molineux and instead continued the hearing for two days' time. This was the opening that the District Attorney's office needed to present the case to a sitting grand jury that promptly indicted Molineux for the murder of Katherine Adams. Bartow Weeks immediately moved to inspect the Grand Jury minutes and was given the right to do so. He moved to quash the indictment on a number of irregularities in the presentation of evidence, particularly the use of handwriting samples to identify Molineux as the perpetrator. The motion was granted and Molineux' case was committed to the next grand jury.<sup>89</sup>

The presiding Justice, McMahon, was a member of the Military Order of the Loyal Legion of the United States and a friend of General Molineux. The foreman of the second grand jury, Colonel William C. Church, was also the General's friend. The second Grand Jury refused to indict Molineux, but he was re-arrested on an assault charge immediately upon release from custody and thrown back into the Tombs.<sup>90</sup>

General Molineux and his son then decided to fight the case in the newspapers. Blanche Molineux released a statement to the press attacking Assistant District Attorney Osborne published in the *New York Times* on March 25, 1899. She denied any improper association with Barnet and pled with the press not to "print such wicked accusations, which the slightest investigation would show to be unfounded."<sup>91</sup>

Roland then followed suit with his own statement in which he denied killing Mrs. Adams or

Barnet. He made a point of showing his resentment of the attack that District Attorney Osborne had made on his wife's virtue during the Grand Jury hearing. He restated his willingness to cooperate with the police by giving writing samples for analysis and noted that Joseph Koch could not identify Molineux as the man who rented a mail box from him using the name of "H Cornish."<sup>92</sup>

However, the District Attorney case made a third trip to the grand jury and Molineux was again indicted on six counts of first degree murder of Mrs. Adams.<sup>93</sup> This time, the indictment would withstand Weeks' procedural attack<sup>94</sup> and Molineux' case was set for trial in the Recorder's Court presided over by Recorder John W. Goff.

### III. THE TRIAL

#### A. THE PROSECUTOR'S OPENING STATEMENT

The *New York Tribune* covered the opening statement of District Attorney Osborne on December 5, 1899:

This defendant is on trial for murder in the first degree on an indictment charging him with the murder of Mrs. Kate J. Adams while in the act of committing a felony on the person of Harry S. Cornish. On December 28, 1898, this community was shocked by the news that a woman had been poisoned. . . . Mrs. Adams had reached that period where she

had left behind her the passions of youth, and knew only her duty. She had not an enemy on the face of the earth. No human being had the slightest motive for removing her. . .<sup>95</sup>

Osborne retraced the Adams killing step-by step, starting with the purchase of the silver toothpick holder and working forward through the mixing of the poison and its mailing to Cornish. Osborne announced that only a chemist would have access to and be able to mix cyanide of mercury with Bromo Seltzer.<sup>96</sup> He said:

You must look for a chemist to find the sender of the cyanide of mercury, and furthermore you must look for a chemist in working with dry colors, the business of the defendant.

\* \* \* \* \*

You must not look for a man with an all-consuming hatred for Cornish, but for a man whose hatred for Cornish is strong and never ceasing, one that lasts all a man's life."<sup>97</sup>

Osborne then poisoned the well by calling up the death of Henry C. Barnet in November. Over virulent objection from Weeks, overruled by Recorder Goff, Osborne recited how the same physician that had treated Cornish had also treated Barnet. That physician knew Cornish was poisoned by cyanide of mercury because he had identified the poison that killed Barnet a month earlier.<sup>98</sup>

Osborne then went through a detailed explanation of the identification of the person who

wrote the “Barnet” and “Cornish” letters from the known samples of Molineux’ handwriting, preparing the jury for the handwriting experts’ testimony that one person had written all the letters and addresses, including the address on the package sent to Cornish. Osborne also cunningly referred to the physical description given by “H.C. Barnet” in response to a patent medicine request for diagnostic information for an impotence cure. Osborne showed that the physical measurements listed on that blank were the defendant’s, not those of the rotund Barnet.<sup>99</sup>

Osborne wound up his opening statement in a blaze of passion:

Everything tends to show that Roland B. Molineux loved a woman and contemplated matrimony. Suppose he should fear there should come a break between himself and this woman. Suppose he should go to her and plead with her for a speedy marriage. Suppose there should come along a strong and healthy man, good looking and athletic, who was beginning to pay this woman marked attention. And suppose the man who wrote those letters and this woman should suddenly marry. What would you say to that? What would you think?<sup>100</sup>

The opening statement shows that Osborne intended to try Molineux for two killings; the murder of Barnet and the murder of Mrs. Adams, from the outset of the trial. The opening statement appeared to do more to convince the jury that Molineux had murdered Barnet than it did to convince them that he murdered Mrs. Adams.

Weeks chose to reserve his opening statement to the end of the prosecution's case. This left the jury in a quandry, not knowing why Barnet's name had been injected into the case, and willing to accept Osborne's thesis: the same man that murdered Barnet in November murdered Mrs. Adams in December.

## B THE ADAMS POISONING

Osborne's organization of the witnesses and the physical evidence was haphazard and confusing. Lay witnesses were put on out-of-order and expert testimony from physicians, chemists and handwriting analysts was sandwiched between the lay witnesses in no coherent order. The following re-ordering of the evidence makes his game plan clear.

### *1. Police Witnesses*

Osborne called Officer John A. Palmer, who responded to the scene of the poisoning of Mrs. Adams on 28 December. He described how he went to the scene of the crime and found Mrs. Adams lying dead in her living room. Palmer then went to Dr. Hitchcock's house to retrieve the Bromo Selzter bottle and its wrappings. Palmer turned the evidence over to Dr. Weston, the Coroner. Palmer took down the names of everyone in the Adams flat at the time and Mrs. Adams' vital statistics. He had nothing further to do with the case.<sup>101</sup>

Detective John J. Herlihy testified that he found out the silver toothpick holder had been made by Liebkuchner & Co. Herlihy checked the company's sales records on toothpick holders.



Ruling out sales to retailers in the Midwest and New England, he discovered that one had been sold to Hartdegan's Jewelers in Newark. Herlihy went to Newark and interrogated several Hartidegan employees.<sup>102</sup> On 12 January Herlihy and Det. Arthur Carey went to the Kutnow factory where they began searching the company records for letters requesting patent medicine samples. They turned up a letter from "H. Cornish" asking for Kutnow powder which later was identified by handwriting experts as in the handwriting of Roland Molineux.<sup>103</sup> Herlihy traced the letter to Koch's private letter service at 1620 Broadway. Herlihy and Carey recovered a number of patent medicine samples from the private box rented to "H. Cornish."<sup>104</sup> Later, the two detectives chased down the wholesale stationery company that handed blue paper with a crest of three interlaced feathers and got a list of retailers who handled the paper. This was significant because the "H. Cornish" letter to Kutnow Company was written on this scarce, hard-to-find paper.<sup>105</sup>

Detective. Arthur A. Carey told the jury that he had a photograph of the package addressed to Cornish and went over files and records at the Knickerbocker Athletic Club looking for similar handwriting. Carey then went to Hartdegan's in Newark and interviewed Emma Miller who sold the tooth pick holder.<sup>106</sup> Carey also visited Koch and helped Herlihy inventory the "Cornish" box contents. He went to the Adams flat and retrieved the glass and spoon that Harry Cornish had used to mixed the fatal dose of Bromo Seltzer from the Adams' locked china cabinet.<sup>107</sup>

Captain George McCluskey, the Chief of the Detective Bureau , the officer in charge of both

the Adams and Barnet investigations, explained to the jury how the handwriting exhibits were taken up by his officers, assembled and delivered to handwriting experts William Kinsley and David Carvalho for analysis and comparison. McCluskey also testified that he collected handwriting samples from Cornish, Howard Adams, John Adams, Alvin Harpster and Felix Gallagher for the use of the handwriting experts. McCluskey was unable to get a handwriting sample from Molineux, although eventually the handwriting experts obtained a sample from him.<sup>108</sup> Weeks' cross-examination brought out the meeting between General Molineux, the defendant and McCluskey on January 1 or 2, 1899 after the *Journal* had published a banner headline that Roland Molineux was wanted by the police.<sup>109</sup>

Newark, NJ, police officer Joseph Farrell, an accomplished athlete, knew Roland Molineux. He also knew Robert Zeller and Mamie Melando. Farrell had been to Molineux' apartment in the Herrman Bros. Paint Co. several times. Farrell was called because he saw Roland Molineux around 2:00 or 2:30 P.M. on December 21, 1898 walking east on Market Street in Newark. Farrell said he spoke to Molineux. Farrell could not state where Molineux was going, although Osborne tried to get Farrell to commit to an opinion that Molineux was heading in the direction of Hartdegen's Jewelry Store.<sup>110</sup>

## *2. Incident Witnesses*

Osborne called twenty-two lay incident witnesses to establish his case against Molineux. Most of the lay witnesses authenticated various documents, such as John D. Adams,<sup>111</sup> George W. Hall of Moodus, CT,<sup>112</sup> Agnes Evans, a companion to the wife of Dr. James Burns of New York,<sup>113</sup> Andre Bustanoby, Superintendent of the Knickerbocker Athletic Club,<sup>114</sup> and

William W. Scheffler, a friend of Molineux.<sup>115</sup> Chief Postal Clerk Henry Lockwood was called for the purpose of showing the post mark on the “H. Cornish” package was from the New York General Post Office.<sup>116</sup>

Mamie Melando, Harry Cornish and Joseph Koch were the three most important lay witnesses in the case of Mrs. Adams’ death. Mamie Melando went on first. After identifying herself and acknowledging that she had known Roland Molineux since she was thirteen. She told the jury that she had worked for him at both the C. T. Raynald Co and Morris Herrman & Co as a paint mixer and foreman. District Attorney Osborne showed her one of the letters requesting a patent medicine sample on blue stationery with three intertwined feathers forming a crest at the top. Melando said she had seen that kind of paper before in Roland Molineux’ apartment in the summer of 1898 and had even taken a few sheets for her own personal use in October, 1898. She claimed she lost the sheets after writing a letter to a friend named Wilson.<sup>117</sup> She also testified that she went to see Bartow Weeks in January, 1899, to disclose to him that she had sheets from Molineux’ apartment identical to the published “H. Cornish” letters that appeared in the New York newspapers early in 1899. Recorder Goff decided to take her examination away from counsel for the parties. Melando admitted going to see Molineux in his Newark apartment in January to show her sympathy for him.<sup>118</sup> Recorder Goff asked her if Molineux ever sent her letters; she admitted receiving several some years before the trial, but claimed she had destroyed them.<sup>119</sup>

Harry Cornish made his appearance on December 28.<sup>120</sup> After giving a little of his background as an athletic director and student of sport,<sup>121</sup> Cornish told the jury how he had

received an anonymous present on Christmas eve consisting of a sample bottle of Bromo Seltzer and a silver holder. He described throwing away the wrapper at first, until chided by Patrick Finneran to save it and try to trace who it was that sent him the present.<sup>122</sup> Cornish then took the jury through the chain of events that led up to Mrs. Adams' death and his own near death on the morning of the 28<sup>th</sup>. He told them that Mrs. Adams collapsed doubled over in pain in the bathroom after drinking the Bromo Seltzer Cornish had mixed for her from the poison bottle.<sup>123</sup> Cornish explained that he had sipped the Bromo Seltzer and become violently ill but was able to go to get help from the neighborhood drug store.<sup>124</sup> Then he stepped down from the stand for another witness. The District Attorney recalled him the same day to explain how Drs. Hitchcock and Potter were summoned to treat Mrs. Adams. Cornish also described how he was able to leave the Adams flat, take an elevated train downtown to the Knickerbocker Club, and manage to stop off to see John Yocum, a friend and a chemist, to inquire about poisons.<sup>125</sup> He had left the Adams flat in the charge of John D. McIntyre, an assistant District Attorney and family friend and the distraught Mrs. Rodgers.<sup>126</sup>

Bartow Weeks' cross-examination strategy was destructive: first he showed that Cornish was a divorced man, and therefore his word was not believable.<sup>127</sup> Weeks also insinuated that Mrs. Rodgers, separated from her husband, might have been a romantic interest of Cornish.<sup>128</sup> Weeks' cross-examination was a traverse of direct examination that did his client no particular good.<sup>129</sup> The District Attorney never asked Cornish about any bad blood between himself and Molineux. At the end of a day-long cross-examination, Cornish told the jury about the money he was offered to give an exclusive interview to the *New York Journal*. Cornish claimed he visited

the *Journal* offices for the sole purpose of finding out who had given Molineux' name as his assailant.<sup>130</sup>

Osborne had a witness that corroborated Cornish's story. Harry A. King was in Cornish's office on the 24<sup>th</sup> of December and saw Cornish open the package in his presence. On the 27<sup>th</sup>, King developed a headache while working out and asked Cornish if he could mix a dose of Bromo Seltzer from the "gift" on Cornish's desk. King couldn't get water out of the cooler and so lost the opportunity to be the first victim of the poison package<sup>131</sup>

Florence Rodgers then gave a straightforward account about the Adams-Rodgers family's frequent changes of address in 1897-98 and corroborated Cornish's version of the poisoning of her mother on 28 December. On cross-examination, she admitted that she had rented a private letter box in 1895, 1896 and 1897 when she had not yet separated from her husband.<sup>132</sup> The importance of this shred of evidence became apparent during Bartow Weeks' closing argument.

The next witness, Gustav Kutnow, one of the owners of the Kutnow Brothers Drug Company, identified People's Exhibit A, a tin sample box of his company's product. He told the jury that his product was a compound of Carlsbad salts. He also authenticated Exhibit E, which showed that "H Cornish" had requested a sample of Kutnow Powder on 22 December 1898, shipped the next day to 1620 Broadway, New York City.<sup>133</sup> Since the poison intended for Cornish was not packaged in a Kutnow Powder free sample, the relevance of this examination to the killing of Mrs. Adams is mystifying. However, Kutnow's testimony was relevant to showing

that Barnett had been killed by a sample of Kutnow Powder from the same firm in July.<sup>134</sup>

John H. Yocum, Cornish' chemist friend, told the jury that Cornish had come to his office on the afternoon of the 28<sup>th</sup> on his way to the Knickerbocker Athletic Club. Cornish told him of Mrs. Adams' death and his own illness. Yocum tried to get him to drink a glass of whiskey mixed with milk, but "he threw it off."<sup>135</sup> About 6:00 P.M. on the 28<sup>th</sup>, Yocum dropped by the club to see how his friend was doing. Cornish asked Yocum to go to the Adams flat and check on the inhabitants.<sup>136</sup>

Knickerbocker Club House Committee Chair Charles C. Hughes recounted the differences between Molineux and Cornish over the amateur circus, the baths and the gym. Hughes also recalled that Cornish said Molineux made his money in the liquor business, a highly insulting comment to an upper class fellow such as Molineux.<sup>137</sup> Alvin Harpster told the jury about his affiliation with the Knickerbocker Club and his former work as a bill collector for the Stearns Company. Harpster testified that he had to get a bond to serve as a clerk at the club, and that he was a good friend of Cornish. He also said that he had contacted his former employer about the time that he was required to put up bond to be cash clerk.<sup>138</sup> There was no mention of Molineux' attempt to get dirt on Harpster from his former employer to get him fired from the Knickerbocker. Rudolph Heiles, a former Knickerbocker Club employee, had already told the court that he wrote a letter to Stearns & Co. of Detroit for Molineux asking for an endorsement of Harpster's character for a pretended job application. Heiles said that Molineux planned to use the reply letter to get Harpster discharged if the reference was poor.<sup>139</sup> Heiles got a piece of

company stationery from Charles Jacobs of Charles Jacobs & Co. and got Jacobs to sign the letter for Heiles. Stearns & Co. answered the letter and Heiles showed the letter to Molineux: Stearns had nothing negative to say about Harpster and Heiles kept it until after Mrs. Adams' death. Then he discarded the letter.<sup>140</sup>

Osborne called Joseph Koch, who told the jury that Molineux had been in his business on December 21, 1898 to ask about box rental prices for a friend and then he went away without renting a box. Another man appeared on the 21<sup>st</sup> of December and rented a box under the name of "H. Cornish." Koch stated that Harry Cornish was not the man who rented the box using his name. Koch described the man as about 5'9" or 10" with broad shoulders and a dark brown moustache who was "of the size and general appearance of Mr. Cornish, with one exception, that was the man's moustache was not curled up."<sup>141</sup> He also said that Molineux was not the man who rented the box either.<sup>142</sup> Koch identified a number of packages and envelopes received by the owner of the "Cornish" mail box. Koch said he received money for giving an "exclusive" story to the *New York Journal*.<sup>143</sup> Koch also revealed that Bartow Weeks had interviewed him in January, 1899, and he had told Weeks that he had identified Molineux as the man who made inquiries about renting a letter box.<sup>144</sup>

Emma Miller, the woman who sold the silver toothpick holder to a man with a sandy beard on December 21, 1898,<sup>145</sup> told the jury that Detectives Carey and Herlihy had interrogated her at Hartdegen's in December, 1898. She said the buyer, who "looked like a gentleman. . ."<sup>146</sup> came to the jewelry store about 5:00 P.M. When Bartow Weeks and Molineux confronted her on the 2<sup>nd</sup> or 3<sup>rd</sup> of January, she denied that Molineux was the buyer, and she stuck to her story

on the stand.<sup>147</sup>

Osborne then tried to prove that Molineux had access to Prussic acid and mercury, the compounds from which Mrs. Adams' fatal dose of salts had been made. He called Carl Trommer, a sales representative for Roessler & Hesslacher, a supply house that dealt in pigments and related chemicals, who testified that he called on Molineux and saw barrels of prussiate of potash, the raw material for making prussic acid, in the Herrman Co. laboratory.<sup>148</sup> Molineux' employer, Morris Herrman, contradicted Trommer. He testified that there was no cyanide of mercury in his factory or in Molineux's laboratory. Herrman said that Molineux was experimenting with enamels.<sup>149</sup>

### *3. The Medical Evidence*

Doctor Wendell Phillips told the jury he had treated Harry Cornish in December for poisoning and also treated "A.B" for poisoning a month before. According to Dr. Phillips, "AB" told him he had just taken a dose of Kutnow powder before becoming violently ill and Phillips said: "I believe he said it was that damned Kutnow Powder that had caused the trouble."<sup>150</sup>

Doctor Phillips recitation of Barnet's complaints was hearsay that included a lay opinion on causality of Barnet's fatal illness.<sup>151</sup> At that time a hearsay statement relating to pain, suffering and the source of illness made to a physician was admissible in New York.<sup>152</sup>

Doctor Albert T. Weston testified about the autopsy on Mrs. Adams' remains on December



28, 1898. Weston stated that Mrs. Adams died from poisoning by hydrocyanic acid. Doctor Weston then told the jury that he had also performed an autopsy on the remains of Henry Barnett on February 28 1899 without giving an opinion on the cause of death.<sup>153</sup>

Doctor Lewis A. Coffin had treated Cornish on December 28, 1898, for symptoms that included gas, bloating and acute gastroenteritis. Coffin admitted he knew little about cyanide of mercury poisoning, but nonetheless gave an opinion that Cornish had been poisoned by cyanide of mercury.<sup>154</sup>

Doctor Frank Ferguson assisted Dr. Weston during the autopsy on Mrs. Adams. He testified that Mrs. Adams' stomach was normal in size but that all of the mucous membranes were destroyed, swollen and intensely congested. Ferguson attributed this to bichloride of mercury. His own opinion was that Mrs. Adams had died of Prussic Acid poisoning. He responded to Osborne's hypothetical question that in his opinion Mrs. Adams died of cyanide of mercury poisoning.<sup>155</sup>

Doctor E. Styles Potter had treated Mrs. Adams and had pronounced her dead. In his opinion, Mrs. Adams died from cyanide of mercury poisoning.<sup>156</sup> Despite the fact that none of the five physicians called had any prior experience with cyanide of mercury poisoning, had never diagnosed a case or treated a patient suffering from that type of poisoning, the uncontradicted evidence from five physicians showed that Mrs. Adams had died from cyanide of mercury poisoning. The cause of death by external and violent means would have been established

without toxicological evidence. However, Osborne left nothing to chance.

#### *4. The Toxicological Evidence*

Osborne had selected his expert toxicologists with care. Doctor Rudolph Witthaus first gave evidence showing that Henry C. Barnett died of cyanide of mercury poisoning. Recalled on 12 January 1900, Witthaus resumed his direct examination and stated that Mrs. Adams had also died from the same poison substance..<sup>157</sup> His evidence corroborated the evidence of the five physicians.

#### *5. Molineux' Former Testimony at the Coroner's Hearing*

Osborne used Coroner Hart and George H. Gordon, the stenographer who took the record of proceedings, to authenticate the transcript of Molineux' testimony at the February, 1899, Coroner's hearing. The portion that related to the Adams case contained Molineux's admission that he had trouble with Harry Cornish that led Molineux to resign from the Knickerbocker Club.<sup>158</sup> First, Cornish had taken no action to rid the club of an athletic member who used foul language in the bathing area.<sup>159</sup> Second, Molineux complained that Cornish sabotaged the Amateur Circus scheduled for 27 April 1897 by failing to order costumes on time,<sup>160</sup> and substituting an inferior make of parallel bars for the set requested by Molineux to replace bars of the inferior make had already broken under his weight during his gymnastic routine.<sup>161</sup> Molineux also told George Ballentine that Cornish was attempting to run the club and had

written the “Bernie Wefers” letter disparaging Bartow Weeks.<sup>162</sup> Molineux admitted that he tried unsuccessfully to get Cornish fired as athletic director “for the good of the club.”<sup>163</sup> Finally, Molineux admitted meeting Cornish on the club’s staircase after his failed attempt to get Cornish fired. Cornish called Molineux a son of a bitch and gloated that Molineux had failed to get him fired.<sup>164</sup>

To summarize the evidence against Roland Molineux for the murder of Katherine Adams: the medical experts and the toxicologists had given uncontradicted evidence that Katherine Adams had died from cyanide or mercury poisoning. Molineux had a strong dislike for Harry Cornish and had unsuccessfully tried to get Cornish fired as athletic director of the Knickerbocker Athletic Club. Molineux was a chemist who worked with dry colors, including Prussian Blue, which can be broken down in the laboratory into Prussic acid, which when combined with a mercury source such as Queen’s Yellow, could produce cyanide of mercury, the rare poison that killed Mrs. Adams. The evidence showed that Molineux had the motive to kill Cornish and the opportunity to mix the deadly poison that killed Mrs. Adams by mistake. The handwriting experts had identified the handwriting on the package sent to Cornish as that of Molineux.

However, Emma Miller denied that Molineux was the purchaser of the silver toothpick holder that was sent to Cornish along with the fake Bromo Seltzer bottle. Joseph Koch denied Molineux was the person in the white Alpine hat that rented the “H. Cornish” box from him at 1620 Broadway. The chain of circumstantial evidence linking Molineux to the Adams homicide

was exceedingly fragile. First, the jury must believe that the unknown man in the white Alpine hat that bought the silver toothpick holder at Hartdegen's was an unknown confederate of Molineux. Second, they would have to believe that Molineux or his confederate had obtained a Bromo Seltzer bottle from some unknown source and a "look-alike" blue bottle that fit into the silver bottle holder bought at Hartdegen's. The police failed to trace the blue bottle that contained the poisonous mixture. Third, they must believe that Molineux secretly broke down Prussian Blue dry color into prussic acid in his laboratory, although police search of the premises turned up no trace of such a reduction. They must accept the inference that Molineux mixed the prussic acid with Queen's yellow or some other source of mercury to make cyanide of mercury crystals. Third, they would have to accept the prosecution's view that Molineux and some unknown, unidentified confederate mixed the cyanide of mercury crystals with the Bromo Seltzer, stuffed the contents into the smaller bottle, packaged the bottle and its holder in a Tiffany's box and mailed it from the General Post Office in downtown Manhattan to Cornish using the return address of Koch's mail box service. The jury could not convict Molineux on this thin tissue of circumstantial evidence. The People's evidence raised a reasonable doubt about the identity of the perpetrator.

#### B. THE KILLING OF HENRY C. BARNET

Osborne used the evidence that showed Molineux may have murdered Henry C. Barnett to bolster his case against Molineux for killing Mrs. Adams. Osborne thought that he could prove that Molineux had murdered Barnett by cyanide of mercury poisoning, and if so, then the jury

could reason that the two crimes were committed in such a singular and unusual fashion that the same person committed both murders.

### 1. Evidence of Lay Witnesses

Osborne put on a second parade of lay witnesses to authenticate genuine samples of Barnet's handwriting, such as Robert S. Holt. William H. Guilfoyle, a Clerk from the New York City Health Department, introduced copies of Barnet's death certificate and the marriage license and return for Roland Molineux and Blanche Chesebrough.<sup>165</sup> Joseph Moore, an ex-porter at the Knickerbocker Club, told the jury that he was in Barnet's room the day he took sick. Moore said Barnet told him to fetch a small round box out of the trash basket. Moore could not find it, so Barnet, between spells of vomiting, rummaged through the basket and found it. Moore identified the box when Osborne produced it. Moore said he tasted the powder in the box.<sup>166</sup>

### 3. Proof that Molineux had the Opportunity to Kill Barnet.

Although Kutnow Company book keeper Elsie Gray authenticated a December letter from "H. Cornish" requesting a sample of Kutnow powder, the main reason she was called was to identify and authenticate the box of Kutnow Powder that Henry C. Barnet received in October and used to settle his upset stomach in late October.<sup>167</sup>

Charles D. Allen, Molineux' private secretary at Morris Herrman Co., told the jury that he

had written letters to patent medicine purveyors on Molineux' behalf. He authenticated several of these requests for the jury. He also told them that Allen, Mamie Melando, Robert Zeller and the foremen of the paint rooms were the only people regularly allowed in Molineux' laboratory.<sup>168</sup> This proved that Molineux had obtained patent medicines using an alias.

People's Exhibit I, a diagnostic blank submitted to the Marston Remedy Co. by "H.C. Barnet" who gave his address as Box 217, # 257 West 42<sup>nd</sup> St., New York, was the most damning piece of evidence against Molineux. The questionnaire was to be used by company physicians to prescribe a remedy for impotence. It had 54 questions for the sufferer. Questions 20 and 21 called for the sufferer's chest and waist measurements, shown as a 37" chest and a 32" waist. The sufferer responded to Question 30 by saying he had gonorrhea about 3 years earlier which was cured. Question 55 asked if anyone in the family had consumption or scrofula, the sufferer wrote in "phthisis" in the blank.<sup>169</sup>

The physical measurements in Exhibit I did not come close to the generous proportions of Henry C. Barnet. They matched those of Roland Molineux. Molineux' tailor, Frank Hunt, told the jury that Molineux' waist was 32 inches and his chest 37 inches, matching the diagnostic blank's description of "Barnet."<sup>170</sup> Joseph O. Goodwin, the Town Clerk of East Hartford, Connecticut, authenticated the death certificate of Harriet T. Clark, Molineux' maternal grandmother, that showed her cause of death to have been "Phthisis."<sup>171</sup> Herbert Jackson, the undertaker who had buried Barnet, told the jury that Barnet was 5 ft. 8 inches tall.<sup>172</sup>

Finally, Edmund H. Barnet, Henry's brother, testified that he was with his brother during the final day of his life.<sup>173</sup> Edmund identified a white box found in his late brother's effects that contained Calthos shipped from the Von Mohl Co. of Cincinnati. Barnet said he threw the contents away after his brother's death.<sup>174</sup>

Dr. Vincent Hamill, a physician in the impotence cure business, identified three exhibits that implicated Molineux as the person who impersonated "Barnet" to obtain patent medicine samples. The "diagnostic blank" was the most important of the three. Doctor Hamill also said that two doctors had diagnosed "Barnet's" impotence using the exhibit.<sup>175</sup> Barnet's brother, Edmund, put in evidence showing his late brother was of light complexion and a tinge red in the face, 5 ft. 8 inches tall and weighed 185 pounds.<sup>176</sup> Barnet's general physical appearance was confirmed by James J. Hudson, a sales associate who worked with Barnet. Hudson also told the story about Barnet's reception of a package of "Calthos" in the mails in the fall of 1898.<sup>177</sup>

Although the physical measurements and medical history on the diagnosis blank fit Molineux and not Barnet, this did not prove that Molineux killed Barnet. It did show that Molineux had assumed Barnet's identity to write away for an impotence cure under an assumed name to avoid embarrassment if his name had been recognized by someone at the patent medicine company, since the blank revealed that "Barnet" had a social disease.

Osborne's case against Molineux for the Barnet killing required proof that Molineux had a motive to kill Barnet: sexual jealousy. Osborne called Rachel Greene, who had been a maid at

the apartment of Mrs. Bell when Blanche Chesebrough had been a boarder. She swore that Molineux had lived with Blanche and had passed himself off as “Mr. Chesebrough.” Her evidence was a lie. Recorder Goff later ordered this testimony stricken from the record, but the jury had heard the allegations.<sup>178</sup>

Nicholas Heckman was Osborne’s prize witness. He ran a private letter box at 257 W. 42<sup>nd</sup> St. Heckman testified that Molineux came into his shop around 6:00 P.M. on 27 May 1898 to rent a private letter box. He told Heckman that his name was “H. C. Barnet.” According to Heckman, Molineux alias Barnet came into Heckman’s shop about 20 times between May and December, 1898, to pick up mail and packages from his letter box. Heckman remembered seeing packages with the trade name “Kutnow Powder” in “Barnet’s” mailbox.<sup>179</sup> He also remembered “Barnet” receiving Calthos samples as well. Heckman revealed that he had first identified “Barnet” as “Molineux” during the coroner’s inquest into the death of Katherine Adams, and confirmed his identification when he went to Newark with *New York World* reporter, Mr. Buchignani, and confronted Molineux in the Herrman Bros paint factory.<sup>180</sup> Heckman admitted during cross-examination that he had failed to identify Molineux as the man called “Barnet” when he went to the Sinclair House with Capt. McCluskey for the express purpose of making a positive identification. Heckman also admitted he was getting \$15 a day from the *New York World* as a special operative at the time.<sup>181</sup> While Weeks’ cross-examination demonstrated Heckman’s lack of integrity and his motive to falsify an identification in order to get money out of the sensationalist newspapers, Osborne’s rehabilitation seemed to off-set the impeachment. Heckman stated he was willing to make his identification without being paid for it by the



newspapers. He said his conscience was troubled at the Coroner's inquest because the evidence seemed to point towards Cornish as the perpetrator and he knew Cornish was not "Barnet."<sup>182</sup>

## 1. The Medical Evidence

Dr. Henry B. Douglass, M.D. was Henry C. Barnet's principal physician in November, 1898. Douglass identified the box of Kutnow Powder that had been on a shelf in the toilet in Barnet's room at the Knickerbocker Club when he took ill. Douglass stoutly defended his initial diagnosis of diptheria and his conclusion that diptheria poisoning killed Barnet, not mercury poisoning.<sup>183</sup> Douglass acknowledged that Barnet had mercury burns on his mouth. He also admitted sending the Kutnow Powder out to a chemist for analysis. Douglass maintained that calomel, often used to treat diptheria, could have produced the burns.<sup>184</sup> He was recalled on 19 January and refused to retract his original diagnosis of death by diptheria poisoning after Osborne confronted him with the fact that Douglass made no report to the New York City Board of Health that Barnet had received a box of Kutnow Powder in the mail that contained cyanide of mercury.<sup>185</sup>

Doctor Andre H. Smith, who also attended Barnet during his last days, disagreed with Douglass. Smith testified in response to an hypothetical question posted by Osborne that Barnet died of diptheria poisoning. Smith admitted he had no prior experience with mercurial poisoning or any knowledge about cyanide of mercury poisoning.<sup>186</sup>

Doctor Henry P. Loomis, a pathologist and Professor of Medicine at Cornell Medical College, did the post-mortem examination on Barnet on 8 February 1899 after Barnet's remains had been exhumed. Loomis was certain the Barnet had not died from diphtheria or its complications.

Osborne put the following hypothetical question to Dr. Loomis:

Assuming that on October 28, 1898, H.C. Barnet took a dose of powder which has been shown to contain cyanide of mercury and was attended by a physician, assuming that in two days he was attended by another physician to whom he stated that on the 28<sup>th</sup> he had risen with a sore throat and taken the powder because he was in a habit of doing so; assuming that he was taken with purging I have described; assuming that mercurial stomatitis was found in the mouth with an inflammation which the attending physician attributed to diphtheria; that on the 7<sup>th</sup> all evidence of diphtheria had disappeared and that on the 10<sup>th</sup>, he died' that the attending physician gave in his death certificate the cause of death to be cardiac failure following diphtheria; that an analysis of the organs of the body showed evidence of cyanogen in the liver and mercury in the kidneys and brain; that a competent pathologist found no evidence of diphtheria in a further examination of the body; that the attending physician made two cultures of the exudations in the throat and found no evidence of the bacillus of diphtheria, what in your opinion was the cause of death?<sup>187</sup>

Loomis answered that in his opinion, Barnet died from mercury poisoning. Loomis, like all the others, had never seen a case of cyanide of mercury poisoning before.<sup>188</sup>

Doctor A. Campbell White was a diagnostician and inspector for the New York City Board of health and had seen “two or three thousand cases of diptheria”<sup>189</sup> but had never seen as case of cyanide of mercury poisoning. Doctor White testified that Klebs-Löffler bacilli is the only recognized cause of diptheria. He responded to Osborne’s hypothetical question that in his opinion, Barnett had died of cyanide of mercury poisoning.<sup>190</sup>

#### D. Chemists and Toxicologists

Guy P. Ellison was Osborne’s first expert chemist. He had tested and examined the contents of the box of Kutnow Powder sent to him by Dr. Douglass on 4 November 1898. Ellison quickly used a field test (tasting the substance) to determine that it was some kind of cyanide salt, then used standard reagent tests to precipitate out the salt. His conclusion was the box contained cyanide of mercury.<sup>191</sup> Ellison entertained the jury with an in-court demonstration of his reagent test using a pinch of powder from the People’s box of Kutnow Powder.<sup>192</sup>

Professor Rudolph Witthaus of Cornell College and the University of Vermont was the People’s star toxicologist. Witthaus recited a long list of the poisoning cases that he had appeared in as an expert. On 4 January 1899, Witthaus had received a package of Kutnow Powder from Det. Carey of the New York City Police. He identified the exhibit in court, and Bartow Weeks raised a number of objections to Witthaus’ testimony about the substance that may have killed Barnett. Osborne made a proffer that the method and means by which Barnett was killed was so similar to that used to dispose of Mrs. Adams that proof of one necessarily

entailed proof of the other.<sup>193</sup> In so doing, he exposed his object in proving that Molineux probably killed Barnett by a poison patent medicine sample: to show that Mrs. Adams was the victim of a similar crime committed by the accused so bizarre and strange that only one person could have been the author of both crimes.

Professor Witthaus then told the jury<sup>194</sup> that he was present at Henry C. Barnett's autopsy and removed tissue samples from Barnett's intestines, liver, brains, stomach heart and kidneys and fluid from the chest cavity. Using destructive testing methods, Witthaus found traces of both cyanide and mercury in Barnett's body parts.<sup>195</sup>

Doctor Robert Bocock, a specialist in homeopathic remedies, had experience in using cyanide of mercury in the treatment of diphtheria patents. He had observed the results of prolonged use of cyanide of mercury on diphtheria patients. Bocock testified it would take a number of doses of cyanide of mercury to produce the kind of breakdown that took Barnett's life.<sup>196</sup>

#### E. The Handwriting Experts

Osborne used two kinds of handwriting experts,. The first group were men whose livelihood depended on the ability to identify and authenticate the signature of customers, the paying tellers at several New York City banks. In those times, before every bank draft was copied on microfilm or microfiche, (or scanned as in today's systems), drafts were paid on

customer's account on the approval of a paying teller who was the bank's expert on the authenticity of customers' signatures. Osborne called Gilbert B. Sayre, a paying teller from the National Shoe and Leather Bank of New York. Sayre had examined all the handwriting samples, including some genuine examples of Molineux's handwriting, for two weeks' time prior to trial. In his opinion, the same person had executed all the samples.<sup>197</sup> Osborne called six other paying tellers who were also permitted to examine all the handwriting samples and letters placed in evidence by the People. Each of them agreed with Sayre that the same person had written all the exemplars.<sup>198</sup>

The District Attorney's also had a stable of questioned document examiners. Osborne had lined up the foremost questioned document examiners in the United States to examine the disputed handwriting on the "H.C. Barnet"<sup>199</sup> and "H. Cornish"<sup>200</sup> letters as well as the address on the Cornish poison package. William J. Kinsley, Osborne's first expert, was one of the weakest members of the District Attorney's herd of experts. Kinsley was the editor of *Penman's Art Journal*, a trade magazine for teachers of handwriting and penmanship. He was a self-identified authority on disputed handwriting. Kinsley had collected handwriting samples from Molineux in the presence of his lawyer and of Mr. Carvalho, the defense questioned document expert. Kinsley claimed to have testified as an expert questioned documents examiner 100 to 150 times before the Molineux trial.<sup>201</sup> Kinsley's direct examination was then interrupted for the testimony of John F. MacIntrye on his story of the events of 28 December 1898. Bartow Weeks conducted a voir dire examination of Kinsley that showed, among other things, that he raised prize hens on his Long Island estate.<sup>202</sup> The Recorder then permitted Kinsley to give an opinion that Molineux had been the author of a letter purportedly sent by "H. Cornish" to obtain a patent

medicine sample of Bromo Seltzer.<sup>203</sup>

Albert S. Osborn was the chief expert for the People. He was the recognized U.S. authority on identification of disputed documents by microscopic examination.<sup>204</sup> Osborn's colleague John F. Tyrrell of Milwaukee, Wisconsin, also appeared for the People.<sup>205</sup> Both of these experts agreed that the same person had written all the letter exhibits and all the numbered exhibits. Since some of the exhibits were known samples of Molineux's own handwriting, these experts were giving an opinion that Molineux had been the person who had crudely lettered the address on the package to Cornish containing the poison Bromo Seltzer. The opinions of the two leading experts were confirmed by four other handwriting experts.<sup>206</sup>

The undisputed evidence showed that Molineux had written letters requesting samples of patent medicines for impotence and upset stomachs, including Kutnow Powder, using the name "H. Barnet" and had obtained other patent medicines using the name "H. Cornish." All the handwriting experts identified Molineux as the person who wrote the address on the package sent to Cornish. This was circumstantial evidence that Molineux had perpetrated the poisoning of both Mrs. Adams and Henry Barnet.

However, there were serious flaws in the prosecution's case against Molineux. First, Dr. Douglass, who signed Barnet's death certificate did not believe that Barnet died of cyanide or mercury poisoning. Second, there was no direct or circumstantial evidence showing that Molineux had mailed the poison Kutnow Powder to Barnet. Heckman's evidence showed that

Molineux had a private letter box at his establishment; it did not show that Molineux mailed the poison to Barnet. Molineux told the Coroner during the inquest that Barnet was his friend. He admitted introducing Barnet to his future wife, and acknowledged that they might probably have seen one another during the period of time after Blanche Chesebrough had refused his first proposal and the time that he returned from Europe.<sup>207</sup> Molineux said that he had asked his fiancé to send Barnet a bouquet of flowers when he learned that he was ill. He also defended Blanche's letter to Barnet as a simple expression of sympathy and not a confession of a secret affair between them.<sup>208</sup>

The People rested. Despite the fact that the defense team included renowned handwriting expert David Carvalho, there was no defense. Weeks made the obligatory motion for a directed verdict of acquittal which was denied, and both counsel argued their case to the jury. Weeks went first.

## F. FINAL ARGUMENT

### 1. Defense Counsel

The *New York Times*<sup>209</sup> suggested and the *Tribune* reported that Bartow Weeks' summation was "a brilliant and convincing effort."<sup>210</sup> Weeks set a scene in which an innocent young man, son of a Civil War hero, was wrongfully accused of a heinous crime. He excoriated the District Attorney for impugning the good name of Blanche Molineux.<sup>211</sup> Weeks attacked Heckman's and Koch's credibility, arguing that their testimony had been purchased by the sensationalist

newspapers that offered them fees for identifying Molineux as the person who rented private letter boxes in order to disguise his means and motives.<sup>212</sup> Weeks also belittled the handwriting experts, bringing up the well-known wrongful conviction of Capt. Dreyfuss based on erroneous handwriting expert testimony.<sup>213</sup> Weeks' final peroration invited the jury to weigh the credibility of the prosecution's witnesses and reminded them that Molineux' fate was in their hands.<sup>214</sup> Weeks' lengthy closing argument was pretty much an off-the-shelf argument that the presumption of innocence lay with the accused until proved guilty and the state's evidence was not credible on the issue of guilt.

## 2. The District Attorney

Osborne's summation featured a recital of the People's case in chief and a bitter attack on defense counsel's failure to call witnesses to disprove the People's case. Without directly commenting on Molineux' failure to testify, Osborne found fault with the defense' failure to call Mrs. Molineux to refute the charge that she had an affair with Barnett before her marriage. Osborne suggested the reason was that Barnett's attention to Blanche Molineux was the reason he was killed.<sup>215</sup> Osborne also referred to Molineux' apartment in Newark as a "den of iniquity" that explained why Robert Zeller was not put on as a witness for the defendant. These non-sequiturs were Osborne's stock in trade in a jury argument. Parroting the law, Osborne told the jury to convict Molineux of the Adams killing because he had ample motive to kill Barnett:

You must not regard the death of Barnett as a crime. You must look upon it merely as a transaction, and of itself, it must not be allowed to prejudice your minds against the



defendant. But the man who was responsible for Barnet's death sent the poison to Cornish. That hypothesis was practically agreed upon in the beginning by Mr. Weeks and myself. You must remember that Molineux was married on November 29, 1898; that Barnet died on November 10 of the same year, and that he testified that he had been trying to marry Miss Chesebrough since the first of the previous January. She refused him. These are the facts as the defendant told them. Molineux never married this woman til Barnet's body was cold in the grave, and the marriage was sudden. For more than a year he had been trying to marry this woman. But another man intervened. I say that this woman represented the concrete form of the motive for killing Barnet. If the facts were not as I stated, nothing would prevent this woman from taking the witness stand here and giving the lie to the District Attorney if I have lied. God knows I do not relish bringing this woman's name into this court, but I say that Mr. Weeks should be heartily ashamed of himself for allowing the woman to come to listen to what I am here compelled to say.<sup>216</sup>

The jury apparently accepted Osborne's strong of non-sequiturs and his call to convict Molineux on the ground that he may also have killed Barnet. After seven hours' deliberation, the jury returned a verdict of guilty of capital murder.<sup>217</sup> The verdict was supported by the District Attorney's proof that Molineux was probably guilty of the killing of Barnet, a crime not charged in the indictment. The District Attorney made creative use of the uncharged misconduct rule that permitted proof of other crimes committed by the defendant if those crimes tended to prove some intermediate issue other than Molineux' heinous character. Weeks' appeal would be based on the argument that proof of the Barnet killing in the Adams case was prejudicial error.

#### IV. UNCHARGED MISCONDUCT EVIDENCE BEFORE MOLINEUX

By 1899, the rule against proving crimes not charged in the indictment had been recognized for nearly 200 years. The common exceptions to the rule had been used by skillful prosecutors for about 150 years. A short history of the development of the uncharged misconduct rule is required in order to understand why Osborne's proof of the Barnet killing was prejudicial error.

##### A. CHARACTER EVIDENCE IN ENGLAND

There were no rules of evidence in criminal prosecutions prior to the late 17<sup>th</sup> century.<sup>218</sup> An English criminal jury trial in the Court of Oyer & Terminer in the time of Henry VIII was an altercation between the Crown Counsel, the defendant and the presiding justice.<sup>219</sup> The presiding justice did not limit the testimony of witnesses, nor did he exclude exhibits offered by the Crown Counsel. The principal part of the trial was the examination of the accused by the court and by crown counsel. The Court of King's Bench was the venue for serious felony trial, including such notable cases as the trial of Sir Walter Raleigh for treason. King's Bench extended a number of procedural rights to prisoners. The prisoner was not permitted to have the service of a lawyer, but the court usually permitted the accused to be confronted by the accusing witnesses in open court. The prisoner could cross-examine the accusing witnesses. The presiding Justice or Justices would then sum up the evidence to the prisoner who would then make his defense. The prisoner could call witnesses on his behalf. Their evidence, perhaps not given under oath,

would be given to the court and jury in open court. Then the presiding Justice would sum up the case to the jury which would retire and give a verdict in open court<sup>220</sup> When Lord Coke denied Sir Walter Raleigh the right to confront Lord Cobham in open court, he went against English tradition.<sup>221</sup>

The English judicial system also a special criminal court: the Court of Star Chamber, that tried cases of criminal libel and other misdemeanors.<sup>222</sup> It followed Continental canonical methods of proof. The accused could not refuse to give evidence against himself and was required to swear an *ex officio* oath before an examining Judge essentially accusing himself of committing the crime charged. The witnesses who would give evidence against the accused were examined *ex parte* before a Judge of the Star Chamber and their depositions were presented to the Court. The defendant could not confront and question his accusers, nor did he have the right to counsel. The defendant was presumed guilty and had to explain his innocence to the court.<sup>223</sup>

King's Bench permitted the admission of evidence of the prisoner's bad moral character having little to do with the crime charged. Sir James Stephen cites the perjury prosecution of Benjamin Faulconer in 1653 in the Court of King's Bench as an example of this practice:

He had made statements the effect of which was that the estates of Lord Craven were sequestrated. Upon this he was indicted for perjury by the Craven family in the Upper Bench, as the Court of King's Bench was then called. Many witnesses were called to prove

the falsehood of the matter sworn, after which others were called to show that Faulconer was a man of bad character. They testified to his having drunk the devil's health in the street at Petersfield; to his having used bad language and been guilty of gross immorality; and lastly, to his having been committed on suspicion of felony and having 'a common name for a robber on the highway.' As Faulconer's evidence had been accepted and acted upon by Parliament, it is unlikely that he should have been treated at his trial with any special harshness. It would seem, therefore, that at this time it was not considered irregular to call witnesses to prove a prisoner of bad character in order to raise a presumption of his guilt."<sup>224</sup>

As a result, relevant prior bad acts of the defendant similar to the crime charged in the indictment would ordinarily be proved by testimony in open court.<sup>225</sup>

The Glorious Revolution of 1688 that deposed James II and instituted a limited monarchy also brought criminal law reform. Parliament passed the Treason Act of 1695 that made substantial changes in the procedure for treason trials. Treason would be tried in the King's common law courts. The accused would receive a copy of the indictment at least five days before trial, and the alleged treasonable act would have to be proved by the testimony of two witnesses in open court subject to cross-examination. Any overt treasonable act not stated in the indictment was not capable of proof in court.<sup>226</sup> The standards of the Treason Act eventually became the rule of fair play in all criminal proceedings including those that were not treason felonies directly subject to the Act. The courts came to believe that the accused should not be tried for offenses that were not included in the indictment. This became one leg for the

uncharged misconduct rule.

The standard 18th century treatises on Pleas of the Crown by Sir Matthew Hale, John Foster and John Hawkins contained specific provisions for excluding evidence of other similar acts in criminal prosecutions that were not stated in the indictment. Foster, for example, said:

The rule of rejecting all manner of evidence in criminal prosecutions that is foreign to the point in issue is founded on sound sense and common justice. For no man is bound at the peril of life or liberty, fortune or reputation, to answer at once and unprepared for every action of his life... .And had not those concerned in state prosecutions out of their zeal for the publick service, sometimes stepped over this rule in the case of treasons, it would perhaps be needless to have made an express provision against it in this case. Since the common-law grounded on the principles of natural justice hath made the like provision in every other.<sup>227</sup>

The accused could call friends and neighbors to testify that his reputation in the village where he lived for good moral behavior. This would be done after the Crown's case had been put in and the judge had summed up the case against the accused.<sup>228</sup> If the accused chose to call character witnesses to prove his good character, defense character witnesses were open to cross-examination on prior bad acts of the accused to discredit their statement of the defendant's good reputation.<sup>229</sup> Since the accused had initiated an inquiry into good character, the courts saw no particular harm in permitting the Crown to impeach the accused's neighbors.<sup>230</sup> However, the

Crown was forbidden to prove the accused was of bad moral character when the accused made no attempt to prove good character.

## B. RENOVATING THE LAW OF CHARACTER EVIDENCE IN THE NINETEENTH CENTURY

During the next hundred years, the English courts periodically made exceptions to the rule against admitting bad character evidence against the prisoner when the accused did not try to prove his good character. These exceptions took the form of allowing specific incidents of prior bad conduct into evidence to prove some intermediate issue. In *Rex v. Horne Tooke*,<sup>231</sup> the court admitted other criminal acts of the alleged conspirators that furthered their alleged traitorous conspiracy, although the evidence of other criminal acts also blackened the character of the conspirators. The Court of Kings Bench allowed witnesses in counterfeiting cases to tell the jury about other attempts made by the accused to pass counterfeit money not alleged in the indictment. The rationale given for this exception was the heavy burden on the Crown to prove intent to pass a counterfeit.<sup>232</sup>

In 1791, in *Rex v. Pierce*,<sup>233</sup> a criminal libel case, the identity of the author of an anonymous libelous publication was at issue. Pierce was the author of a very similar libelous piece; the Crown was permitted to prove the earlier authorship in order to prove the identity of the author of the alleged libel. Of course, the proof of the prior libel showed that Pierce was a bad fellow. The treatise writers began to pick up these cases. Indeed, East offered his own unreported violation of the character rule: in an extortion prosecution for writing anonymous threatening

letters, the Crown was permitted to prove the accused had written other threatening letters to other persons to establish the identity of the perpetrator. Once again, the jury was also informed that the accused was a person of bad moral character by innuendo. In a prosecution for maintaining a disorderly house, the Crown could offer proof that the accused had maintained a disorderly house in another location in the past, to show the continuing nature of the accused's criminal operations.<sup>234</sup> Similar exception to permit evidence of the accused' passing forged notes not charged in the indictment to prove the forger knew the notes identified in the indictment were forged, and by this means to demonstrate the accused's criminal intent to pass off bad notes as good.<sup>235</sup>

### C. EXPORTING CHARACTER EVIDENCE TO NORTH AMERICA

The Thirteen Colonies inherited their criminal law and procedure and their rules of evidence from the Mother Country. This included the rudiments of the character evidence rule. The early history of the use of character evidence in the United States was as fragmentary and incoherent as its English ancestor was. Only one reported decision before 1776, *Rex v. Doaks*,<sup>236</sup> dealt with the issue of admissibility of criminal acts not charged in the indictment. Doaks was charged with keeping a bawdy house and the prosecution tried to introduce other lewd and lascivious acts of the accused. The Massachusetts Supreme Judicial Court held the other acts inadmissible.<sup>237</sup>

By 1800, Federal courts recognized the general rule that the accused had the option to defend against a criminal charge on ground of good moral character,<sup>238</sup> and its corollary, the

prosecution could not offer evidence of bad character unless the accused chose to put in evidence of good character.<sup>239</sup> State courts accepted the general rule as well.<sup>240</sup> Early U.S. commentators agreed that there was a general rule against the prosecution's use of evidence of the accused's bad character unless the accused made an issue of good character that the prosecution could challenge.<sup>241</sup>

*People v. White*<sup>242</sup> illustrates how the character evidence issue was handled in the early 19<sup>th</sup> Century. White was indicted for possessing counterfeit bank notes with intent to pass them. The People called Moses Strong who testified that he had a conversation with White. Strong asked White for the details of the theft of money from the Rutland Bank, which White denied having anything to do with. Defense counsel objected to Strong's evidence on the ground that it was simply proof of the bad character of the defendant, and White had not put on a character evidence defense. The trial judge overruled the objection and permitted Strong to complete his answer, loosely based on the rule of completeness: Strong said that White told him he should never have been suspected of robbing the Rutland Bank if he had not been an inmate of the Massachusetts State Prison.<sup>243</sup> White presented no character evidence witnesses. The jury quickly convicted White of passing counterfeit notes and White's appeal to the Supreme Court of Judicature resulted in a reversal. Judge Sutherland wrote the opinion for a unanimous court. Sutherland stated the only reason that the "State Prison" conversation would be relevant would be to prove the accused's bad moral character. The general rule forbade the prosecution to prove the accused's bad moral character unless the accused chose to make character an issue, and even in that case, the prosecution would be barred from proving specific bad acts of the accused by



testimony of other witnesses to disprove the accused's bad character. He said:

Here the prisoner had called no witnesses to support his character, nor was it put in issue by the prosecution. The prosecutor, therefore, had no even to impeach his general character, much less to prove specific facts against him. . . . The prisoner, according to the witness, had merely declared his innocence of robbing the Rutland Bank — a declaration which could have no possible bearing on the issue which they were then trying, and which, of course, it was not important or material to explain, by showing what either preceded or followed it.<sup>244</sup>

Judge Sutherland regarded the rule against proof of bad character by specific acts as a form of the rule that precluded proof of impeachment by extrinsic collateral facts. In his view, the prior criminal activities of the defendant, unrelated to any issue in the case being tried, were irrelevant<sup>245</sup>

To be sure, the prior criminal acts of the accused could be relevant to the issues in a criminal prosecution.<sup>246</sup> For example, public officials could be removed from office in quasi-criminal proceedings in some states for misconduct<sup>247</sup> Early U.S. decisions also permitted the bad character for chaste conduct of the victim of an alleged sexual assault to be proved and disproved by character witnesses.<sup>248</sup> In homicides and assaults, the accused could support a claim of self-defense by proving that the victim had committed prior violent acts, whether known to the accused or not, that would justify resort to force to repel the victim's aggression. State and

federal courts also permitted impeachment of any witness by proof of bad character for truthfulness, and rehabilitation by proof of good character for truthfulness.<sup>249</sup> In all these instances, the character of the accused or victim was relevant and individual acts of uncharged misconduct were admissible to prove the character of the accused or the victim.

In prosecutions where the character of the accused or the victim was not at issue, the courts allowed the prosecution to prove specific uncharged criminal misconduct that proved an intermediate issue in the prosecution as well as the bad moral character of the accused. By the middle 19<sup>th</sup> century, the commentators recognized that a criminal plan or design or criminal intent could be proved by bad acts committed in the course of the criminal design.<sup>250</sup> They also recognized that similar bad acts of the accused could be admitted to prove guilty knowledge,<sup>251</sup> mens rea or criminal intent, as well.<sup>252</sup> However, no one had connected the dots.

The courts continued to struggle with admission of other acts of misconduct during the remainder of the 19<sup>th</sup> century. The courts preferred to deal with specific exceptions to the general rule without specifying a general theory of admissibility. By the end of the century, U.S. courts routinely admitted specific uncharged misconduct of the accused which were collateral to the case in chief and also proved the accused was a person of bad moral character. These exceptions to the general rules were made to allow the prosecution to prove an intermediate issue such as motive, intent, guilty knowledge, plan or design, nature and extent of a conspiracy and identity of the accused.

## 1. Motive.

Motive is the answer to the question “why did the accused commit the crime?” It may be a covert way of establishing criminal intent. Courts in the United States sometimes permitted proof of a criminal act not charged in the indictment when that act proved the motivation for committing the crime charged.<sup>253</sup> For example, in the mid 19<sup>th</sup> century Nevada case of *State v. McMahon*,<sup>254</sup> the accused was charged with arson. He allegedly burned cordwood belonging to another party in order to get hired as a watchman by the owner. The prosecutor introduced testimony by P. Henry, one of the co-owners of the wood pile, showing that eleven other arsons had been committed in the same town<sup>255</sup> On the other hand, invoking the collateral fact rule, the courts would exclude evidence of another, unrelated criminal act committed by the accused because it was only relevant to proof of bad character which was excluded on policy grounds.<sup>256</sup>

A contrary result was reached in *Snurr v. State*,<sup>257</sup> a prosecution for rape upon the accused’s daughter. She testified to other incidents of sexual assault committed on her by her parent. The prosecutor offered the evidence of other assaults to prove the defendant’s motive: sexual gratification. The Court of Appeals reversed the trial court on the ground that the other sexual assaults were collateral to the indictment and prejudicial to the defendant because the recitation of other rapes on his daughter only served to show that he was a man of bad moral character<sup>258</sup>.

## 2. Intent.

According to U.S. 19<sup>th</sup> century criminal law commentator Joel Bishop:

There can be no crime, large or small, without an evil mind. In other words, punishment is

the sequence of wickedness, without which it cannot be. And neither in philosophical speculation, nor in religious or moral sentiment, would any people in any age allow that a man should be deemed guilty unless his mind was so. It is therefore a principle of our legal system, as probably it is of every other, that the essence of the offence is the wrongful intent, without which it cannot exist.<sup>259</sup>

Most crimes require no proof of specific intent, general intent or mens rea is enough. If the accused was able to know what he or she was doing when he or she committed the criminal act, then the accused had sufficient intent. A smaller group of crimes require proof of specific intent. This group include such crimes as assault with intent to do grievous bodily harm, possession of counterfeit coins or banknotes with intent to pass them as genuine, and the like. In prosecutions where specific intent is an element of the crime, the prosecution must prove that intent by direct or circumstantial proof. The courts first grappled with admission of similar criminal misconduct evidence to prove specific intent in counterfeiting and forgery cases. A person could possess counterfeit bank notes or forged promissory notes unwittingly without specific intent to pass them to others. The courts permitted the prosecution to prove intent to pass by proof of other instances where the accused passed bad currency or notes. The use of similar criminal acts to show specific intent then spread to such prosecutions as criminal non-support,<sup>260</sup> an assault with intent to obtain sexual gratification,<sup>261</sup> and obtaining money under false pretenses.<sup>262</sup>

## 2. Guilty Knowledge

Some crimes such as obtaining money or property under false pretenses,<sup>263</sup> receiving stolen

property,<sup>264</sup> require proof of guilty knowledge. In *Bottomly v. United States*,<sup>265</sup> decided in 1840, Judge Story used the smuggling prosecution as a platform to list a number of occasions when similar acts may be introduced to prove guilty knowledge or knowing possession, citing to English 19<sup>th</sup> century decisions admitting other instances of passing counterfeit coin or notes to show knowledge that the notes passed were counterfeit.<sup>266</sup> In *Stanley v. State*,<sup>267</sup> a prosecution of a county clerk for embezzling funds, the Alabama Supreme Court held that evidence of other acts of embezzlement not in the indictment were admissible to prove the guilty knowledge of the accused that he was stealing county funds.<sup>268</sup>

*State v. Smith*<sup>269</sup> was a representative instance of the admission of similar acts to prove guilty knowledge. Smith was indicted for knowingly passing a counterfeit New Jersey bank note. At trial, the state introduced evidence that Smith had come to New Haven with Able Starks who had been passing counterfeit New Jersey bank notes. The State asserted the association with Starks was proof of Smith's guilty knowledge that *his* notes were counterfeit.<sup>270</sup> Although 21<sup>st</sup> Century judges might differ with the admission of evidence showing a non-accomplice passed counterfeit money to prove knowledge, the Connecticut Supreme Court agreed that no new trial was warranted and the evidence was properly received. In *Carnel v. State*,<sup>271</sup> an 1896 Maryland prosecution for obtaining money on false pretenses, the trial court admitted two letters to a Hagerstown, Maryland, bank that contained false statements about the defendant's financial situation to show, among other things, that the defendant had guilty knowledge of the false pretenses used in the crime charged in the indictment to get money out of another bank<sup>272</sup>.

*State v. Jacob*<sup>273</sup> is representative of a dozen 19th century decisions permitting other, similar instances of possession of stolen property to be introduced to prove guilty knowledge. Jacob was charged with knowingly receiving stolen property. The state called the victim who testified, over objection, to other items of stolen property were found in the accused's possession that were not listed in the indictment. The South Carolina Supreme Court affirmed the accused's conviction. It held that the other items of stolen property were properly identified and admitted into evidence to show that Jacob knowingly possessed stolen property. A single stolen item might be an accidental, unknowing acquisition, but several stolen items showed Jacob's possession was no coincidence.

It does not seem to us that there was any error in receiving the testimony which is made the basis of the second and third grounds of appeal. As appears from the extract made from the judge's charge above, this testimony was received solely as a circumstance tending to show guilty knowledge on the part of the defendants, and the jury were carefully instructed to consider it only in that light. As is said in 1 Greenleaf on Evidence, section 53, note (b): "The general rule undoubtedly is, that a distinct crime, unconnected with that laid in the indictment, cannot be given in evidence against a prisoner. It is not proper to raise a presumption of guilt on the ground that having committed one crime the depravity it exhibits makes it likely that he would commit another. In all criminal cases, however, where the felonious intent or guilty knowledge is a material part of the crime, evidence is admissible of similar acts of the prisoner at different times, if such acts tend to prove the existence of such guilty knowledge or felonious intent." One of the illustrations there

given is this very charge of receiving stolen goods, where the gist of the offence is the guilty knowledge of the party charged.<sup>274</sup>

The Court cited three ancient South Carolina cases<sup>275</sup> and Roscoe on Criminal Evidence in support of the same proposition.<sup>276</sup>

### 3. Absence of Mistake or Accident.

Bishop had something to say about the defense of mistake of fact.:

“Ignorance or mistake in point of fact is, in all cases of supposed offence, a sufficient excuse.”. . . We have seen that to constitute a crime the law requires an evil mind or intent; but, except as to some special crimes, there is no defined sort of mental wrong uniformly necessary. Now, though a mistake of fact may and commonly does show the non-existence of the evil mind, it does not always or inevitably.<sup>277</sup>

The accused may claim that an otherwise criminal act was the result of an honest mistake or an accident. This challenges the presumption that the accused acted with mens rea and requires the prosecution to prove that the criminal act was not the product of mistake or accident. The English courts recognized that in such cases, the Crown could produce evidence of other similar criminal acts by the accused to show that at the time of the act charged in the indictment, the accused had the requisite mens rea.<sup>278</sup>

#### 4. Nature and Extent of Conspiracy

A conspiracy indictment required the allegation and proof of one or more overt acts of the conspirators in furtherance of the conspiratorial plan. Were other overt acts of the conspirators not charged in the indictment admissible? According to Justice Joseph Story, they were. Story decided *Bottomly v. United States*<sup>279</sup> in 1840. He held that overt acts of the conspirators showing that they had worked a fraudulent scheme against other victims during the life of the conspiracy were admissible to prove the conspiracy. Story said:

. . . . But it appears to [be] clearly admissible upon the general doctrine that in cases of conspiracy and fraud, where other acts in furtherance of the same general fraudulent design are admissible, first, to establish the fact, that there is such a conspiracy and fraud; and secondly, to repel the suggestion, that the acts might be fairly attributed to accident, mistake, or innocent rashness or negligence.<sup>280</sup>

The Connecticut Supreme Court also permitted proof of overt acts of conspirators not alleged in the indictment in *State v. Spalding*.<sup>281</sup> In *Commonwealth v. Eastman*,<sup>282</sup> the Massachusetts Supreme Judicial Court validated admission of acts of three conspirators to purchase goods on false credit that were not alleged in the conspiracy indictment in order to show their comprehension of their actions, on a false analogy to proof of scienter in fraud cases.<sup>283</sup> There were no other conspiracy cases before mid-century that raised the issue of admissibility of other



criminal acts of the conspirators.

#### 5. Identity of the Accused.

In many instances, the identity of the perpetrator of a crime must be established by circumstantial proof. If a prior crime had been committed in a very unusual manner that matched the way in which the crime was committed in the crime charged in the indictment, and the identity of the perpetrator were known, then the English courts would admit proof of the perpetration of the first crime to prove the identity of the prisoner. This same issue surfaced in an early Ohio murder by poisoning prosecution, *Farrar v. State*.<sup>284</sup> Nancy Farrar, a mentally challenged young woman who was a servant in the household of Elisha Forest, was accused of murdering Mrs. Forrest and two children by giving them arsenic of lead in their food. She was indicted for the murder of one of the children, James Forrest. Her counsel set up an insanity defense.<sup>285</sup> Evidence of the poisoning of the whole family including Mrs. Forrest and her other child was admitted without objection, but defense counsel vociferously objected to evidence of the poisoning of Mrs. Green, the former employer of Jane Farrar, by the same chemical, arsenic of lead. The Ohio Supreme Court reversed and remanded the case on the ground that the mention of the poisoning of Mrs. Green by an unknown and unidentified perpetrator in

#### 6. Inseparable Crimes.

By mid-century, defense counsel challenged testimony that revealed criminal acts other than the act charged in the indictment that may have represented preparation for the act charged, or steps in carrying out that criminal act charged.<sup>286</sup> *Horn v. State*<sup>287</sup> was a representative cases. The defendant was charged with assaulting storekeeper Isaac Rosenberg with a gun and nearly taking his life. Prosecution witnesses regaled the jury with descriptions of the defendant's prior assault on the storekeeper's clerk and attempted murder of his wife, all occurring within minutes of the attack on Rosenberg. Defense counsel objected on the ground that the other assaults were not charged in the indictment and simply constituted proof of the accused's bad character. The trial court overruled the objection and Horn was convicted. The Alabama Supreme Court agreed with the trial court's decision. It said:

. . . . Very clearly, we think, the fact that he attempted to shoot the clerk, and shot at and severely beat the wife, are so connected with the assault upon Isaac as to bring all these things within the *res gestae* of any one of them, so that each would not only legitimately tend to establish the naked existence of the others, but would also have a very material and pertinent bearing upon the inquiry as to the intent which actuated the defendant throughout, in the way of showing that when he assaulted and shot Isaac Rosenberg his purpose was to kill him. There was, upon these considerations, no error in allowing the testimony referred to to go to the jury.<sup>288</sup>

Other courts, faced with the same situation reached the same result. The uncharged criminal acts of the accused were admissible if the story of the charged criminal act seemed to require the

dramatic inclusion of criminal acts leading up to the crime,<sup>289</sup> or following after the crime.<sup>290</sup>

#### E. THE EARLY COMMENTATORS

The United States had its own evidentiary commentators in the 19<sup>th</sup> century. Their published treatises dealt with the proof of uncharged misconduct in criminal prosecutions in one way or the other. The most influential 19<sup>th</sup> century treatises included Wharton's *Criminal Evidence*,<sup>291</sup> first published in 1846 and updated periodically since that time to the present; Greenleaf's *Evidence*,<sup>292</sup> also published in the 1840's and updated until supplanted by Wigmore's *Evidence* in 1913, and Underhill's *Criminal Evidence*,<sup>293</sup> first issued in 1898.

Harvard Professor Simon Greenleaf's treatise did not synthesize a general rule for admission of uncharged misconduct. In general, he thought that relevant evidence could be held inadmissible on grounds of collateral inconvenience. Greenleaf included both unfair prejudice and confusion of the issues as the kind of collateral inconvenience that would exclude otherwise relevant evidence.<sup>294</sup> Greenleaf thought that evidence of the moral character of the accused was relevant to guilt or innocence, but excludable on grounds of unfair prejudice and confusion of the issues submitted to the jury.<sup>295</sup>

Greenleaf recognized that the accused could always inject the issue of character into the case by giving evidence of good moral character.<sup>296</sup> He devoted several paragraphs to admission of other similar crimes or misconduct as evidence of intent or knowledge. Noting that the

precedent was both “uncertain and inharmonious,”<sup>297</sup> Greenleaf suggested that the principles behind admission of other criminal acts evidence were well-known and accepted. First he said that a person’s guilty knowledge could be inferred from circumstances that would bring the matter to the accused’s attention, such as feeding a dog something that caused him to die shortly after eating could put the accused on notice that the substance fed the dog was poisonous.<sup>298</sup> Second, a person’s criminal intent could likewise be proved circumstantially from other like acts of the accused. Greenleaf’s example was the man who was shot at from behind during a hunting party. The first shot would possibly have been an accident, but a second shot would argue for deliberate conduct, i.e., criminal intent.<sup>299</sup> Greenleaf then collected case citations supporting admission of uncharged misconduct under the taxonomic system of specific crimes charged. Greenleaf collected most of the known English and U.S. cases that permitted proof of other acts of forgery or counterfeiting to prove criminal intent to pass bogus instruments.<sup>300</sup> He followed the same method with other types of crimes requiring proof of specific intent and general intent, or guilty knowledge. Greenleaf took up admissibility of other uncharged misconduct evidence to prove plan or design as part of his discussion of proof of habit or routine practice.<sup>301</sup>

Greenleaf associated proof of a plan or design with proof of a habit or routine practice because habit is established by proof of many repeated, similar acts.<sup>302</sup> Greenleaf’s classification system, later adopted by Wigmore, was not based on a common rule that screened proof of uncharged misconduct. Instead, Greenleaf admitted that evidence of the predisposition of the accused to commit criminal acts was relevant, but forbidden due to excessive prejudice to the accused. He then cited a string of instances that showed that the courts had allowed an

exception to the character rule for purposes of proving an intermediate issue, without justification or support for the exception.

Pennsylvania lawyer Francis Wharton regarded the proof of an accused's character as a collateral issue in criminal prosecutions. Therefore, character evidence is generally irrelevant to the issues in a criminal prosecution.<sup>303</sup> Wharton then states that proof of a collateral offense is irrelevant and highly prejudicial:

A defendant ought not to be convicted of the offense charged against him simply because he has been guilty of another offense. Hence, when such evidence is offered simply for the purpose of proving his commission of the offense on trial, evidence of his participation, either in act or design, in commission or preparation, in other independent crimes, cannot be received.<sup>304</sup>

Wharton noted that the rule is observed strictly when the other offense evidence is offered to prove the accused's guilt. Wharton did recognize a number of exceptions to the general negative rule,<sup>305</sup> which he illustrated by his own case classification method that differed from that used by Greenleaf. He started with a *res gestae* exception that corresponded more or less loosely to the interwoven crimes exception, citing a number of cases that permitted proof of criminal acts not charged in the indictment that led up to, or followed the criminal act charged.<sup>306</sup> Then Wharton cited a number of cases permitting other criminal acts to be provided to prove scienter, i.e., guilty knowledge.<sup>307</sup> He followed this case-by case analysis with another directed at proof of

mens rea.<sup>308</sup> At no time did he connect up these exceptions into any type of general theory of admissibility.

Underhill, writing at the end of the century, devoted an entire chapter to the general rules relating to character evidence.<sup>309</sup> He accurately stated the general rule permitting the accused to offer good character evidence in a succinct discussion of the principles of admitting good character and bad character evidence.<sup>310</sup> In § 82, Underhill explained that bad character could not be proved by specific bad acts because the accused was in no position to contradict specific facts that were sprung on the accused without prior notice,<sup>311</sup> a ground that will later become a constitutional objection to uncharged misconduct evidence.

Underhill gave a whole chapter to proof of other criminal acts.<sup>312</sup> Following along his general theme that the accused should not be forced to defend against charges when not on notice that the accused should do so, Underhill says that jurors are prone to convicting an accused on proof of other similar crimes on the ground that the accused is guilty of the current offense because the accused committed another similar offense. Underhill says:

To guard against this evil, and at the same time to avoid the delay which would be incident to an indefinite multiplication of issues, the general rule (to which, however, some very important exceptions may be noted) forbids the introduction of evidence which will show, or tend to show, that an accused has committed any crime wholly independent of that offense for which he is in trial. To this general rule there are a very few exceptions which

have been permitted from absolute necessity, to aid in the detection and punishment of crime.<sup>313</sup>

Underhill started his discussion of the exceptions to the “no criminal acts” rule with the intermingled crime exception based on a foundation showing that more than one crime was committed by the accused in the course of committing the crime charged as part of a general criminal plan.<sup>314</sup> Underhill allowed another exception for proof of intent when intent is a material issue in the case.<sup>315</sup> He also recognized an exception for proof of identity of the accused<sup>316</sup> and the predisposition of a sex offender to commit sex crimes.<sup>317</sup> However, Underhill, like the others, stopped short of a general formula for admitting uncharged misconduct evidence that would cover all these cases. That was the task that the New York Court of Appeals felt compelled to attempt in *People v. Molineux*<sup>318</sup> in 1901.

## V. THE APPEAL

### A. THE APPELLANT’S COUNSEL

Although Bartow Weeks and Joseph Battle stayed on the Molineux defense team, John G. Milburn replaced Weeks as lead counsel for oral argument. Milburn was a very highly respected Buffalo trial lawyer who was the Chairman of the 1901 Buffalo Pan American Exposition. The exhibition opened in May. On June 17, 1901, Milburn put aside his duties as Chairman of the Buffalo Exposition to spend three days arguing the Molineux case to the Court

of Appeals, then sitting in Buffalo. On September, President William McKinley would be carried to Milburn's house with a fatal gun shot wound inflicted by an anarchist named Leon Czolgosz.<sup>319</sup> H. Snowden Marshall from Milburn's firm would be his second chair for oral argument.<sup>320</sup>

#### B. THE DISTRICT ATTORNEY'S TEAM

Assistant District Attorney Osborne had very little to do with the appeal. The task was turned over to Assistant District Attorney Eugene A. Philbin, assisted by David B. Hill (of counsel).<sup>321</sup> Philbin was an appellate specialist. The prosecutors were overmatched by the heavyweight lawyers on the defense team.

#### C. THE MEMBERS OF THE COURT OF APPEALS

In 1901, the New York Court of Appeals was at full strength. The seven members of the Court were Democrats Chief Judge Alton W. Parker,<sup>322</sup> Associate Judges John Clark Gray,<sup>323</sup> Denis O'Brien,<sup>324</sup> Republicans Edward T. Bartlett, Irving S. Vann. Albert Haight, and interim associate Judges Judson S. Landon, Edgar M. Cullen and William E. Werner , all of whom were Republicans appointed by Gov. Theodore Roosevelt.<sup>325</sup>

Chief Judge Parker was a well-liked former Supreme Court justice , former Chairman of the New York Democratic Party Central Committee, elected Chief Judge in 1898 by a 60,000 vote



majority in a state that had given the Republicans a 250,000 majority in 1896. Parker was the same kind of Democrat as Grover Cleveland, one of his personal friends. He did not share the “free silver” views of William Jennings Bryan and perceived the role of the federal government as limited in a Jacksonian model.<sup>326</sup> The three Roosevelt appointees presumably shared Theodore Roosevelt’s Progressive views on the active role of the executive in curbing graft and corruption among state employees, and in maintaining a strong central government with an Army and Navy ready to fight to protect U.S. international interests. Bartlett, Vann and Haight, the older Republicans on the Court were not Progressives.

Molineux’ appeal came to the court as a capital murder case. Seven of the nine judges took part in the deliberations.<sup>327</sup> All seven voted to reverse and remand the case for a new trial: there were three opinions: the court opinion written by Republican Judge Werner in which his Republican colleagues Bartlett and Vann joined. Judge O’Brien wrote a concurring opinion as did Chief Judge Parker. Judges Gray and Haight joined in Parker’s concurrence.<sup>328</sup> The court’s lack of unanimity on the grounds for reversing Molineux’ conviction would have an affect on the use of Molineux as precedent in the future.

#### D. THE ISSUES ON APPEAL

Defense counsel contended that Recorder Goff erred in admitting Barnet’s hearsay statement to Dr. Douglas in which Barnet stated he was made sick by the contents of a box of Kutnow Powder that he received through the mail. They also contended that evidence that showed

Molineux had murdered Barnet was inadmissible to prove Molineux' intent to kill Mrs. Adams. They argued that the handwriting experts committed prejudicial error on two grounds: first, they erroneously relied on writing samples from in the defendant's hand because the authenticity of the "Barnet" and "Cornish" letters and the address on the Cornish package was not the subject-matter of the homicide prosecution; second, the experts used handwriting samples of the defendant that were not conceded to be authentic in making their comparisons. They charged that Recorder Goff had erroneously admitted Molineux' testimony before the coroner's inquest at trial. Finally, defense counsel objected to Recorder Goff's charge to the jury.<sup>329</sup>

#### E. THE MINOR ISSUES

Judge Werner disposed of the handwriting issues raised by the defendant by construction of two New York statutes pertaining to disputed handwriting cases. At common law, proof of the authenticity of handwriting could be had from witnesses who had been present at the writing, by witnesses familiar with the handwriting of the alleged author and by comparison of genuine and disputed examples of handwriting by the jury without intervention of a witness.<sup>330</sup> An 1880 statute recognized that a comparison of a disputed handwriting sample with a known handwriting sample had to depend on preliminary proof that the known sample was authentic.<sup>331</sup> In 1884, the Court of Appeals held in *Park v. Callaghan*,<sup>332</sup> that an expert witness could compare a genuine specimen of the supposed author of a document with disputed documents said to be by the same author. The statute covered only the situation when the disputed instrument is the subject of controversy in the action.<sup>333</sup> In 1888, the 1880 statute was modified to include the *Park* holding.

Defense counsel made a disingenuous argument that the Recorder erred by introducing Molineux' handwriting samples authenticated by various sources to compare with the address on the poison package sent to Cornish. Judge Werner disposed of the contention that the package address was not "the subject of controversy" by noting that the statute referred to a writing in dispute, which covered the identification of the author of the poison package address.<sup>334</sup> He also noted that Molineux' handwriting samples written for the People's experts were admissible when offered by the People against the defendant.<sup>335</sup>

Defense counsel contended that the Coroner had not advised Molineux of his right to remain silent before he testified at the February Coroner's hearing. Judge Werner noted that if Molineux was under arrest or formally accused of Mrs. Adams' murder, he was entitled by statute to be warned of his right to remain silent and to have assistance from counsel if examined by a magistrate. The Court of Appeals had extended the same protection to persons testifying at a Coroner's inquest. Judge Werner noted that Harry Cornish had testified earlier in the inquest proceedings that he suspected Molineux had sent him the poison package. This was insufficient information to charge Molineux with the murder of Mrs. Adams. Molineux had been subpoenaed by the Coroner; his testimony was given under compulsion. He could have refused to answer any questions put to him on the grounds that the answer might incriminate him. Since he did not do so, admission of the Coroner's inquest testimony was proper.<sup>336</sup> Werner also brushed aside claimed errors in the District Attorney's summation and in the Recorder's charge to the jury.<sup>337</sup>

Judge Werner next addressed the admissibility of Henry Barnet's hearsay statement to Dr.

Douglass that he had become ill after taking the Kutnow powder that he had received in the mail. Werner held that the hearsay statement was incompetent and its admissibility was reversible error because the entire case against Molineux for the poisoning of Barnet turned on Barnet's statement that he had taken the Kutnow powder before falling ill. This point requires some analysis because Judge Parker concurred in the result only on this ground. First, Barnet was ill. His attending physician, Dr. Douglass, visited his patient and in the course of taking a quick medical history, Barnet told him he had fallen ill after taking the Kutnow powder in the sample box on his bathroom shelf. He also told Douglass that he had received it through the mail.<sup>338</sup> New York law recognized a hearsay exception for statements made to a physician for purposes of treatment, and Dr. Douglass testified that he had to find the source of Barnet's mercurial poisoning shown by mercury burns on the mouth and acute gastroenteritis.<sup>339</sup> The legal issue was whether or not the physician needed to know how Barnet came by the poison Kutnow powder in order to treat him. If he did, then Barnet's identification of the source of his Kutnow powder was competent, material and admissible as part of his declaration made for purposes of medical treatment. If not, the statement was erroneously received.<sup>340</sup> The weight of authority in those days excluded the hearsay statement of the patient to the doctor identifying the source of injury or disease.<sup>341</sup> Under a more modern interpretation of the hearsay exception for declarations to physicians of physical and mental symptoms, Barnet's statement that the poison was sent to him in the mail would probably not be admissible because Dr. Douglass did not need to know where the Kutnow powder came from in order to have it analyzed and prescribe treatment for whatever injuries it had caused.<sup>342</sup>

## F. UNCHARGED MISCONDUCT

Judge Werner's summary of the law of uncharged misconduct and its application to the Molineux case reads like a treatise. He started with a statement of the collateral fact rule:

. . . The general rule of evidence applicable to criminal trial is that the state cannot prove against the defendant any crime not alleged in the indictment, either as a foundation for a separate punishment, or as aiding the proofs that he is guilty of the crime charged.<sup>343</sup>

Werner said that the rule was the product of the presumption of innocence and the requirement that the accused be proved guilty beyond a reasonable doubt. Citing several New York decisions, Werner said that the law excludes evidence of other offenses not charged in the indictment with few exceptions. In an oblique way, Werner said that uncharged misconduct evidence was generally not relevant. Taking a long quotation from *Coleman v. People*,<sup>344</sup> a prosecution for receiving stolen property, Werner admitted that it would be easier to convict a person of one crime if the trier of fact knew that he had committed other, similar acts in the past.<sup>345</sup> Quoting from another New York prosecution, *People v. Shea*,<sup>346</sup> Werner contrasted the Continental method of prosecuting a criminal case in which the offender's record of prior offenses is presented to the tribunal as part of the proof of guilt with what Werner believed was the more merciful English view that stressed the presumption of innocence.<sup>347</sup> The evil to be avoided in U.S. prosecutions, Werner said, was the assumption that the accused was guilty of the crime charged because he had committed other similar crimes in the past.<sup>348</sup> Werner implicitly

acknowledged that admissibility of uncharged misconduct evidence depended upon a calculus of probative value weighed against the prejudice to the accused.

Judge Werner immediately noted that there were exceptions to the general rule.

The exceptions to the rule cannot be stated with categorical precision. Generally speaking, evidence of other crimes is competent to prove the specific crime charged when it tends to establish (1) motive; (2) intent; (3) the absence of mistake or accident; (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the others; (5) the identity of the person charged with the commission of the crime on trial.<sup>349</sup>

Werner accepted these five instances as specific examples of situations that made uncharged misconduct evidence relevant to a criminal prosecution. He then began to apply each of the exceptions to the admission of the mass of evidence pointing toward Molineux' murder of Barnett by cyanide of mercury.

### 1. Motive

Werner noted that "in every criminal trial when proof of motive is an essential ingredient of the evidence against a defendant, the motive to be established is the one which induced the

commission of the crime charged.”<sup>350</sup> The motive for killing Cornish would be hatred of Cornish. The motive for killing Barnet, on the other hand, was “jealousy caused by the latter’s intervention in the love affair of the former.”<sup>351</sup> Since the motive for murdering Barnet was not the same as the motive for murdering Cornish, proof of the killing of Barnet could not be used to prove that Molineux killed Mrs. Adams. Judge Werner cited a plethora of English and U.S. authorities including several cases of murder by poisoning.<sup>352</sup> In each, he identified the motive of the accused slayer and showed how the case permitted proof of uncharged misconduct. In *People v. Otto*, for example, the accused was charged with murdering his brother’s wife. Otto apparently poisoned the whole family, but two children survived Otto was appointed their guardian. Otto then filed spurious claims against the dead father’s estate. Otto’s attempted to defraud the estate was admitted to show his motive for killing his brother and his sister-in law.<sup>353</sup>

## 2. Intent

Turning next to the exception for uncharged misconduct evidence to prove intent, Werner noted that motive and intent are often thought of as the same concept. Werner promptly distinguished between the two exceptions:

Motive is the moving power which impels to action for a definite result. Intent is the purpose to use a particular means to effect such result. When a crime is clearly proven to have been committed by a person charged therewith, the question of motive may be of little or no importance. But criminal intent is always essential to the commission of crime.

There are cases in which the intent may be inferred from the nature of the act. There are others where willful intent or guilty knowledge must be proved before a conviction can be had.<sup>354</sup>

Most modern commentators would have separated guilty knowledge from intent, following the text of Rule 404(b), although Werner's observation that proof of guilty knowledge is really proof of criminal intent is correct.<sup>355</sup> The mens rea required to prove Molineux was guilty of murdering Mrs. Adams was proof that he intended to kill Harry Cornish. If the mass of evidence showing that Molineux had intent to kill Barnet with the poison Kutnow powder, that intent would not be transferred to the killing of Katherine Adams.<sup>356</sup> Judge Werner also declared that the act of mixing a poison compound of Bromo Seltzer and cyanide of mercury was sufficient proof of general criminal intent to meet the standard for convicting Molineux of the killing of Mrs. Adams.<sup>357</sup>

### 3. Absence of mistake or accident

Having disposed of the exceptions for motive and intent (including guilty knowledge), Judge Werner dealt with the claim of mistake or accident. This gave him the chance to comment on the famous Australian baby farm homicides, as well as another series murders by poisoning in which the accused claimed poison was accidentally administered.<sup>358</sup> Anticipating the "doctrine of chances" by nearly a century, Judge Werner said:



There are cases in which the possible or probable defense of accident or mistake may be rebutted upon the direct case of the prosecution or in which the doubtful cause of the particular death may be established by other previous similar deaths.<sup>359</sup>

Werner started with *Regina v. Gardner*,<sup>360</sup> the case in which a milk dealer was accused of poisoning his first wife. Gardner sold arsenic as well as milk, and claimed his wife died by accidental poisoning. Unfortunately for Gardner, the prosecution was permitted to prove that Gardner's mother and three horses died from arsenic poisoning.<sup>361</sup> After going through a quick study of two more poisoning cases, Judge Werner was able to present *Makin v. Attorney General for New South Wales*<sup>362</sup> the "baby farm" homicides, and the grandmother of the doctrine of chances. Makin was charged with murdering an infant named Horace Murray. As the authorities dug around on Makin's back yard, they found more and more dead babies buried in the yard. At trial the prosecution introduced the finding of the other dead babies when Makin defended on the ground that Murray had died accidentally.<sup>363</sup> Judge Werner went on to other homicide cases<sup>364</sup> in which the defendant had made a claim of accident or mistake, then concluded that the poisoning of Mrs. Adams was no accident:

Was this poison sent by mistake or accident? Are not utter depravity, venomous malignity, murderous design, fiendish cunning, indelibly stamped upon every fact and circumstance connected with the act? It would be a travesty upon our jurisprudence to hold that, in a case of such appalling and transparent criminality, it could ever be deemed necessary or proper to resort to proof of extraneous crimes to anticipate the impossible

defense of accident or mistake. The same irrefutable logic of fact and circumstances that establishes felonious intent as clearly negatives the possibility of accident or mistake.<sup>365</sup>

Judge Werner had ruled out admitting the mass of evidence on the Barnett killing to offset a pretense of accident or mistake.

#### 4. Common plan or Scheme

True to his original design, Judge Werner examined the exception for common plan or scheme.

It sometimes happens that two or more crimes are committed by the same person in pursuance of a single design or under circumstances which render it impossible to prove one without proving all. To bring a case within this exception to the general rule. . . there must be evidence of system between the offense on trial and the one sought to be introduced. They must be connected as parts of a general and composite plan or scheme, or they must be so related to each other as to show a common motive or intent running through both.<sup>366</sup>

Judge Werner seems to limit the plan or design exception to the modern notion of inseparable or interwoven crimes. Since there was no allegation of a conspiracy he did not consider the proof of overt acts of a conspiracy not alleged in the indictment as an example of the plan or design

exception. He also did not consider that an accused could commit a series of unrelated crimes as part of a “crime spree” that were not necessarily part of a rationally formed plan to commit a crime.

Judge Werner cited a number of decisions in which uncharged criminal conduct was admitted to prove a plan. He cited *Hester v. Commonwealth*,<sup>367</sup> cited one of the Molly Maguire cases, to show how the plan or design exception worked without realizing that *Hester* was the genesis of the doctrine that uncharged misconduct committed by conspirators in favor of the conspiracy could be admitted against all conspirators without any showing that the conspirators were aware of the actions of the conspirators whose uncharged misconduct was proved against them.

Judge Werner’s also reviewed *People v. Zucker*,<sup>368</sup> an arson prosecution in which the accused moved furniture out of his New York City house and trucked it across the Hudson to Newark to get a confederate named Selzter to insure the furniture. The furniture was burned in Newark, then the New York house was burned a few days later. The court approved admission of both arsons as evidence of a common plan or design to commit arson. After reviewing two more arson cases in which evidence of a plan or design to commit arson had been admitted,<sup>369</sup> Judge Werner rejected any link between the murder of Barnet and the murder of Mrs. Adams because the two crimes lacked a common motive and purpose.

. . . it is impossible to perceive any legal connection between the two cases. Barnet

was said to have been poisoned because he interfered in the defendant's love affair.

Cornish was to be poisoned because he had incurred the hatred of the defendant as a result of quarrels between them over club matters. . . Let us suppose that the defendant, having a motive for the killing of Barnet, had shot and killed him in November, 1898; and that in darkness of night on the 28<sup>th</sup> day of December, 1898, someone had shot and killed Mrs. Adams while she was near to Cornish, . . . could it be shown that the defendant shot Barnet to prove that he shot Mrs. Adams? The two deaths were caused by the same means, at different times, inspired by separate motives and charged against one person. Is there any connection between the two crimes?<sup>370</sup>

Judge Werner dismissed the evidence that showed the murder of Barnet was accomplished by similar means (poison package of patent medicine sent through the mail to the victim) as the Adams murder because the link of similarity was based on inadmissible hearsay. Assuming that the link had been established by other means, Judge Werner also dismissed the argument that the similarity in the *modus operandi* of the person who took Barnet's life and Mrs. Adams' life demonstrated a plan or design of poisoning one's enemies. In Werner's view, the crimes were similar in the same way that two deaths by shooting, for example, were due to firing of a gun.<sup>371</sup> In conclusion, Judge Werner rejected the admission of the facts of the Barnet killing as evidence of a common plan or design to murder on the part of Molineux because he believed there was no common plan.

## 5. Identity

Judge Werner concluded with a tough analysis of the exception for identity of the accused.

Another exception to the general rule is, that when the evidence of an extraneous crime tends to identify the person who committed it as the same person who committed the crime charged in the indictment, it is admissible. There are not many reported cases in which this exception seems to have been affirmatively applied. A far larger number of causes, while distinctly recognizing its existence, have held it inapplicable to the particular facts before the court. The reason for this is obvious. In the nature of thing there cannot be many cases where evidence of separate and distinct crimes, with no unity or connection of motive, intent or plan, will serve to legally identify the person who committed one as the same person who is guilty of the other.<sup>372</sup>

Judge Werner chose *People v. Rogers*,<sup>373</sup> a California homicide prosecution, to show how the identity exception worked. Rogers was accused of murdering Mr. Kimball during a burglary. The burglar gained entry by means of a knife and chisel, and the victim was shot with a pistol. The People introduced evidence that Rogers had burglarized Connick's house from which a knife and chisel had been taken and a saloon, from which the pistol used on Kimball's murder had been taken. The court held that evidence of the commission of the other two burglaries by Rogers tended to show his identity as the perpetrator of the Kimball burglary and killing.<sup>374</sup>

Judge Werner also used *Commonwealth v. Choate*<sup>375</sup> to demonstrate how the identity

exception worked. Choate was charged with setting Ackerman's barn on fire. The remains of a peculiar wooden box containing the residue of a lighted candle was found in the ruins. A search of Choate's shop turned up a similar box. A third similar box had been found at a church which had been the site of a bungled arson attempt. Choate wrote a threatening letter that implicated him in setting other fires by this unique means. The Massachusetts Supreme Judicial Court affirmed Choate's conviction, finding that proof of other criminal acts committed in a similar, unique fashion could be admitted to show the identity of the accused.<sup>376</sup> Judge Werner also went through several other cases where the identity exception had been employed to admit uncharged misconduct when the motive for both crimes was dissimilar.<sup>377</sup> Judge Werner determined that the perpetrator of Barnet killing and the Adams murder had a different motive, intent and plan for each homicide. If the *modus operandi* of the killer in both cases was unique and highly similar, the evidence of the Barnet killing could be received in the trial for the Adams killing if the identity of the perpetrator of the Barnet killing had been established. The elements of similarity were striking: both victims died from ingesting a sample of patent medicine laced with cyanide of mercury, a rare poison. Harry Cornish, the intended victim in the Adams case, and Henry Barnet were men that Molineux had good reason to hate. The patent medicine samples used in each case were solicited by a person who disguised his true identity by renting a private letter box in the name of the intended victim. The chain of similarity broke at its weakest link, Barnet's hearsay statement that he had received his Kutnow powder sample through the mails. Since that was inadmissible hearsay, the identity of the person who murdered Barnet had not been established by sufficient evidence to infer the guilt of the perpetrator of the Adams killing from identification of the killer of Barnet.<sup>378</sup> Worse yet, Judge Werner said a little later on in

dealing with the Barnett hearsay statement, “the record is barren of evidence which tends to connect the defendant with the killing of Barnett.”<sup>379</sup>

#### G. THE CONCURRING OPINION OF JUDGE O'BRIEN

Judge O'Brien agreed with Judge Werner's finding that admission of Barnett's hearsay statement to Dr. Douglass was reversible error. He also accepted Judge Werner's general characterization of the uncharged misconduct rule.<sup>380</sup> He chose to write his concurring opinion because “[T]he only question upon which there is an opportunity for minds to differ is whether the events connected with Barnett's sickness and death are so related to the case at bar so as to form an exception to the general rule. . .”<sup>381</sup>

Judge O'Brien was most concerned about the modus operandi theory of admissibility; that the two crimes were so similar that the perpetrator of one necessarily had to be the perpetrator of the other. The Judge said:

I think the evidence relating to Barnett's sickness and death would not for a moment be considered competent but for the fact that it creates a strong impression upon the mind that the author of his death must also be the author of Mrs. Adams' death, since in both cases, death was caused by similar means. We may attempt to deceive ourselves with words and phrases by arguing that it is admissible to prove intent, or identity, or the absence of mistake, or something else in order to bring the case within some exception to the general rule; but what is in the mind all the time is the thought, so difficult to suppress, that the

vicious and criminal agency that caused the death of Barnet also caused the death of Mrs. Adams. The rule of law that excludes the evidence for such a purpose may be, and probably is contrary to the tendency of the human mind, but since the law was intended to curb the speculations of the mind and to guard the accused from the result of error in its operation, I am for maintaining the law in all its integrity. . . .”<sup>382</sup>

Judge O’Brien plainly believed that if Molineux had perpetrated the Barnet killing, he should be tried for that offense separately, rather than throwing in a mass of Barnet evidence into the trial for the death of Mrs. Adams.<sup>383</sup> Implicitly, O’Brien rejected the evidence that Molineux may have killed Barnet on grounds of excessive prejudice to the accused.

#### H. THE CONCURRING OPINION OF JUDGE PARKER

Chief Judge Parker voted for reversal because of the erroneous admission of Barnet’s statement to Dr. Douglass about the source of the Kutnow powder. He dissented from the majority’s conclusion that had the People established from competent sources that Barnet received his Kutnow Powder through the mail, evidence of the Barnet killing would nevertheless have been inadmissible in the prosecution for the killing of Mrs. Adams.<sup>384</sup> Judge Parker stated the general bar against uncharged misconduct in much the same way that Judge Werner had done. He took issue, however, with Judge Werner’s use of a list of a very limited number of exceptions to the general rule that did not precisely fit the Barnet homicide evidence. Judge



Parker cited most of the same cases that Judge Werner had cited in support of his version of the exceptions to rule. He said:

. . . each one of them presents a case in which proof of the facts tending to show the commission of another crime by the defendant on trial was admitted for the purpose of aiding in establishing the fact that he committed the offense charged. . . it is said in effect that this case is not within the rule as interpreted by those cases. In other words, that the facts of this case do not bring it within the exceptions--so called--created by those cases. The argument proceeds upon the assumption that the exceptions are not to be added to; but that as large a number had been created when this trial began as should be tolerated, instead of treating these decisions as establishing the principle that the facts of another crime may be proved by the People whenever their tendency is to prove the commission of the crime charged.<sup>385</sup>

While Judge Parker agreed that the well-recognized exceptions to the uncharged misconduct rule were a good starting point, he acknowledged that other circumstances might make such uncharged misconduct relevant and admissible. Parker also argued that the Barnett evidence established the identity of the perpetrator of the Adams killing. First, Mrs. Adams and Barnett were victims of a very rare poison compound. Second, the identity of Molineux as the author of the “Barnet” letters by expert evidence identified him as the perpetrator of the Barnett killing . Third, both intended victims belonged to the same athletic club. Fourth, both victims had offended Molineux. Fifth, the perpetrator of both homicides had obtained patent medicine

samples using a false name via a private letter box.<sup>386</sup> Judge Parker did not mention the amount of proof that the People had to amass in order to admit the evidence of the Barnet killing in the prosecution for Mrs. Adams' murder. The implication from his analysis of the points of similarity between the two homicides indicates that he would have required a low degree of proof that Molineux committed the Barnet homicide to permit the use of the evidence of that killing in the Adams case.<sup>387</sup>

The evidence in the Barnet case, therefore, tends to identify Molineux as the sender of the poison package in the Cornish case, thus supporting the evidence of the lay and expert witnesses who testified that the address on the poison package sent to Cornish was in the handwriting of Molineux.<sup>388</sup>

Judge Parker also disagreed that proof that Molineux killed Barnet had to be based on proof of all the elements of the offense. Judge Gray's brief concurring opinion agreed with that of Judge Parker.<sup>389</sup>

## I. A SYNOPSIS OF THE RULE

Judge Werner's explanation of the rule barring proof of the bad character of the accused became the traditional one employed by the courts. First, Werner characterized the rule as a version of the collateral fact rule: acts collateral to those charged in the indictment are not admissible because the acts were not relevant. Second, he characterized U.S. criminal prosecutions as founded on a presumption of innocence and on the hallowed rule that the

accused must be found guilty beyond a reasonable doubt. Third, he admitted that the character traits or predisposition of the accused to commit similar criminal acts was relevant to deciding the issue of guilt or innocence, but one foreign to the genius of the Anglo-Saxon peoples. None of these propositions compels the exclusion of evidence proving the defendant had a predispositions to act in a manner consistent with the crime charged. The collateral fact objection is an issue of relevance and notice: the notice clause of the 6<sup>th</sup> Amendment provided that the accused was entitled to pre-trial notice of the charges against the accused in order to make a meaningful defense against charges of misconduct that were brought up at trial. Thus, in modern times, any act that would enhance the sentencing penalty for a crime charged must be included in the indictment.<sup>390</sup> Absence of notice can be dealt with by requiring the prosecution to give notice of intent to prove uncharged misconduct prior to trial. Although the criminal standard of burden of proof by beyond a reasonable doubt is constitutionally protected,<sup>391</sup> evidence showing the accused was predisposed to commit the crime charged by a pattern of prior conduct does not directly nor indirectly attack the presumption of innocence nor lessen the requirement of proof of the elements of the offense beyond a reasonable doubt. The presumption of innocence sets up the requirement to disprove innocence beyond a reasonable doubt. Predisposition evidence like any other logically relevant source of proof, is admissible to rebut the presumption of innocence.

Judge Werner's telling admission that proof of a pattern of similar conduct would be helpful to the jury and therefore relevant discloses the implicit reason for excluding evidence of patterns of misconduct: the filtration function of the rules of evidence. Ultimately a jury would decide on

the accused's guilt or innocence and the court feared that the jury would misuse evidence of other acts of uncharged misconduct. None of the opinions stated the kind of misuse that the court feared.

Werner asserted, after reviewing the evidence of the Barnet killing, that the five known exceptions to the general rule against admission of other criminal acts of the accused had been exhaustively examined. Since none of the exceptions fit the evidence showing Molineux poisoned Barnet, then the evidence of the Barnet killing was inadmissible in the prosecution for the murder of Mrs. Adams.<sup>392</sup> Judge Parker disagreed, treating the traditional exceptions to the bar against uncharged misconduct evidence as examples of the occasions when the courts recognize the relevance of uncharged misconduct that proves some issue in the case as well as the bad character of the accused. Parker's view comes closer to that of Fed. R. Evid. 404(b) than does Werner's view. It is inclusive, rather than exclusive.

All the opinions agree that uncharged misconduct of the accused is not generally admissible in a criminal prosecution. All agree that there are times when instances of uncharged misconduct evidence is relevant and admissible against the accused. The common thread between Werner's view of a limited number of exceptions for uncharged misconduct and Parker's more generous inclusionary view is relevance to some issue other than the bad character of the accused. The basis for allowing proof of specific acts of uncharged misconduct during trial, then, is the existence of some issue other than bad character in the case. Were the jurists who wrote these opinions alive, they might agree that a tight formulation of their synthesis would be something

on these lines:

Evidence of the predisposition of the accused to commit crimes of the type charged in the indictment is logically relevant to proof of the guilt of the accused. However, due to policy considerations such as the constitutional presumption of innocence, such evidence is not ordinarily admissible. The rule is suspended when a material intermediate issue in the case exists that may be proved by proof of uncharged misconduct, so that the object of proof is not the bad character of the accused. Historical examples of this suspension include proof of motive to commit a crime, proof of criminal intent when general mens rea is insufficient to establish intent, (which includes such issues as proof of specific intent where the elements of the crime require such proof, proof of guilty knowledge, where the accused cannot have mens rea unless the accused knows some material fact; proof of absence of accident or mistake, which negatives intent); proof of a plan or design of criminal activity; proof of overt acts of conspirators not charged in the indictment made in furtherance of the conspiracy; and proof of the identity of the accused.

Is there evidence that the result in Molineux reflected either public opinion on the original guilty verdict or pressure exerted by insiders on the court? Judge Werner's papers are held by the University of Rochester. He left no notes or correspondence relating to the Molineux case.<sup>393</sup> Judge Cullen was the only member of the court who had any relationship with the Molineux family. He did not take part in the case. Chief Judge Parker left no papers relating to the Molineux decision according to his biographer.

## VI. THE SECOND TRIAL

### A. THE PROSECUTORS AND THE DEFENSE TEAM FOR THE SECOND TRIAL

The cast of characters changed dramatically for the second trial. Bartow Weeks remained as defense co-counsel, but the lead counsel was none other than former Republican Governor Frank S. Black, assisted by his partner William Olcot.<sup>394</sup> Osborne was held over to try the second trial when more senior Assistant District Attorneys refused to take the case.

Recorder Goff did not preside at the second trial because the trial was transferred to the Supreme Court. John A. Lambert, a Republican Justice from Upstate New York, was called in as judge.<sup>395</sup> The political balance tilted in favor of General Molineux and his son. Recorder Goff's legendary animosity towards defense counsel was no longer an issue in the case.

The second trial started on October 10, 1902. Six jurors were picked on the first day, four more on the second day. Jury selection was interrupted by Osborne's motion in limine to get a ruling on the admissibility of the H.C. Barnet letters. Osborne argued that the Barnet letters were still admissible as exemplars for his handwriting experts, and intended to refer to them in his opening statement. Governor Black opposed admission on any basis. He argued that the Court of Appeals decision precluded any reference to H. C. Barnet on retrial. Justice Lambert quickly reigned in both counsel and decided that he would not rule on the admissibility of the Barnet letters until they were offered at trial.<sup>396</sup>

Osborne's opening statement was restrained, unlike the florid and argumentative opening statement in the 1899 trial. Justice Lambert stopped Osborne from suggesting in his opening statement that the defense counsel had the duty to produce Mae Melando and Robert Zeller as witnesses before Governor Black could object. Lambert cut off the District Attorney's allusion to Harry Cornish's innocent administration of the poison Bromo Selzter to Katharine Adams. The Judge also stopped Osborne from suggesting or implying conclusions during his opening statement, a perfectly correct ruling that should have been made during the first trial's opening statement<sup>397</sup>

#### B. THE PROSECUTION'S CASE IN CHIEF

The People's case in chief opened, as it had in the first trial, with Dr. Hitchcock's testimony. His evidence in the second trial was much the same as his testimony in 1899.<sup>398</sup> On the second day of trial, Osborne put on 13 witnesses, largely due to the lack of defense objections that had marked the 1899 trial. The testimony of Mss Elsie Grey, the clerk at the Kutnow company, was also read into evidence since she had died after the end of the first trial. Harry Cornish, as expected, denied renting a private letter box in 1898, and denied writing all the letters signed "H. Cornish." Governor Black's cross-examination of Cornish uncovered Cornish's divorce on grounds of adultery committed with "Mrs. Small," that was excluded during the first trial. Cornish also contradicted his direct testimony by reluctantly conceding that he had rented a letter box jointly with Mrs. Adams. Although these points may have affected the jury's appraisal of

Cornish's credibility, his evidence was consistent with the first trial. The other witnesses who replicated their earlier testimony included the two detectives Cleary and Herlihy, and John Yocum, Cornish's chemist friend who saw him within minutes of the Adams poisoning. Their evidence was much as before, except that any references to Henry C. Barnet were rigorously excluded.<sup>399</sup>

On October 22, Osborne put on Rudy Heiles, star witness for the prosecution in the 1899 trial. Heiles replayed his earlier testimony in which he repeated Molineux' admission that Cornish and Harpster were "dirty, low, dirty villains."<sup>400</sup> Heiles also told the jury about his conversation with Molineux when Molineux revealed that Cornish had accused him of keeping a disorderly house in Newark. Then Osborne's case started to fall apart. Doctor Potter testified again and gave his opinion that Mrs. Adams had been poisoned by mercury. Governor Black's cross-examination brought out the fact that Potter had lost his notes on the Adams case and was not able to testify to important details brought out in the first trial. He also admitted receiving \$1,960 from the State of New York as an expert witness in the case. Letter box company owner Joseph Koch stuck to his original story that Molineux had talked to him about renting a letter box, but had never done so. Koch obliged defense counsel by identifying Harry Cornish as the man who actually rented the letter box and received free samples of Von Mohl's remedy for impotence.<sup>401</sup>

On October 23, Osborne presented the transcript of Molineux' testimony before the Coroner in February, 1899. Justice Lambert kept out any reference to H. C. Barnet in the transcript testimony. John Adams took the stand followed the transcript. Adams once again repeated the



story about his ability to identify Molineux as the writer of the address on Cornish's poisoned package. Adams authenticated Molineux' letter on blue stationery with a three feathered crest requesting a free sample of patent medicine.<sup>402</sup>

Governor Black conceded that Mrs. Adams had died by poisoning by cyanide of mercury, which had the effect of wiping out the evocative value of the testimony of Prof. Witthaus on the cause of her death.<sup>403</sup> After Whitthaus finished his expert evidence, Osborne called Nicholas Heckmann with the intent to have Heckmann testify that Molineux had hired a letter box from him under the name of "H. C. Barnet." Justice Lambert sustained defense objections to his testimony as irrelevant and precluded by the Court of Appeals ruling.<sup>404</sup>

On Friday, the 24<sup>th</sup>, Osborne attempted to wrestle an identification of the accused out of Miss Miller, the former stenographer at Hartdegen's Jewwelry Store in Newark. She stuck to her original testimony and again insisted that the man with the red beard who bought the toothpick holder from her was not Molineux. On cross-examination, Governor Black asked Molineux to stand up: she said that Molineux was not the man who bought the silver from her.<sup>405</sup> Osborne produced Eugene Ehrhardt, who said he wrapped the tooth pick holder for the purchaser at Hartdegen's on the 21<sup>st</sup> of December. He estimated that he wrapped the goods around 2:00 P.M.<sup>406</sup>

The trial resumed on October 28 with District Attorney Jerome's accusation that Bartow Weeks had used undue influence via the Newark Police Department to keep Archibald Arnold, Mamie Melando, Robert Zeller and Detective Farrell from obeying the request of the District

Attorney to voluntarily attend the Molineux trial and give their evidence.<sup>407</sup>

Osborne concluded the prosecution's case in chief on October 29. He presented two handwriting experts who gave their opinion that Roland Molineux had written the address on the poison package sent to Cornish. He moved the court to permit the testimony of Detective Farrell and Mamie Melando from the 1899 trial to be read into the record as former testimony of unavailable witnesses, but Justice Lambert denied the motion.<sup>408</sup> The People rested. On 30 October, Governor Black made the expected motion for directed verdict of acquittal, which Justice Lambert refused to grant.<sup>409</sup>

### C. THE DEFENSE CASE

On Friday, November 1, 1902, Roland Molineux took the oath and began to give his version of the story. Molineux kept his smile on throughout five hours of often painful direct and cross-examination, politely correcting District Attorney Osborne on dates and times when Osborne's questions were not on point. The *New York Times* reporter covering the trial described Molineux demeanor in detail:

The extreme affability of the defendant was no less conspicuous than upon the occasion of the Coroner's inquest. . . . He was always courteous. When asked as to unpleasant facts and circumstances. . . . he always hesitated about answering. He acted as though it were revolting to his sensibilities to repeat such incidents.

Molineux's smile was a feature of his testimony. . . It was not a smile of amusement, it was a smile of courtesy. . . He seemed to smile at just the right places. . . there was often a sneer in his voice.<sup>410</sup>

Molineux told the jury that his father had sent him to the far West when he was 15 because he had been named a co-respondent in a divorce suit.<sup>411</sup> This was a solid piece of anticipatory impeachment by Governor Black. Following that admission, Molineux plunged into an accurate description of his quarrels with Harry Cornish over the 1897 Amateur Circus apparatus and the misbehavior of some of the athletic members of the club. Molineux then explained to the jury that he denounced Cornish's letter to Bernie Wefers attacking Bartow Weeks to Mr. Ballentine, the club owner, but got no satisfaction for Cornish's misbehavior. Molineux described his meeting with Cornish on the stairs of the Knickerbocker and his resignation. Again, he professed to the jury that he had gotten over his animosity towards Cornish long before his marriage to Blanche Chesebrough.<sup>412</sup>

Molineux denied buying the silver toothpick holder at Hartdegen's Jewelry Store. He denied ever going to Koch's private letter service on Broadway. Then he told the jury that he was mistaken about his whereabouts on 23 December, the day that the poison package had been mailed to Cornish from the General Post Office: he had spent the morning at Newark but had gone into the City to spend the afternoon with Prof. Vulte and Prof. Chandler at Columbia College looking over the campus. Molineux denied mailing the poison package to Cornish and denied writing the address on the poison package. He recalled having only one sheet of blue

stationery with three intertwined feathers embossed on it. He denied killing Mrs. Adams and having any knowledge of the facts surrounding her death.<sup>413</sup>

Osborne began his cross-examination with a plunge into Molineux's role as co-respondent in the divorce suit of Kindberg v. Kindberg and claimed that Molineux had colluded with Kindberg to obtain a divorce on grounds of the adultery of Mrs. Kindberg with Molineux. Osborne then tried to get Molineux to explain how cyanide of mercury could be made by a chemist. Molineux used the questions to give a lecture in chemistry to the jury on the manufacturing process for dry colors. Osborne then moved to the subject of the missing New Jersey witnesses, asking Molineux about the depth of his relationship with Zeller and Mamie Melando. He then shifted to Molineux's relationship with Barnet, but stopped short of plunging into the Barnet poisoning case.<sup>414</sup>

Osborne did impeach Molineux on the issue of the blue paper: he confronted Molineux with his statement during the Coroner's Inquest denying that he had ever owned any such blue paper, and his direct examination response that he had at least one sheet of the blue paper. Then he moved to the subject of the missing New Jersey witnesses. Osborne used Melando's and Farrell's testimony from the former trial to cross-examine Molineux, putting some of their evidence before the jury by way of his questions, over defense objections.<sup>415</sup>

Osborne tried to get Molineux to admit that his own handwriting samples were remarkably similar to the handwriting on some of the Cornish and Barnet exhibits. Molineux refused to take

the bait. Molineux admitted he had an account at Plum & Co. and that he had purchased stationery there. Picking up the diagnosis blank that had been excluded by Justice Lambert, Osborne took the questions from the blank and put them to Molineux. He then handed the diagnosis blank to Molineux and asked him if he had written it. Justice Lambert sustained Governor Black's objection to admitting the blank in evidence.<sup>416</sup> Osborne pled exhaustion after five hours of cross-examination and Molineux was allowed to stand down from the witness box.<sup>417</sup>

The defense team then summoned its own team of hand-writing experts to refute the prosecution's claim that Molineux had written the address on the Cornish poison package. The three experts all concluded that Molineux had not written the address on the Cornish poison package. Each explained away the conclusions of the prosecution's experts.<sup>418</sup> The District Attorney took the morning of November 6 to cross-examine David Carvalho, the star of the defense expert team. Osborne tried to get the diagnosis blank before the jury while cross-examining Carvalho. His insidious technique involved tendering the diagnosis blank to Carvalho and asking him if it was written by the same hand that had written the "Cornish" letters. Justice Lambert again sustained defense objections to admission of the blank.<sup>419</sup>

Molineux' defense team came up with a surprise witness, Mrs. Anna Stevenson of Brooklyn, who gave her evidence on November 6. She happened to be in downtown Manhattan on the afternoon of December 23, 1898 near the General Post Office when a man carrying a package brushed by her on a street corner. He appeared to be very agitated. While the middle-

aged housewife looked on, he pulled a package out of his pocket addressed to “Harry Cornish” then vanished into the crowd. Governor Black asked Molineux to stand up: Mrs. Stevenson told the jury that Molineux was not the man she saw that day. Osborne asked Harry Cornish to stand up-- a mistake. Mrs. Stevenson told the jury that “He looks very much like the man.”<sup>420</sup> Mrs. Stevenson told Osborne that she had not come forward during the first trial because she had an attack of nervous prostration during the trial. She admitted she was ill from the same condition several months before she encountered the man with the package.<sup>421</sup> The defense team then called pharmacist Louis Jacobson who had a drug store across the street from the Adelaide apartments. He testified that Harry Cornish and Mrs. Rodgers were frequent customers, and he recalled one time when one of them drank a glass of Bromo Seltzer.<sup>422</sup> Martin Huff, a traveling salesman, took the stand. He had been in Hartdegen’s Jewelry Store in Newark just before Christmas 1898, when a man pushed his way past him to get service. Huff stated that the man had asked for a bottle holder for a Bromo Seltzer bottle to match the articles on a lady’s dresser. Huff told the jury that Molineux was not the man who had tried to get a bottle holder that day.<sup>423</sup>

Professor Herman Vulte of Columbia College was the next defense witness. He testified on November 7. Vulte told the jury that he had invited Molineux to visit him at the Columbia Campus on Morningside Heights on the afternoon of 23 December 1898, which corroborated Molineux’ testimony. Professor Vulte knew that they met on 23 December because they met on the last school day before the Christmas holiday. Molineux stayed until around 4:30 that afternoon.<sup>424</sup> Henry C. Terry testified that prosecution witness Joseph Koch had told him during the Coroner’s inquest in February, 1899, that he had never seen Molineux before the inquest.<sup>425</sup>

Several law clerks testified that they were able to buy cyanide of mercury from local drug stores readily, contradicting the prosecution's contention that the chemical was difficult to buy.<sup>426</sup> The defense rested after a law clerk testified to the tabulated number of alleged similarities between Molineux' genuine handwriting samples and the poison package and other disputed writings.

### C. THE PROSECUTION'S REBUTTAL

Assistant District Attorney Osborne produced a number of rebuttal witnesses. First, he put on Detective Farrell who repeated his testimony in the 1899 trial that he had seen Molineux on the street in Newark on December 21, walking away from the direction of Hartdegen's. Then Osborne put on a witness who testified that Ass't District Attorney McIntyre had advised Mrs. Rodgers to rent a private letter box in 1894. The rest of the rebuttal was an attempt to show the jury that Harry Cornish could not have sent the poison package to himself. John Yocum swore that he and Cornish were in the offices of James Sullivan on Park Place until 4:20 P.M. on the 23<sup>rd</sup>. Cornish was recalled to tell the jury that he went with Yocum to Sullivan's office as described by Yocum. Cornish denied ever owning a brown overcoat and denied buying Bromo Selzter from Jacobson's Drug Store. Osborne's last witness was the police officer husband of Mrs. Stevenson, who stated he put no stock in his wife's story about the man with the package. With that last witness, the prosecution rested and both sides prepared for final argument on Monday, November 10, 1902, the fourth anniversary of Henry C. Barnett's death.

According to contemporary accounts, Governor Black argued that Harry Cornish, not Molineux, was the man behind the poison package scheme to get rid of Mrs. Adams. Governor

Black suggested that Cornish had a motive to eliminate his cousin in order to have his way with her daughter. Osborne countered with an elegant account of Cornish's lack of motive to murder his cousin and his alibi on December 23.<sup>427</sup> The exhausted prosecutor concluded the final argument the next morning, and Justice Lambert charged the jury on the morning of November 11.

#### D. THE VERDICT

The jury deliberated for 13 minutes when they returned with a unanimous verdict of "not guilty." Although Justice Lambert had warned the spectators against making a demonstration when the verdict was received, the New York Times described the scene as resembling "a football rush" as the spectators congratulated General Molineux and his son, and their hard-working lawyers.<sup>428</sup> Although Osborne had lost his case, the jurors filed by to congratulate him on a stellar presentation of the facts. He gathered up his exhibits and left the court room to the rejoicing crowd of Molineux supporters.<sup>429</sup>

The twelve jurors talked freely about their decision to the press. Foreman Edward Young revealed that the jurors immediately agreed on an all-or-nothing vote for first degree murder, eliminating any of the lesser included offenses that Justice Lambert had given them in the charge. He took one preliminary straw vote which turned out to be unanimously "not guilty." Juror J. Noah Slee said that eleven out of twelve would have voted to acquit Molineux at the end of the prosecution's case without hearing Molineux' alibi. The twelfth man had not heard the



question, and when he understood it, he agreed with the others. Juror John J. Redsner said that the “prosecution had failed to connect the defendant with the cyanide of mercury or with the purchase of the silver holder.” Juror Frank Harrison Gould admitted that he had concluded “it would have been a terrible thing to condemn that young man to death” two or three days into the trial and therefore he planned to vote for acquittal.<sup>430</sup>

#### E. AFTERMATH: THE FALL OUT FROM THE TRIALS

The General and his son went home to 117 Fort Green Place, Brooklyn, in the family carriage, receiving cheers from bystanders at the Criminal Court Building and on street corners in Brooklyn. One very important person had been absent during the entire trial; Blanche Molineux. Just before the trial commenced, General Molineux had paid for Blanche’s rooms at the Murray Hill Hotel. She stayed in her apartment during the trial and did not spend a minute in the court room with her husband during the trial. Governor Black sent his partner Olcott, to the Murray Hill to pick up Blanche Molineux and take her to Brooklyn to the Molineux family residence. Olcott had the presence of mind to buy a bouquet of American Beauty roses for Blanche, who would in turn deliver them to her husband in Brooklyn at their reunion.<sup>431</sup> What Olcott did not know was that Blanche Molineux had come to a decision to leave her husband, no matter what the outcome of the case would be.<sup>432</sup>

When Olcott’s carriage pulled up outside the Molineux mansion, Blanche stepped out, completely forgetting her bouquet of flowers, and went in, dodging the attempts of reporters to

get her reaction to the verdict. Instead of greeting her husband, she went upstairs to the room she had occupied for years while a virtual prisoner of her in-laws. She wrote a letter explaining her decision to leave Molineux and obtain a South Dakota “quickie” divorce, packed her personal effects and went to bed while her husband greeted well-wishers in the main parlor and read over cards and telegrams congratulating him.<sup>433</sup> The next morning, Blanche Molineux called a cab and left her in-laws mansion for the Murray Hill Hotel.<sup>434</sup>

Meanwhile, the editorial pages of the *New York Times* were flooded with letters of support for Molineux. L. B. Pritchard condemned the ex parte grand jury system for wrongfully indicting Molineux a second time for a crime he did not commit. “Grand Army” denied it was the strength of the Grand Army of the Republic’s political influence that led to Molineux’ acquittal. The writer noted that the GAR could use its influence only to affect the Court of Appeals’ decision, the trial judge and the jury, but detected no evidence of undue influence on the part of the GAR.<sup>435</sup>

Blanche Molineux left New York for South Dakota on the 15<sup>th</sup>. General Molineux had continued to pay her expenses after she moved out. He released a public statement to the press concerning his daughter-in-law on the 16<sup>th</sup>:

“She left no word,” he said, “ and that is the last we have seen or heard of her. . . .” As to the report that Mrs. Roland Molineux has gone to South Dakota for the purpose of getting a divorce, the General said: “I know that the idea of a divorce did not come from any

member of my family or household. I expect to obtain more particulars tomorrow, which I may or may not communicate to the public.”<sup>436</sup>

Blanche Molineux’ filed a South Dakota divorce petition within a few weeks, then married her lawyer, Wallace D. Scott.<sup>437</sup> Forty years later Blanche Wallace wrote an incomplete memoir that formed the basis for an outstanding true crime story written by Jane Pejsa in 1983. Roland Molineux went on to write several short stories and a play based on his experiences in the death house at Sing Sing. In 1913 he married Margaret Connell who had helped him with his two plays. She survived him as did their daughter Margaret.<sup>438</sup> Molineux began to show symptoms of syphilis dementia within a few years of his second marriage, and he was committed to a hospital for the insane in 1915. Roland Molineux, died in the Kings Park, Long Island, Insane Asylum, in 1917.<sup>439</sup>

## VII. MOLYNEUX’ INFLUENCE ON THE LAW OF UNCHARGED MISCONDUCT

### A. UNCHARGED CRIMINAL MISCONDUCT<sup>440</sup>

Although the term “uncharged misconduct” would not be coined until the 1970's to describe the kind of evidence that was made admissible by *Molineux*, the case changed the perspective of the courts on admissibility of other criminal acts of the accused. Nearly all the commentators<sup>441</sup> except Prof. Wigmore,<sup>442</sup> accepted Judge Werner’s formation of the rule as defining its limits: henceforth the rule would be formulated as a general prohibition against proof of other bad acts

of the accused unless the other bad act fit one of Judge Werner's pigeon-holes. There was much room for debate about adding another exception to the general rule. Some courts recognized an exception for evidence of flight from authorities as consciousness of guilt.<sup>443</sup> Other courts added a special exception to permit proof of other sexual offenses by persons charged with sex offenses.<sup>444</sup> The courts were divided on the quantum of proof necessary to bring an act of alleged uncharged misconduct before the jury. Most states held that the trial judge had to find that uncharged misconduct was established by clear and convincing evidence before the jury could hear it,<sup>445</sup> while Texas insisted that uncharged misconduct had to be proved beyond a reasonable doubt.<sup>446</sup>

#### B. THE UNIFORM LAW COMMISSION & MOLINEUX

The American Law Institute accepted a challenge to write an evidence code in the waning days of the Great Depression. Edmund M. Morgan and John M. Maguire of Harvard University Law School were the official reporters for the group of very distinguished men who were responsible for the code. Professor Wigmore was a special consultant to the group.<sup>447</sup>

Chapter Five of the Evidence Code related to the admissibility of character evidence. Rule 411 was the group's first formulation of the uncharged misconduct rule.

Evidence that a person committed a crime or civil wrong on a specified occasion is inadmissible as tending to prove that he committed a crime or civil wrong on another

occasion if, but only if, the evidence is relevant solely as tending to prove his disposition to commit such a crime or civil wrong or to commit crimes or civil wrongs generally.<sup>448</sup>

This draft rule was a resurrection of Judge Alton Parker's rejected formula in *People v. Molineux*. The commentary, prepared by Maguire, contradicted the 40 year history of the rule as expressed and used by nearly all U.S. jurisdictions. Maguire based his new evidence rule on two Harvard Law Review articles by Prof. Julius Stone, purporting to trace the history of the rule from English precedent to contemporary U.S. practice.<sup>449</sup> Stone had criticized Judge Werner's opinion and advocated rejection of his opinion as a "spurious rule" in favor of Judge Parker's opinion that to Stone, embodied the correct rule that uncharged misconduct evidence could be admitted to prove any issue other than the accused's bad character.<sup>450</sup> Morgan accepted Stone's view and composed the rule to reflect the inclusionary view point.

The 1942 final edition of the Model Code of Evidence kept the same basic inclusionary formulation of the uncharged misconduct rule. The final edition rule was renumbered 311 and referred back to Rule 306, the general rule on admissibility of character evidence. The commentary was unchanged except for the reference to Rule 306.<sup>451</sup>

Professor Morgan's introductory comments to the 1942 edition of the Model Code reflect the attempt to revise the uncharged misconduct rule to make it an inclusionary rather than exclusionary rule had his blessings.<sup>452</sup>

### C. UNIFORM RULE 55

The Model Code of Evidence was never adopted by any jurisdiction. After World War II, the American Law Institute passed the Model Code of Evidence to the Committee on Scope and Programs of the National Conference of Commissioners on Uniform State Laws as part of the Committee's general inquiry into the law of evidence. In 1953, the National Conference of Commissioners on Uniform State Laws issued a somewhat revised edition of the Model Code as the Uniform Rules of Evidence. The 1953 Uniform Rules were adopted by Kansas and were the basis for the 1965 California Evidence Code.<sup>453</sup> Model Rule 411 became Uniform Rule 55.

Uniform Rule 55 was essentially the same as Model Rule 411.<sup>454</sup> It followed the inclusionary theory that uncharged misconduct evidence is admissible unless all that it tends to prove is the bad character of the accused. This formula encountered some difficulty in the 1960's when California was considering adoption of the Uniform Rules as a California Evidence Code. The California Advisory Committee had rejected the general approach to character evidence taken by the 1942 Model Rules and the 1953 Uniform Rules that favored admissibility of character evidence. Section 2053 of the California Code of Civil Procedure and relevant case law held that character evidence was inadmissible in civil actions to prove action in conformity therewith.<sup>455</sup> The 1965 California Evidence Code had a single section that dealt with admissibility of character evidence in criminal prosecutions and of instances of uncharged misconduct:

#### **§ 1101. Evidence of character to prove conduct**

(a) Except as provided in this section and in Sections 1102, 1103, 1108, and 1109, evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion.

(b) Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident) other than his or her disposition to commit such an act.<sup>456</sup>

The Advisory Committee did not address the issue of proof of uncharged misconduct evidence in its commentary. The Committee ruled out admissibility of character evidence to prove action in conformity therewith in civil cases because it thought that character evidence was a poor sort of circumstantial evidence of a person's actions of admitted low probative value. As a result, Uniform Rule 55 was scheduled for overhaul along with all other character evidence rules.

#### D. RULE 404(B): AN ATTEMPT TO BOTTLE MOLINEUX

The story of the torturous path that the Federal Rules of Evidence followed from 1969 to 1975 is well known to most readers. Rule 404 was one of the least controversial rules. Its legislative history from 1969 to 1975 shows that the rule went through only two evolutions. The original draft of Rule 404 contained two parts. Part (a) related to admissibility of character evidence in criminal prosecutions. It was not based on Model Rule 406, although it addressed

some of the same topics.<sup>457</sup> Part (b) addressed admissibility of other crimes or wrongs with no limit to criminal prosecutions. It was not based on the inclusionary formula of Model Rule 411.<sup>458</sup> Both sections reflected the changes made by the California Evidence Code to the 1953 Uniform Rules.

In 1972, the Supreme Court sent its proposed Rules of Evidence to Congress for study. The 1972 draft contained a slightly different version of Rule 404(b):

(b) Other crimes, wrongs, or acts.-- Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. This subdivision does not exclude the evidence when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.<sup>459</sup>

The Advisory Committee's commentary on this version of the uncharged misconduct rule is much less favorable to admissibility of uncharged misconduct. It acknowledges that such evidence may be admissible to prove some other issue than the bad character of an actor.<sup>460</sup>

Rule 404(b) was not the focus of public commentary during the lengthy process of public hearings before the House Judiciary Committee and the Senate Judiciary Committee. Professor Edward Cleary, the reporter for the Advisory Committee mentioned the rule briefly in his 1973 extended written remarks that were introduced before the Special Subcommittee of the House



Judiciary Committee on Reform of Criminal Laws.<sup>461</sup> Alvin K. Hellersatein of the Association of the Bar of the City of New York complained about the change from the March 1971 draft to the 1973 draft on 8 February 1973.<sup>462</sup> On 22 February, Judge Henry J. Friendly, Chief Judge of the U.S. Court of Appeals for the 2<sup>nd</sup> Circuit had a prescient comment on the proposed rule:

Rule 404(b)--Character evidence. Does this adopt the “federal rule” allowing evidence of other crimes except when offered only to show the defendant is a bad man, or the rule requiring that these crimes show some particular trait relevant to the charge? The rule seems to walk both sides of the street. It will provide a bountiful source of appeals and possible reversals on a subject where the federal law is now reasonably clear.<sup>463</sup>

Judge Friendly implied that the inclusionary formula of the uncharged misconduct rule was the then-current federal rule. He doubted that Rule 404(b) restated that rule. The change that bothered Judge Friendly showed up on the Committee Print issued 28 June, 1973.<sup>464</sup> William S. Cohen also preferred the March, 1971, formulation, although he thought the changed wording was unimportant.<sup>465</sup> When the Federal Rules of Evidence were adopted by Congress, the 1971 version of the text of Rule 404(b) was adopted as the rule.

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.<sup>466</sup>

The official commentary and the notes from the House and Senate Judiciary Committees do little to explain the potential impact of the rule.<sup>467</sup>

Since 1975, Rule 404(b) has been the most contested Federal Rule of Evidence. It has been cited in 5,603 Federal trial and appellate decisions since adoption.<sup>468</sup> No other rule comes close to this rule as a breeder of issues for appeals. Part of the problem is exacerbated by the right of a person convicted of a federal felony to take an appeal and the necessity that the practicing bar faces in finding some plausible grounds for an appeal. If the purpose of Rule 404(b) is to clarify and simplify the application of the uncharged misconduct rule, it has failed. If the purpose of the rule was to raise the consciousness of the criminal defense bar to the substantial negative effect of admitting uncharged misconduct evidence to prove an intermediate issue other than guilt, the rule appears to be a howling success.

## VIII. CONCLUSION

Judge Friendly was the only commentator who suggested that there were any major problems with Rule 404(b). The problems with the rule on uncharged misconduct are not problems that can be solved by tweaking the current formula to improve its efficiency. The problem is systemic and structural: back in 1901, Judge Werner said that the uncharged misconduct rule was an exception to the general rule that forbade proof of the bad character of the defendant in a criminal prosecution when the defendant had not made an issue out of his or her good character. The Molineux opinion started the bench and bar off on a pathway that was

bound to end in confusion and endless complications. Judge Werner tried to confine the potential damage to a simple check-list of specific exceptions to the character evidence rule substantiated by case law that permitted uncharged misconduct to be admitted to prove an intermediate issue, accepting the innuendo of the bad character of the accused as a necessary consequence of the obligation to prove malice, intent, plan or design, or similar exceptions. This attempt was bound to fail because the necessity to prove some other issue not included in Werner's list challenged the ingenuity of prosecutors and flexibility of judges. The common-law growth of the number of recognized exceptions to the uncharged misconduct rule from 1901 to 1975 shows that the rule was well on its way to being the counterpart of the hearsay rule. Like the hearsay rule, the first clause of the rule was a categorical denial of admissibility followed an ever increasing number of exceptions deemed necessary to prove a case, and not terribly prejudicial to the rights of the accused to a fair trial. No one seems to have thought that this was absurd. No one seems to think that 26 years' experience with the Federal Rules of Evidence that froze the uncharged misconduct rule into a form that invited testing its limits, a rule that was cited in more than 5,000 cases, was absurd.

One of the definitions of insanity is to repeatedly try the same actions over and over again with the expectation that the results will be different the next time. Rule 404(b) and its companion character evidence rules are unworkable, absurd and do not reflect the actual practice in Federal criminal prosecutions. Only lawyers would tolerate such a mess. Of course, the best defenders of the status quo will quickly point out that competent trial lawyers and competent judges thoroughly understand the present rules, and any attempt to revise the character evidence

rules would be fraught with unanticipated concerns about prejudice, violation of the presumption of innocence and burden of proof rules, etc.

The plain truth is that bad character evidence in the form of prior bad acts of the accused are generally admissible, unless the probative value of the prior bad acts of the accused is substantially outweighed by “unfair prejudice” and the usual issues of judicial economy. Once prior bad acts of the accused are introduced in evidence and handed over to the jury to use, the realistic prosecutor, defense counsel and trial judge know that the jury will use that bad character evidence to reason that the accused is a person of bad character or predisposition, and ought to be convicted of the present offense because of the prior history of the accused. The usual limiting instruction certainly makes the cold-type record look better to a reviewing court, but the efficacy of such an instruction has been questioned by professors and judges for decades. It is another example of repeating the same act and expecting different results.

It’s time to admit that in the real world of the criminal prosecutions, the prosecutor will be able to prove relevant specific instances of the accused’s uncharged misconduct by employing the “magic words” vocabulary of Rule 404(b) that frame some intermediate issue in the case, unless the trial judge believes that the probative value of other uncharged misconduct is substantially outweighed by prejudice to the accused, waste of time or confusion of the jury. By dispensing with the magic words approach, the rule becomes honest rather than dishonest, sane rather than perpetuating insanity. Evidence that shows the accused committed other uncharged misconduct is normally admissible unless the evidence is irrelevant, or in the discretion of the

trial judge, the uncharged misconduct evidence has low probative value, high prejudice, or would tend to confuse the jury waste time or confuse the issues in the case. That is precisely the kind of synthetic rule that Judge Friendly believed to be the current federal standard in 1973.

## NOTES

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1. Fed. R. Evid. 404(a); Unif. R. Evid. 404(a).
2. *Id.*
3. *Id.*
4. Fed. R. Evid. 404(b); Unif. R. Evid. 404(b).
5. Fed. R. Evid. 406; Unif. R. Evid. 406.
6. Fed. R. Evid. 404(a)(3), 608; Unif. R. Evid. 404(a)(3), 608.
7. Rule 404(b) Fed. R. Evid.; and R. 404(b) Unif. R. Evid. provide that specific instances of conduct may not be admitted to prove that the defendant acted in conformity therewith, but the same evidence may be admissible to prove motive, intent, knowledge, plan or design, absence of mistake, or identity of the perpetrator.
8. See, e.g., Imwinkelried, Mueller & Kirpatrick, Wigmore (Leonard rev. 2001)
9. Rule 413, 414 and 415 Fed. R. Evid. The Uniform Rules have no counterpart to these rules.
10. See, e.g., Section 460 N. Y. Criminal Procedure Law (McKinney 2002).
11. 61 N.E. 286 (N.Y. 1901). See, e.g.,
12. The states that have not adopted the Uniform Rules of Evidence are an endangered species. They include Georgia, Illinois, Louisiana, Massachusetts, Missouri, New York, and Virginia.
13. See text at notes 18 to 94.
14. See text as notes 95 to 213.
15. See text at notes 214 to 311.

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16. See text at notes 312 to 389.

17. See text at notes 390 to 435.

18. See text at notes 436 to end.

19. In 1882, Gisborne Molineux published *Memoirs of the Molineux Family* that presented the genealogy of this Norman family from the 11<sup>th</sup> century down to the 19<sup>th</sup> century. One branch of the family lived in Molineux House in Wolverhampton, site of the Molineux Sports Complex in which the World Cup Soccer finals were held some years ago. The family history is set out in detail at the Molineux website. [Http://www.molineux.com](http://www.molineux.com) (2 Sep. 2002).

20. Edward H. Dyer, COMPENDIUM OF THE WAR OF THE REBELLION, 1464 (Des Moines, 1908) Morningside Press ed. (1978) (regimental history of 159<sup>th</sup> N.Y.V. I.) Molineux' regiment suffered 84 officers and men killed in action and 131 officers and men died of disease during its tour of duty. Edward L. Molineux, was born in England in 1833 and emigrated to New York City in the 1850's. Edward Molineux was active in the New York State Militia at the outbreak of the Civil War. In 1862, he became colonel of the 159<sup>th</sup> New York Infantry Regiment. Colonel Molineux saw action in the 1864 Red River Campaign, and was a brigade commander in the 19<sup>th</sup> Corps in Louisiana and in the Shenandoah Valley during the fall of the same year. A grateful administration rewarded him with a promotion to Brigadier General and then Major General of Volunteers at the end of hostilities. After the war, General Molineux was the president of C.T. Raynolds & Co., and Devoe Paints. James G. Wilson & John Fiske, ed., APPLETON'S CYCLOPEDIA OF AMERICAN BIOGRAPHY (virtualology ed. <http://virtualology.com/apewardlesliemolineux/> 3 Sep. 2002); Marquis Publ. Co., ed., 1 WHO WAS WHO IN AMERICA 1897-1942, 853 (1943).

21. Marquis Publ. Co., ed., 4 WHO WAS WHO IN AMERICA WITH WORLD NOTABLES 1961-1968, 669 (1969).

22. Arthur A. Carey, MEMOIRS OF A MURDER MAN, 77 (1930).

23. N.Y. TIMES, Oct. 15, 1897 at 15.

24. Jane Pesja, THE MOLINEUX AFFAIR, 12-13 (1986).

25. *Mohican* was owned by Clark Miller of the Larchmont Yacht Club. Miller had invited two women to share his trip: Mrs. Isia Stearns, wife of a wealthy Boston lumber dealer, and her younger sister, Blanche Chesebrough. Miller had been in port at Conanticut Island in Narraganset Bay a few days earlier. The Stearns family had a summer home on the island and Mrs. Stearns had invited her younger sister to spend August with the family. They accepted

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Miller's offer of a week's cruise aboard his yacht, since Isia's husband was busy at his desk in Boston and the nannie would care for her children. *Id.* at 14-15, 17-20.

26. Blanche's surname was spelled in the newspapers as "Chesbro", "Chesbrough" and "Chesebrough." This spelling has been adopted as the one most consistently used in the Chesebrough family history.

27. may have been the disputed prize that triggered one of the dual murders. She was the daughter of Civil War veteran and inventor James Francis Chesebrough and Harriet Newell Crumb of Westerly, Rhode Island. She was a direct descendant of William Chesebrough, one of the founding colonists of Stonington, Connecticut. The descendants of William Chesebrough held office and ran stores and the local bank in Stonington.

28. Jane Pejsa, *THE MOLINEUX AFFAIR* 15-16 (1983).

29. *Id.* at 16.

30. *Carey*, 69-70.

31. Testimony of Rachel Green, *N. Y. TIMES*, Jan. 16, 1900 at 4.

32. *Pejsa*, 39-40.

33. *Id.* at 44-45, 52-54.

34. *Id.* at 41-43.

35. Testimony of Edmund Barnet, *NEW YORK TIMES*, Jan. 19, 1900, at 12. Barnet described is brother as a man who had "a good clear complexion, the face having a tinge of color, but not florid. He weighed 180 pounds and was 5 feet 8 inches in height, the waist being larger than the chest. He had a small brown moustache."

36. *N.Y. TIMES*, Oct. 15, 1897 at 15.

37. *Id.*

38. Diphtheria is an infection of mucous membranes in the upper respiratory tract caused by *Corynebacterium diphtheriae*. The disease is transmitted from a person with an active infection by nasal droplets or secretions. The bacteria has been known to survive for as long as six months outside a human carrier in dust. Before immunization, diphtheria was a common disease affecting children in the United States. Common symptoms include fever and chills, malaise, sore throat (in almost all cases) swelling of the lymph nodes in the neck, coughing, nausea & vomiting and a headache. Diphtheria is a killer (5-10% mortality rate, higher rate (20%) in small children and

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elderly) because the infection causes the mucous membranes of the throat to swell, cutting down on the patient's ability to breathe. It also produces myocarditis (infection of the membrane surrounding the heart that can lead to circulatory collapse and heart failure. Malini K. Sing, M.D. and Phillip Z. Saba, M.D., Diphtheria, EMedicine, <http://www.e.medicine.com/emerg/topic138.htm>. 28 Sep. 2002.

39. The ancient term for c. diphtheria bacilli. *Id.*

40. *Carey*, 76; Testimony of Dr. H. Beaman Douglass, Samuel Klaus, ed., THE MOLINEUX CASE, 326 (1929). According to the testimony of Dr. Douglass, Barnet told him that he had taken Kutnow Powder the morning he became ill. *Id.* at 326.

41. Testimony of Guy Ellison, *Klaus*, 296 . See also N. Y. TIMES, Jan. 5, 1900, at 2.

42. *Carey*, 91.

43. *Id.*

44. Dr. Douglass continued to insist that Barnet died from complications of diphtheria at the Coroner's Inquest and at Molineux' trial. See Samuel Klaus, THE MOLINEUX TRIAL at 211.

45. *Id.* at 71-72.

46. *Id.* at 74.

47. N.Y. TIMES, 14 Nov. 1897 at 3.

48. See N.Y. Journal 1897

49. Testimony of Roland B. Molineux at the inquest into the death of Mrs. Katherine Adams held 10 February 1899, *Klaus* at 346.

50. Letter of Roland Molineux to "My Dear Adams" dated Dec. 24, 1897, reprinted in N.Y. TIMES, Dec. 7, 1899 at 2.

51. Testimony of C.C. Hughes, N. Y. TIMES, Jan. 5, 1900, at 2.

52. Testimony of Roland Molineux at Coroner's Inquest, 10 Feb. 1899, *Klaus*, 355.

53. *Klaus*, 10.

54. *Id.*



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55. N.Y. TIMES, Dec. 29, 1898, at 1. See also *Carey* at (fac-simili of package address).

56. *Id.*

57. *Id.*

58. *Carey*, 72-73.

59. Testimony of Dr. E. F. Hitchcock, *New York Times*, Dec. 6 1899 at 2.

60. *Carey*, 70.

61. *Id.*

62. *Id.*

63. Testimony of Dr. Albert T. Weston, *New York Times*, Jan. 3, 1900 at 2.

64. *Carey*, 74.

65. *Id.* a 79.

66. *Carey*, 70-71.

67. *Id.* at 72.

68. *Id.* at 76-77.

69. Prussic acid or hydrocyanic acid (HCN) is an organic compound naturally occurring in sorghum plants exposed to early frosts. It is a major cause of toxic death of livestock in the Midwest. See, e.g., University of Nebraska Farm Extension web-page [http:// www.ianr.unl.edu/Pubs/range/g775.htm](http://www.ianr.unl.edu/Pubs/range/g775.htm), 10 Sep 2002. According to the on line Oxford University Press, A DICTIONARY OF SCIENCE, hydrogen cyanide (hydrocyanic acid; prussic acid) is: A colourless liquid or gas, HCN, with a characteristic odour of almonds; r.d. 0.699 (liquid at 22°C); m.p. -14°C; b.p. 26°C. It is an extremely poisonous substance formed by the action of acids on metal cyanides. Industrially, it is made by catalytic oxidation of ammonia and methane with air and is used in producing acrylate plastics. Hydrogen cyanide is a weak acid ( $K_a = 2.1 \times 10^{-9}$  mol dm<sup>-3</sup>). With organic carbonyl compounds it forms cyanohydrins. Xrefer, <http://www.xrefer.com/entry/489049>, 10 Sep. 2002.

70. The effect of hydrocyanic poisoning on human victims is well documented. According to L.S. Goodman, L.S., and A. Gilman eds, *The Pharmacological Basis of Therapeutics*, 904 (5th

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ed. 1975) SYMPTOMS OF ... POISONING APPEAR WITHIN ... SECONDS TO MIN AFTER INGESTION OR BREATHING VAPORS ... THEY CONSIST OF GIDDINESS, HYPERPNEA, HEADACHE, PALPITATION CYANOSIS, & UNCONSCIOUSNESS. ASPHYXIAL CONVULSIONS MAY PRECEDE DEATH. According to R.E.Gosselin, R.P. Smith, & H.C. Hodge, 3 CLINICAL TOXICOLOGY OF COMMERCIAL PRODUCTS, III-126 ( 5th ed., 1984) the symptomatology includes:

1. Massive doses may produce, without warning, sudden loss of consciousness and prompt death from respiratory arrest. With smaller but still lethal doses, the illness may be prolonged for 1 or more hours. 2. Upon ingestion, a bitter, acrid, burning taste is sometimes noted, followed by a feeling of constriction or numbness in the throat. Salivation, nausea and vomiting are not unusual ... 3. Anxiety, confusion, vertigo, giddiness, and often a sensation of stiffness in the lower jaw. 4. Hyperpnea and dyspnea. Respirations become very rapid and then slow and irregular. Inspiration is characteristically short while expiration is greatly prolonged. 5. The odor of bitter almonds may be noted on the breath or vomitus ... 6. In the early phases of poisoning, an increase in vasoconstrictor tone causes a rise in blood pressure and reflex slowing of the heart rate. Thereafter the pulse becomes rapid, weak, and sometimes irregular ... A bright pink coloration of the skin due to high concentrations of oxyhemoglobin in the venous return may be confused with that of carbon monoxide poisoning. 7. Unconsciousness, followed promptly by violent convulsions, epileptiform or tonic, sometimes localized but usually generalized. Opisthotonos and trismus may develop. Involuntary micturition and defecation occur. 8. Paralysis follows the convulsive stage. The skin is covered with sweat. The eyeballs protrude, and the pupils are dilated and unreactive. The mouth is covered with foam, which is sometimes bloodstained ... The skin color may be brick red. Cyanosis is not prominent in spite of weak and irregular gasping. In the unconscious patient, bradycardia and the absence of cyanosis may be key diagnostic signs. 9. Death from respiratory arrest. As long as the heart beat continues, prompt and vigorous treatment offers some promise of survival U.S. Environmental Protection Agency, AMBIENT WATER QUALITY CRITERIA DOC: CYANIDES, C-17 (1980 EPA 440/5-80-037) states that: Two signs associated with cyanide poisoning in man: ... (1) the failure to utilize molecular oxygen in peripheral tissues results in abnormally high concn of oxyhemoglobin in the venous return, which accounts for a flush or brick-red skin; And (2) attempts to compensate for the inhibition of oxidative metabolism leads to increased demands on glycolysis, which accounts for a metabolic (lactic) acidosis.

71. N.Y. TIMES, Dec. 31, 1898 at 1.

72. *Id.* at 77-78.

73. *Carey* at 81-82. Farrell told the same story at Molineux' trial. See *Klaus*, 213.

74. *Klaus*, 6. The *New York World* headline for 30 December 1898 announced that H.C. Barnet had been killed by poisoning six weeks earlier after taking some patent medicine sent through the mail. The *World* headline for 1 January stated "Evidence Grows that Degenerate Was Poisoner-- Had Lost Friends, Position, Home, and Been Divorced."

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75. *Id.* at 7.

76. *Carey* at 84.

77. *Id.* at 78-79.

78. On January 29, 1899, Heckmann went to the Sinclair House with a *World* reporter to identify Roland Molineux as “Barnet” but Heckman did not get a good look at Molineux and was unable to make a positive identification. The *New York World* stringer then took Heckman to Newark to see if Heckman could identify Molineux as “Barnet.” Heckman made the identification and collected his initial fee. *Klaus*, 302-05 (Testimony of Nicholas W. Heckman).

79. *Id.* at 9.

80. *Id.* at 289-91 (Testimony of Joseph J. Koch).

81. N.Y. TIMES, 10 Feb. 1899, at 3.

82. *Id.*, 11 Feb. 1899, at 2.

83. The full transcript of Molineux’ statement to Coroner Hart is printed in *Klaus*, 338-58.

84. N.Y. TIMES, 11 Feb. 1899, at 1.

85. *Klaus*, 16.

86. *Id.* at 17.

87. *Klaus* at 17.

88. *Id.*

89. *Id.* at 19.

90. *Id.* at 20.

91. *Pejsa*, 175.

92. N.Y. TIMES, 6 Jul. 1899 at 2.

93. The list of witnesses endorsed on the back of the indictment is very revealing: Osborne called handwriting experts David Carvalho (retained by the defendant); W. J. Kinsley ( a leading

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prosecution witness) , and Dr. Percifor (mis-spelled “Percival”) Frazer (a Philadelphia questioned documents examiner with 20 years’ experience). He called Prof. Rudolph Witthaus, a chemist, Dr. Hitchcock who attended Mrs. Adams and Dr. Weston, the Manhattan Medical examiner. His lay witnesses included Harry Cornish, Police Detective McCafferty, and Frederick A. Baker. The indictment did not include a count naming Molineux as the murderer of Henry C. Barnet. N.Y. TIMES, 21 Jul. 1899 at 12.

94. Weeks moved to inspect the grand jury minutes for procedural errors, citing the statement of David Carvalho, a handwriting expert, that he had not been asked to identify Molineux as the person who wrote the “Cornish” and “Barnet” letters and addressed the poison package, even though he was a “defense witness.” Judge Blanchard of the Court of General Sessions denied the motion. N.Y. TIMES, 26 July 1899 at 4 ;2 Aug. 1899 at 2.

95. N.Y. TRIBUNE, 5 Dec. 1899 at 3.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Klaus*, 178-79.

102. *Id.* at 179-80.

103. *Id.* at 181.

104. *Id.*

105. *Id.* at 181-82.

106. *Id.* at 198.

107. *Id.*

108. *Id.* at 198-199.

109. *Id.* at 199-200.

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110. *Id.* at 213-14.

111. Adams authenticated a letter from Roland Molineux to the Chair of the House Committee outlining Molineux' complaints against Harry Cornish for ungentlemanly behavior, produced from the club's files. *Id.* at 143-45

112. Hall worked for Dr. Fowler's patent medicine company. He authenticated a letter taken from the company's files purchased from a Detroit firm written by Molineux soliciting remedies for impotence. *Id.* at 87-88.

113. Evans authenticated a letter and envelope addressed to Dr. Burns from the defendant asking for a remedy for impotence. *Id.* at 190-92.

114. Bustanaboy authenticated purchase orders and other club correspondence in Molineux' handwriting. *Id.* at 197. He was recalled to authenticate additional purchase orders in Molineux' hand several days later. See *id.* at 284.

115. Scheffler authenticated letter from Molineux to his wife declining to come to tea and informing them he was getting married. *Id.* at 220-21.

116. *Id.* at 185-86.

117. *Id.* at 89. The Exhibits were Peoples' Exhibit D, E and G. Exhibit D was the spurious request for a reference for Alvin Harpster initiated by Molineux but signed "H. Cornish;" E and G were patent medicine requests from "H Cornish" 1620 Broadway.

118. N. Y. TIMES, 12 Dec. 1899, at 2.

119. *Id.* The *New York Tribune* gives a different version of this story: according to the *Tribune*, Melando denied ever getting any letters from Molineux, but she had obtained a sample of his handwriting on a company order blank that she took with her to Mr. Weeks' office. The order was to buy Mamie a new dress on the company's expense account. N. Y. TRIBUNE, 12 Dec. 1899, at 3.

120. N. Y. TIMES, 29 Dec. 1899, at 1.

121. *Molineux Trial*, 148. Cornish also authenticated six examples of his own handwriting as basis for later expert opinion (Exhibits 20-25) and denied writing to patent medicine companies for samples on blue paper with a crest.

122. *Id.* at 150.

123. *Id.* at 151-52.

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124. *Id.* at 152.

125. *Id.* at 156.

126. *Id.* at 157-58.

127. N. Y. TIMES, 30 Dec. 1899, at 1.

128. *Klaus*, 160. Weeks asked Cornish if he was the reason that Mr. and Mrs. Rodgers had separated. The Prosecution's objection was sustained, but the insinuation was put before the jury. Since the question was patently improper, Weeks would have violated today's standards of professional conduct by deliberately insinuating inadmissible evidence into the trial. See Model Rule of Professional Conduct 3.3.

129. See *Klaus*, 161-69. Weeks even put Cornish through an in-court demonstration with two water tumblers showing how he mixed the inadvertently fatal dose of Bromo Seltzer for Mrs. Adams. According to the *New York Times*, Weeks asked Cornish if he had run from the Adams apartment in his pajamas. Cornish insisted he was fully dressed. What that controversy could have done for Molineux is absolutely lost on the author. N. Y. TIMES, 3 Jan. 1900, at 2.

130. *Klaus*, at 168-69. Cornish also admitted owning a white alpine hat with a black band, but denied wearing it any any time in 1898. Cornish was recalled several days later to answer a question about the composition of the potion mixed in the water tumbler. *Id.* at 169-72.

131. *Id.* at 169-72.

132. *Id.* at 261. Henry W. Wotherspoon, Jr., who was present at the time, corroborated King's story. *Id.* at 193-94. George A. Salmon, *Id.* at 192, and Cornish's assistant, Patrick Fineran also witnessed the arrival of the package on Christmas eve and its opening. Fineran authenticated the writing on the package wrapper. *Id.* at 171-173.

133. *Id.* at 241. Howard A. Adams, Mrs. Rodgers' brother, worked for his cousin Louis Cornish in New York City. At the time of his mother's death, he was laid up with a broken leg in Connecticut. He recited the family relationship with Harry Cornish, who was a first cousin to Adams, his sister and to Louis Cornish. He said his mother never drank. He confirmed his sister's story about the peregrinations of the Adams family from 1897 until the events of the 28<sup>th</sup> of December. *Id.* at 221-23.

134. *Id.*

135. *Id.* at 183.

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136. *Id.* at 184. Yokum added his own personal knowledge that cyanide of mercury can be readily manufactured by boiling Prussian blue which breaks down into its components, and adding to the mix a source of mercury such as Queen's yellow.

137. *Id.* at 209-10.

138. *Id.* at 196-97.

139. *Id.* at 70-72.

140. *Id.* at 73.

141. *Klaus*, 295.

142. *Id.* at 288-89.

143. The *Journal* gave Koch \$500 for his story and the World offered Koch an additional \$250 for his identification of the man in which white Alpine hat. *Id.* at 299.

144. *Id.* at 301.

145. By the time of the trial Ms. Miller had left her stenography and sales job at Hartdegen's Jewelry Store and was working as a stenographer for Fidelity & Casualty Ins. Co. *Id.* at 244.

146. *Id.* at 245.

147. *Id.* at 250, 252. The New York Times reported Miller's testimony in detail on 11 January 1900. Miller told Osborne that she was not sure she could recognize the buyer if she saw him again. She admitted getting \$100 from a New York newspaper for her personal story in February, 1899. N. Y. TIMES, 11 Jan. 1900 at. 2.

148. *Id.* at 263-66.

149. Herrman authenticated photos of his plant and also admitted that Robert Zeller was his employee and would come into New York City to get the payroll, but had not made the trip in the seven months prior to trial. Osborne had charged that Weeks had somehow found a way to keep Zeller from being served with summons as a witness in the case by keeping him on the west bank of the Hudson. *Id.* at 230-32.

150. *Id.* at 131-34.

151. It would take a very conservative view of Fed R. Evid 803(4) (statement made for purposes

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of medical treatment) to exclude Barnet's statement. Barnet's disclosure that he became ill after taking the Kutnow Powder for an upset stomach was pertinent to both diagnosis and treatment. Christopher B. Mueller & Laird C. Kirpatrick, EVIDENCE § 8.41. Modern case law supports admissibility of statements made to physicians about the cause of illness See, e.g., O'Gee v. Dobbs Houses, Inc., 570 F.2d 1084, 1089 (2d Cir. 1978) (rule 803(4) permits admission of plaintiff's symptoms given to her physician about her condition and its origin so long as it was relied upon) ; Britt v. Corporacion Peruana de Vapores, 506 F.2d 927, 930-31 (5<sup>th</sup> Cir. 1975).(cause of back injury).

152. See, e.g., Davidson v. Cornell 30 N.E. 573, 576 (1892) where the court said:

It was, however, held in Hagenlocher v. C. I. & B. R. R. Co. (99 N. Y. 136), that the evidence of a non-medical witness that the plaintiff (who had received an injury) manifested pain by screaming, was held competent because it was apparently involuntary and corroborated by what appeared to be her condition. "The rule of admissibility of statements made to physicians by persons who have been physically injured, or are suffering from disease, is not an unqualified one. They must relate to present and not past pain and suffering. ( Towle v. Blake, 48 N. H. 92.) And it has been held that their declarations, after controversy had arisen, made at a medical examination then had for the purpose of preparing evidence, and not for medical treatment, were incompetent. ( Grand Rapids & Ind. R. R. Co. v. Huntley, 38 Mich. 537; Jones v. Prest., etc., of Portland, 50 N. W. R. 731.) In Matteson v. N. Y. C. R. R. Co. (35 N. Y. 487), it was held that expressions of pain and suffering made by the injured person to physicians when they were examining him were competent evidence notwithstanding the examination was made by them with a view to testifying as to the result of it in a suit then pending. The same was said in Kent v. Town of Lincoln (32 Vt. 591). It may be seen that when attended by a physician for the purpose of treatment there is a strong inducement for the patient to speak truly of his pains and sufferings while it may be otherwise when medically examined for the purpose of creating evidence in his own behalf. It is, therefore, that the weight of judicial authority is to the effect that the statements expressive of their present condition are permitted to be given as evidence only when made to a physician for the purposes of treatment by him. ( Barber v. Merriam, 11 Allen, 322; Fay v. Harlan, 128 Mass. 244; Roche v. Brooklyn City, etc., R. R. Co., 105 N. Y. 294.)

153. *Klaus*, at 176-177.

154. *Id.* at 139-43.

155. *Id.* at 330.

156. *Id.* at 331-33.

157. *Id.* at 273. The New York Times report of the evidence is better than the official transcript: After Recorder Goff admitted the glass and spoon into evidence, Witthaus gave his quantitative



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analysis of the contents of the glass and spoon. He found both mercury and cyanide of mercury. (38.28 grains 74% mercury and 93.37% mercuric cyanide). ““From these results, can there be any doubt that there was cyanide of mercury in the glass’ asked Mr. Osborne.

“None whatever” was the reply.’ N.Y. TIMES, 13 Jan. 1900 at 4.

158. *Klaus* at 339. The *New York Times* reprinted Molineux’ testimony at the coroner’s inquest. The *Tribune* paid little attention to Molineux’ evidence.

159. *Id.* at 333-34. “Athletic members” were usually not from the same social strata as regular members. They paid no dues and were chosen because they added skill and strength to club teams.

160. *Klaus* at 343-45. Molineux also taked to Mr. Ballantine the owner of the building and the patron of the club about Cornish. Molineux admitted saying the Cornish could do more harm to the club in a minute than Molineux could do good in a year.

161. *Id.* at 346.

162. *Id.* at 347.

163. *Id.* at 348.

164. Molineux said he was inclined to strike Cornish, which would have been the manly thing to do according to the peculiar bushido of upper class white men in the 1890's. Instead he checked his temper. Osborne insinuated that Molineux was a coward, but Molineux shrugged off Osborne’s leading questions. *Id.* at 355

165. *Id.* at 210.

166. *Id.* at 215-17.

167. *Id.* at 188-90.

168. *Id.* at 222-25.

169. Exhibit I appears at *id.* 200-01.

170. *Id.* at 218-19.

171. *Id.* at 274-75. Goodwin volunteered that he knew Mrs. Molineux and her mother personally. “Phthisis” means a wasting disease in general, and was often applied to cases of tuberculosis, the meaning that it has in the case of Molinuex’ grandmother’s death. World Book Medical Encyclopedia,<http://www.rush.edu/worldbook/articles/016000a/016000165.html>, 4 Dec.

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172. *Id.* at 282.

173. *Id.* at 112.

174. *Id.* at 315-16.

175. *Id.* at 312.

176. *Id.* at 312-14.

177. *Id.* at 315.

178. *Id.* at 277-79. According to Green, Molineux lived with Blanche at 251 W. 75<sup>th</sup> St, Mrs. Bell's apartment from November, 1897 to May, 1898.

179. *Id.* at 302-03.

180. *Id.* at 303-04.

181. N. Y. TRIBUNE, 18 Jan. 1900, at 4.

182. *Klaus*, 308-11.

183. *Id.* at 203.

184. *Id.* at 204.

185. *Id.* at 322-24.

186. *Id.* at 326-27.

187. N. Y. TRIBUNE, 23 Dec. 1899, at 4.

188. *Id.* at 327-28.

189. *Id.* at 329.

190. *Id.*

191. *Id.* at 206.

192. *Id.* at 207-08.

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193. *Id.* at 266-67. Osborne's representation was as follows:

Well, there are two reasons [for admission] and there is one of them which I will now urge upon the Court at present. The first one, and the simple one, is that we start with Barnett's death, and we show that there were certain symptoms of cyanide of mercury produced on Barnett; or, rather, we show that he had certain symptoms. We did not know what produced them at the time. None of the doctors knew; because if they had known, Barnett now would not be in his grave. But evidently they did not know what the symptoms were. . . . Now, it has been proved here by doctors that Cornish had identically the same symptoms that Barnett had. It is proved here that a part of the substance that Cornish took, Mrs. Adams took. Now, then, if I show that Barnett had taken cyanide of mercury, I prove that Mrs. Adams took cyanide of mercury. Just exactly on the principles that Dr. Witthaus, in the case of Buchanan, that I remember so well, proved that a part of the contents taken from Mrs. Adams body--Mrs. Buchanan's body, was tried on a frog, and produced symptoms of poisoning in this frog. Now, he did that for the purpose of showing what effect it had upon the animal or reptile. And now in many cases before the courts, the courts have allowed evidence of a similar character." *Id.*

194. He was in the estimation of the N. Y. TIMES, a very terrible witness whose mumblings were next to inaudible. The Times reporter said that:

Dr. Witthaus' testimony was, to the lay mind, the most uninteresting testimony of the whole trial. He talked of rare chemicals and infinitesimal tests in technical phrases of great length, and he kept this up for hours at such a rate that it was impossible for the official stenographer to follow him at times. . . . At times, Dr. Witthaus's enunciations was of such a character that his words could not be distinguished at a distance of ten feet. He talked without opening his mouth and a great volume of sound that he emits is lost in his long drooping moustache. N. Y. TIMES, 12 Jan. 1900, at 4.

195. *Klaus*, 268-69.

196. *Id.* at 318-20.

197. *Id.* at 217-18.

198. See, e.g., testimony of Herbert K. Twitchell, paying teller Chase Nat'l Bank, *id.* at 227; David C. Decker, paying teller Union National Bank, *id.* at 227-28; Alfred Graham, paying teller Bank of North America, *id.* at 235; Augustus F. Martin, paying teller Essex County Nat'l Bank of Newark, *id.* at 239-40); John C. Emory, paying teller Seaboard Natl Bank, *id.* at 257; Charles H. Wessels, paying teller Chemical National Bank, *id.* at 257

199. Osborne used a very complicated system for numbering his handwriting exhibits. The "Barnet series" consisted of Exhibit B, an order for Dr. Rudolphe's specific for impotence, received on 1 Jun. 1989, B<2>, the envelope in which B was enclosed, C a letter to Marston

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Remedy C. dated 31 May 1898, F a letter to Cameron & Co dated 1 Jun. 1898 asking for “Book” and Exhibit J the envelope in which F was received, H a letter to Marston & Co received 6 Jun. 1898 requesting a marriage manual, K the envelope in which it was mailed; Exhibit I was the “diagnosis blank” sent by Marston to “H. Barnet” at the private letter box address and returned to Marston & Co. on 5 or 6 Jun. 1898 with the blanks filled in by “Barnet.” Exhibit M was a letter to Von Mohl & Co. on 1 Jun. 1898, N was the envelope for M; O was a letter to Sterling Remedy Co received 7 Jun. 1898, asking for “Book.” P was a letter to G. B. Wright, Marshall Michigan, asking for a prescription and R was its envelope. Osborne had a second series of documents in handwriting marked 58, 61, 62 and 63 in his “prime series.” These four documents were letters found in Box 217 at Heckman’s private letter service by the police in 1899. Three came from the Von Mohl Co., the fourth from Dr. Fowler of Moodus, CT. *People v. Molineux*, 61 N.E. 286, 291 (N.Y. 1901)

200. Osborne’s Exhibit A was the address on the poison package sent to Cornish on 23 Dec. 1898; Exhibit D was a letter signed “H. Cornish” addressed to Frederick Stearns & Co. Detroit, MI received 24 Dec. 1898, feigning that Alvin Harpster had applied for a position as a bill collector and requesting a reference, Exhibit E was a letter sent to Kutnow Bros. requesting a sample of Kutnow Powder dated 22 Dec. 1898; Exhibit G was a letter signed by “H. Cornish” and sent to the Von Mohl Co. requesting 5 days trial of their impotence remedy, *Calthos*, (undated). Exhibits D, E and G were written on blue paper with a crest of three interlaced feathers. Turning to Osborne’s prime series, Exhibit 2 in the prime series was a genuine letter written by Roland Molineux on the same type of blue paper with a tri-feathered crest.

201. *Id.* at 83-84.

202. N.Y. TIMES, 8 Dec 1899 at 1; N.Y. TRIBUNE, 8 Dec. 1899 at 4.

203. *Klaus*, 87; N. Y. TIMES, 8 Dec. 1899 at 2.

204. In 1910, Osborn published *QUESTIONED DOCUMENTS*, a treatise that has the stature of Wigmore on Evidence among graphologists. In fact, Dean Wigmore recognized the importance of *QUESTIONED DOCUMENTS* and wrote the introduction to the original edition. See Albert S. Osborn, *QUESTIONED DOCUMENTS*, vii-viii (2d ed. 1929). Osborne’s treatise still forms the basic structure of modern works on graphology. See, e.g. Hanna F. Sulner, *DISPUTED DOCUMENTS* (1966).

205. Osborn started an informal exchange of technical information with other questioned document examiners in 1913. These informal annual meetings of specialists grew into the American Society of Questioned Document Examiners. Osborne and Tyrrell were founding members. Osborne was the first president of the Society, Tyrrell was its first treasurer. American Society of Questioned Document Examiners webpage, [http://www.asqde.org/about\\_history.htm](http://www.asqde.org/about_history.htm), 10 Oct. 2002.

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206. See testimony of Edward B. Hay (U.S. Treasury Department expert) *Molineux Trial* at 234-36; Persifor Fraser, *id.* at 236-39; Herman J. White, *id.* at 273; William L. Hagen (opposed Carvalho in Garfield's case), *id.* at 320-21.

207. *Klaus*, 353-54, 355-56,

208. *Id.* at 351-52/

209. "The speech of Mr. Weeks was generally regarded as very strong." N.Y. TIMES, 8 Feb. 1900, at 12.

210. N.Y. TRIBUNE, 8 Feb. 1900, at 4.

211. N.Y. TIMES, 8 Feb. 1900, at 12.

212. *Id.*

213. "There is absolutely nothing," Mr. Weeks contended, 'to connect the defendant with the poison package except this expert evidence. And you have read how a great Republic was torn asunder and how a man spent five years on Devil's Island because of a mistake made by handwriting experts'." N.Y. TRIBUNE, 7 Feb. 1900, at 4.

214. *Id.*

215.

Then Mr. Osborne passed on to the question of motive as it applied to the Barnet case he asserted that relations which existed between the defendant and Miss Chesebrough before married were severed, and that the woman moving to another house, received the visits of Barnet. This supplanting in the affections of Miss Chesebrough, the prosecuting officer contended, supplied adequate motive for a wish on the part of Molineux to take Barnet's life. And, he added, if he could supply the motive in the case of Barnet, it would apply with equal force in the case of Cornish, although he did not explain why the two motives should be naturally coincident." N.Y. TRIBUNE, 10 Feb. 1900, at 4.

216. *Id.*

217. N.Y. TIMES, 11 Feb. 1900, at 1.

218. 1 Sir James F. Stephen, A HISTORY OF THE CRIMINAL LAW OF ENGLAND, 368, 371 (1883).

219. *Id.* at 219, 325-26.

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220. Stephen noted that:” Nevertheless, after making every allowance on these points, it must be remarked that from the year 1640 downwards, the whole spirit and temper of the criminal courts. . . appears to have been radically changed from what it had been in the preceding century down to what it is in our own days. In every case the accused had witnesses against him produced face to face, in some cases, the prisoner was questioned, but the prisoner refused to answer. The prisoner was allowed to cross-examine witnesses and to call witnesses of his own, but whether they were examined under oath I am unable to say.” Stephen notes that these changes in criminal trial procedure occurred without legislative intervention. *Id.* at 358

221. Raleigh’s accusers consisted of Cobham and a pilot who allegedly overheard Raleigh and another threaten to cut King James’ throat before he assumed the throne. Lord Coke cut off Raleigh’s demand to be confronted by Cobham and the pilot. Raleigh claimed the right of the accused to be confronted with his accusers in open court based on stat 1 Edw. VI, c. 12; § 22 and 5 & 6 Edw. VI, c. 11. § . 11) which guaranteed such a right founded on common law. Coke said the law had been abrogated. *Id.* at 333.

222. *Id.* at 341.

223. *Id.* at 341. For an excellent discussion of the difference in evidentiary barriers between the Continental and the Anglo-American criminal justice systems, see Mirjan Damaška, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 131 U. PA. L. REV. 506 (1973).

224. *Id.* at 368

225. Julius Stone concedes that a general exclusionary rule barring evidence of other uncharged misconduct did not exist in the 18<sup>th</sup> century. See Julius Stone, *Exclusion of Similar Fact Evidence: England*, 46 HARV. L. REV. 954, 958 (1933).

226. 7 Will. III, ch. 3 (1695).

227. John Foster, CROWN LAW 2 46 (1762).

228. *Id.*.

229. See, e.g., *Rex v. Davidson*, 31 St. Tr. 99 (1809); *Rex v. O’Connor*, 27 St. Tr. 31 (1798); *Rex v. Turner*, 6 St. Tr. 565 (1664).

230. 2 Joseph Chitty, A PRACTICAL TREATISES ON THE CRIMINAL LAW, 621 (right to cross-examine prosecution witnesses), 624( rules for defense witnesses same as those for prosecution), 627 (use of defense character witnesses) London , 1816; Garland Publ. Co. ed. New York, 1978).

231. 25 St. Tr. 1, 27 (1794).

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232. See, e.g., *Rex v. Ball*, 170 Eng. Rep. 973 (K.B. 1808).

233. 170 Eng. Rep. 95 (1791).

234. *Rex v. Neville*, 170 Eng. Rep. 102 (1791).

235. *Rex v. Wiley*, 168 Eng. Rep. 589 (1804); *Rex v. Hough*, 168 Eng. Rep. 714 (1800).

236.. *Quincy*, 91 (Mass. 1763).

237. *Id.*

238. See, e.g., *Commonwealth v. Rodes*, 31 Ky. 595 (1833) (clerk of court removed for making out fraudulent marriage licenses and bribery; reputational evidence of clerk's good moral character admitted, but deemed not decisive).

239. The earliest reported decision on character evidence, *United States v. Carrigo*, Fed. Cas. No. 14,735. 25 F. Cas. 310 (C.C. D.C. 1802) is a two line summary holding states the general rule in accurate modern form:

THE COURT refused to permit the attorney for the United States to bring evidence of the general bad character of the prisoner, unless the prisoner should first bring evidence in support of his general character.

240. See, e.g., *Commonwealth v. Sackett*, 22 Pick. (39 Mass.) 394,395 (1839) (defendant put character at issue, prosecution could prove it was not good); *People v. White*, 22 Wend. 167,177 (N.Y. Supr. 1839)(approving trial judge's comment to jury that a doubtful case should be turned in favor of the prisoner by proof of good character or virtuous life, but that the present case wanted both); *State v. Lipsey*, 14 N.C. 485,490-91 (1832)(error to instruct jury that defendant's character was not to be considered unless there was a doubt defendant killed the victim).

241. See, e.g., *State v. Merrill*, 13 N.C. 269, 277-78 (1829) (error to permit proof of accused's bad temper when accused did not put character at issue). The early treatise writers summed up the law of good and bad character much as their English predecessors had. For example, Prof. Greenleaf, originally writing in 1842 said:

The prosecution in a criminal case is not allowed to resort to the accused's bad character as a basis of inference to his guilt; the reason being that such evidence is too likely to move the jury to condemnation irrespective of his actual guilt of the offence charged. But the accused himself may always invoke his good character as tending to disprove his commission of the offence, no matter what the grade of the offence, and no matter how strong the evidence against him.

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Moreover, if the accused has offered his good character, the prosecution may in reply introduce his bad character; not so much by way of exception to the rule above mentioned as in order to prevent the accused from imposing upon the tribunal by false evidence of good character. 1 Simon Greenleaf, A TREATISE ON THE LAW OF EVIDENCE § 14b(1) (16<sup>th</sup> ed. 1899)

242. 14 Wend, 111 (N.Y. Supr. 1835).

243. *Id.*

244. *Id.* at 114.

245. Sutherland began his opinion by a citation to 1 Chitty on Criminal Law relating to impeaching the accused's statement to the examining magistrate from inconsistent statements made at other times and places. He ends the paragraph alluding to impeaching declarations with the conclusion that anything that the accused said that would amount to a confession would be competent to prove in any manner. He then put the issue as whether the prosecutor could have proved that White had been in the State Prison in Massachusetts either by a record of conviction or by oral testimony of a witness. *Id.* at 113.

246. Greenleaf recognized that the character of a person charged with keeping a house of ill fame could be proved by the prosecution. He cited *Coldwell v. State*, 17 Conn, 467, 472 (18 ) to support the proposition without reference to any English precedent. *Id.* at § 14d. Greenleaf made an exception to character evidence that appeared to be one-sided: in cases involving the character for violent conduct of the victim of a homicide, Greenleaf noted that the defendant could introduce evidence of prior violent acts of the victim to justify a self-defense plea, but said nothing at all about attacking the character of the defendant for violent conduct. *Id.* at § 14b(4).

247. See, e.g., *State v. Bell*, 2 Mart. 683, 702-04 (La. 1824)

248. See, e.g., *State v. De Wolf*, 8 Conn. 93, 100-01 (1830) (victim's good character for chastity may always be proved in a rape prosecution)

249. See, e.g., *Conway v. State*, 21 N.E. 285, 287 (1889) (state can impeach own witness's character for truthfulness); *State v. Woodworth*, 21 N.W. 490, 491-92 (1884) (defendant may be impeached on bad character for truthfulness, not on general bad character); *Commonwealth v. Hourigan*, 12 S.W. 550; 552 (1889); *Smith v. State*, 58 Miss. 867, 874 (1881); *State v. Shields*, 13 Mo. 236, 238 (1850) (general character admissible to discredit witness' testimony).

250. See, e.g., *Cornwell v. State*, 8 Tenn. 147, 151-53 (1827) (acts of conspirators admissible to prove nature & extent of conspiracy). Greenleaf cited *State v. Smith*, 44 Conn. 357 (18 ) as authority for admissibility of a prior bad act to justify an arrest. 1 *Greenleaf* § 14j.



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251. See, e.g., *State v. Williams*, 2 Rich. 418, 420-21 (S.C. 1846) (Knowingly passing a raised bank note); *State v. Houston, Bailey*, 300, 301-02 (S.C. 1829) (same); *State v. Petty, Harper*, 59, 61 (S.C. 1824)(passing a forged note).

252. Greenleaf has a long discussion of the problems associated with admitting other similar ba acts of the accused to show knowledge or criminal intent. First, he noted that; “(1)A person’s *knowledge*. . . may be inferred from the occurrence of some circumstances that would naturally have brought the matter in question to his attention. . . . (2) In most crimes an element of the crime is the criminal *intent*, *i.e.*,the state of mind accompanying the act. . . .”

. . . [T]he limitations of this use are

He identified “five sources of difficulty”associated with the admission of such acts:

“(1) the elements of knowledge and of intent are both present in some crimes” (citing to forgery or uttering false representations). . . .

“(2) in applying the second principle, there is room for much difference of opinion was to the similarity to be required in the other acts before they are properly admissible;”

“(3) the difference between the second and third principles has not always been observed;”

(4) the problem for each sort of offence should be solved according to the particular nature of that offence;. . .

(5) the fundamental rule that the character of a defendant may not be attacked by evidence of his past crimes or other misconduct. . .Id. at §14q.

253. See, e.g., *People v. Pool*, 27 Cal. 572, 575 (1865) (evidence of robbery admitted to show motive for murder)

254. 30 P. 1000 (Nev. 1883)

255. *Id.* at 1003.

256. See, e.g., *State v.* 18 Ohio 221, 222-24 (1849) (prior act of larceny of horse inadmissible to prove any relevant issue except bad character in later larceny of money).

257. 4 Oh. C. C. 393 (Oh. C.C. Fifth cir. 1890).

258. *Id.* at 394.

259. Joel P. Bishop, 1 NEW COMMENTARIES ON THE CRIMINAL LAW UPON A NEW SYSTEM OF LEGAL EXPOSITIONS, § 287 (8<sup>th</sup> ed. 1892).

260. See, e.g., *State v. Ransell*, 41 Conn. 433, 442 (Conn. 1874).

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261. See, e.g., *State v. Acheson*, 39 A. 570, 572 (Me. 1898) (evidence of three later instances where defendant assaulted minor victim for purposes of sexual gratification admissible to show intent).

262. See, e.g., *State v. Myers*, 82 Mo. 558, 563-64 (1884).

263. One's fraudulent intent implies that he knows the pretense to be false; consequently an indictment omitting the word "knowingly" is, in England, held to be insufficient though it pursues the exact words of the Statute of 7 & 8 Geo. 4, c. 29, § 53, whereon it is drawn. 2 *Bishop* § 471.

264. As foundation for the criminal intent, without which there can be no crime, and by the statutory terms, the receiver must know the goods to have been stolen. And this knowledge must exist at the very instant of receiving. 2 *Bishop* § 1138

265. F. Cas. No. No. 1,688, 3 F. Cas. 968 (Cir Ct. D. Mass. 1840).

266. And in all cases, where the guilt of the party depends upon the intent, purpose, or design, with which the act is done, or upon his guilty knowledge thereof, I understand it to be a general rule, that collateral facts may be examined into, in which he bore a part, for the purpose of establishing such guilty intent, design, purpose, or knowledge. Thus, in a prosecution for uttering a bank note, or bill of exchange, or promissory note, with knowledge of its being forged, proof, that the prisoner had uttered other forged notes or bills, whether of the same or of a different kind, or that he had other forged notes or bills in his possession, is clearly admissible as showing, that he knew the note or bill in question to be forged. So the law is laid down in Mr. Phillips and Mr. Amos's excellent treatise on Evidence, in the last edition. The same doctrine is applied in the same work to a prosecution for uttering counterfeit money, where the fact of having in his possession other counterfeit money, or having uttered other counterfeit money, is proper proof against the prisoner to show his guilty knowledge. I have looked into the authorities; and they fully support the statement of the learned writers. *King v. Wylie*, 1 Bos. & P. [N.R.] 92, is very strong to the purpose; as are also *Rex v. Ball*, 1 Russ. & R. 132, and *Rex v. Balls*, 1 Moody, Crown Cas. 470, and *Rex v. Hough*, 1 Russ. & R. 120. Many other cases may be easily put, involving the same considerations. Thus, upon an indictment for receiving stolen goods, evidence is admissible that the prisoner had received, at various other times, different parcels of goods, which had been stolen from the same persons, in proof of the guilty knowledge of the prisoner. *Id.* at 971.

267. 7 So. 273 (Ala. 1889).

268. *Id.* at 275.

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269. 5 Day 175 (Conn. 1811).

270. *Id.* at 178.

271. 36 A. 117 (Md.. 1898).

272. The court also admitted the other letters containing false claims of bank deposits at the Peoples Bank of Hagerstown to show the defendant's plan, design or scheme to defraud other banks with bogus credit letters. *Id.* at 36 A. 118-19.

273. 8 S.E. 698 (S.C. 1889).

274. *Id.* at 8 S.E. 700.

275. *State v. Petty*, Harper 59 (S.C. 1824); *State v. Houston*, Bailey 300 (S.C. 1829) and *State v. Williams*, 2 Rich. 418 (S.C. 1846) previously cited at n. *supra*.

276. *Id.* .

277. *Bishop*, §§ 3010-02.

278. Since the English cases recognizing this reason for offering uncharged misconduct post-date 1776, the strength of these English decisions ' influence on U.S. case law was the Anglophiliac attitude of some appellate courts in the mid to late 19<sup>th</sup> century. *State v. Myers* cited six 19<sup>th</sup> century English decisions in support of admission of similar acts to prove mens rea: *Rex v. Dossett*, 2 Cox C. C. 243 (18 ) (charge of arson of a hayrick by firing a gun into the hay: evidence showing the accused had been standing next to a burning hay rick the day before holding a gun admitted to prove mens rea over claim of accident); *Rex v. Voke*, 1 Rus. & Ry. 531 (18 ) (assault with intent to do bodily harm by shooting; defense; accident: evidence showing the accused had taken a shot at th victim earlier the same day admitted to show mens rea); *Regina. v. Richardson*, 2 F. & F. 343 (18 ) (charge embezzlement; defense accidental mistake in making an account: other false accounts made before and after the account in the indictment admitted to show lack of mistake). *Rex v. Hogg*, 4 Car. & P. 364; 19 E.C.L. 420 (Charge: poisoning a horse with sufuric accident; defense mistake: another instance when the accused administered poion to a horse in its feed admitted to show lack of accident) and *Rex v. Winkworth*, 4 Car. & P. 444; 19 E.C.L. 465(charge: extortion: the accused, part of a mob, attacked the victim's house. The accused advised the owner to give the mob money to make them go away, which he did; other instances of the same extortion of money by means of threatened mob violence introduced to show that the accused did not give the advice as a friend); and *Regina v. Garner*, 3 Fost. & Fin. 681 (183 ) (charge: murder of accused's mother by poison; defense; mistake: evidence that the accused's former wife died from poisoning admitted to

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negative mistake). The Missouri court got these English decisions from 1 Greenleaf, Evidence §14q 53 and in 3 Russell, Crimes §§ 285, 288 and in Ros. Cr. Ev., 86, 89. State v. Myers at 82 Mo. 565.

279. 3 F. Cas 968 (C.Ct. Mass. 1840).

280. *Id.* at 971.

281. 19 Conn. 233, 237 (1848).

282. 1 Cush. (55 Mass.) 189 (1848).

283. *Id.* at 216-17.

284. 2 Ohio St. 54 (1853).

285. *Id.* at. 61-62.

286. The first case that recognized and dealt with the inseparable criminal act issue was *Reece v. State*, 7 Ga. 373 (1849). The defendant was indicted for murder of Ellen Pratt. In the course of pursuing Pratt, Reese assaulted her father. The court allowed evidence of the attack on Pratt's father to be admitted. The court said:

The evidence relating to the homicide describes one entire transaction. The witnesses state what was done by the defendant, at the time of the killing. The defendant went to the house of Gurganus, the father of the deceased, with whom the deceased was living, and made use of insulting and abusive language to the deceased. Gurganus, the father, went out to the defendant at the gate, and said to him, "What are you coming here interrupting us for, we interrupt nobody?" So soon as this remark was made, the defendant knocked Gurganus down with his gun, whereupon the deceased, who was standing in the piazza, ran out to her father, when the defendant raised his gun and shot her dead.

The assault upon Gurganus, by the defendant, was a part of the transaction, and shows that he came to the house with an evil and hostile intention, against the inmates of that house; and there was no error by the Court below, in permitting the witnesses to state all that was done by the defendant, at the time of the killing, as being connected with, and a part of the entire transaction, either exculpatory or as evidence of his innate depravity and malicious intention. After a careful examination of this entire record, we can find no legal ground to disturb the judgment of the Court below. *Id.*, at 375.

287. 102 Ala. 144, 15 So. 278 (1893).

288. *Id.* at 183.

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289. See, e.g., *Mason v. State*, 42 Ala. 532, 537-38 (1868); *People v. Bidleman*, 38 P. 502, 504 (Cal. 1894); *Killins v. State*, 9 So. 711, 722 (Fla. 1891); *Turner v. State*, 1 N.E. 869 (Ind. 1885); *State v. Gainor*, 50 N.W. 947, 950 (1892); *State v. Folwell*, 14 Kan. 105, 108 (1874); *State v. Desroches*, 19 So. 250 (La. 1896); *Commonwealth v. Sturtivant*, 117 Mass. 122, 126 (1875); *People v. Foley*, 31 N.W. 94, 97 (Mich. 1886); *State v. Williamson*, 17 S.W. 172 (Mo. 1891); *State v. Testerman*, 68 Mo. 408, 411, 413-14 (1878)<sup>1</sup>. *People v. Pallister*, 33 N.E. 741, 744 (NY, 1893); *Brown v. Commonwealth*, 76 Pa. 319, 327 (1874); *Mask v. State*, 31 S.W. 408, 411 (Tex. Crim. App. 1895); *State v. Valwell*, 29 A. 1018 (Vt. 1894 ).

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290. See, e.g., *Killins v. State*. 9 So. 711 (1891). The court said:

The two first errors assigned are, that the court erred in permitting the witnesses William Ray and Nancy Powell to testify as to the fact that the defendant, after slaying Margaret Welton, chased, shot at and threatened to kill, and tried to kill Nancy Powell. We do not think the court below erred in admitting this testimony. The proof is, that immediately after the defendant shot Margaret Welton, her mother, Nancy Powell, ran out of the tent *Id.* at 723.

291. Francis Wharton, *EVIDENCE IN CRIMINAL ISSUES* (1846). According to the Encyclopedia Britannica Wharton was a renaissance man. Wharton, a Philadelphia native born in 1820, graduated at 19 from Yale College and was admitted to the Pennsylvania bar in 1843. He edited the *North American* and the *United States Gazette* while conducting a busy practice. In mid-life he switched careers and became professor of history and literature at Kenyon College, until he was ordained an Episcopal priest in 1863. Wharton was a teacher at the Protestant Episcopal Seminary at Cambridge, Massachusetts and also lectured on law at Boston University. In 1886 he took a job as a State Department Solicitor and lectured on criminal law at Columbia Law School, the predecessor of George Washington University School of Law. Wharton published treatises on more than a dozen legal topics including criminal law, evidence and criminal evidence. He died in 1889. See the Memoir (Philadelphia, 1891) by his daughter, Mrs Viele, and several friends; and J. B. Moore's " Brief Sketch of the Life of Francis Wharton," prefaced to the first volume of the Revolutionary Diplomatic Correspondence.

292. Simon Greenleaf, A TREATISE ON THE LAW OF EVIDENCE (1842). Greenleaf had been a Harvard law professor. He dedicated his first edition to Joseph Story, who was the first Dane Professor of Law at Harvard. The treatise was kept in print long after his death and remained a reliable source for cases on evidentiary issues until Wigmore revised it into his own multi-volume set.

293. H. C. Underhill, A TREATISE ON THE LAW OF CRIMINAL EVIDENCE (1898). Underhill was a Brooklyn lawyer.

294. *Greenleaf* § 14a.

295. *Id.*

296. *Id.* § 14b.

297. *Id.* at § 14q.

298. *Id.*

299. *Id.*

300. *Id.*

301. *Id.* at § 14m-14n.

302. *Id.* at § 14n.

303. Such questions, “Is it not true that you have served a term in the penitentiary?” or “have you not been arrested for felony?” – where not propounded in good faith, or asked concerning facts that in themselves are irrelevant, constitute reversible error, entitling the accused to a new trial. And this is true, even though such questions are objected to at the time on the ground of irrelevancy, and the answer excluded by the court. The reason is, the irrelevant facts have been placed before the jury by innuendo, the sinister influence remains, nor is it destroyed by the exclusion.. *Wharton*, § 29.

304. *Id.* at § 30.

305. *Id.* at § 31.

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306. *Id.* at § 33.

307. *Id.* at § 35.

308. *Id.* at 36.

309. *Underhill*, Chapter VII.

310. *Id.* §§ 77-81. Underhill noted that “Good character should be permitted to operate as a positive, appropriate and substantial defense. No distinction should be made, in application and effect between evidence to prove facts and evidence to prove character.” *Id.* at § 79. In § 80 he notes that good character is not conclusive on the issue of guilt, “Unless the evidence of guilt is so convincing that it precludes a reasonable doubt, an acquittal will be justified if the evidence of good character, considered in connection with all the other evidence, raises a reasonable doubt.” *Id.* Good and bad character may be proved by reputation alone, Specific acts are not allowed. *Id.* at § 81.

311. *Id.* at § 82.

312. Chapter VIII.

313. *Underhill* § 87.

314. If several crimes are intermixed, or blended with one another, or connected so that they form an indivisible criminal transaction, and a complete account of any one of them can not be given without showing the others, any or all of them are admissible against a defendant on trial for any offense which is itself a detail of the whole criminal scheme. *Id.* § 88.

315. Another exception to the rule occurs when the intention of the act is material. . . . [E]vidence of similar and independent crimes (but not of those which are dissimilar) is often relevant to show the presence of some specific intent. *Id.* § 89.

316. “Where a crime has been committed by some peculiar, extraordinary and novel means, or in a peculiar or extraordinary manner, evidence of a similar crime committed by the accused, by the same means, or in the same manner, has been received.” *Id.* § 91.

317. “. . . Under an indictment for adultery or incest evidence of the commission of similar crimes by the same parties prior to the offense received. In all such cases the mutual relations and the disposition of the parties towards one another are relevant upon the question, did they have illicit intercourse?” *Id.* at § 92.

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318. 61 N.E. 286 (NY 1901).

319. This account of Milburn's career is taken from From History of Buffalo website: <http://ah.bfn.org/h/milb/index.html> (20 Dec. 2002) American Exposition: World's Fair as Historical Metaphor" as found in "High Hopes: The Rise and Decline of Buffalo, New York," by Mark Goldman. Albany: State University of New York Press, 1983; [http://www.publicbookshelf.com/public\\_html/The Great Republic By the Master Historians vol IV/president gc.html](http://www.publicbookshelf.com/public_html/The_Great_Republic_By_the_Master_Historians_vol_IV/president_gc.html) (21 Dec 2002). The Pan American Exposition lost more than \$6,000,000. Milburn went to Washington in 1902 to get a Congressional bailout for the Exposition Committee's debts since its bonds were worthless. However, Congress refused to act and the Committee defaulted on its bonds. Milburn then accepted a position with the New York City firm of Carter & Ledyard. A great trial and appellate lawyer, Milburn represented Standard Oil Co. before the U.S. Supreme Court in the Standard Oil anti-trust case. Milburn was equally well-known for his oral argument in *Molinuex*. See Joseph S. Auerbach, *THE BAR OF OTHER DAYS* 271-73 (1940).

320. *People v. Molinuex*, 61 N.E. 286 (1901).

321. *Molineux*, 61 N.E. 688.

322. Alton W. Parker was the Democratic presidential candidate in 1904. He was elected to the Court in 1897 by 60,000 votes although the State had voted Republican in the 1896 presidential election. Judge Parker was a Conservative Democrat. He was a school teacher who graduated from Albany Law School in 1873 and after a short career as a trial lawyer was elected Ulster County Surrogate. FRANCES BERGAN, *THE HISTORY OF THE NEW YORK COURT OF APPEALS 1847-1932*, 224 (1985).

323. Elected in 1888 to replace Judge Rapallo, the first Italian-American to sit on the Court of Appeals. *Id.* at 124 (1985).

324. *Id.* O'Brien was a native of Ogdensburg, a former mayor of Watertown, and a member of the bar since 1861. He was Attorney General under Gov. Tilden in 1884-86. He was elected to the Court in 1889. See also Marquis Pub. Co., ed., 1 *WHO WAS WHO IN AMERICA, 1896-1942* 904 (1942) (hereafter "Who Was Who").

325. *Id.* at 225. Judge Cullen, a Democrat and a Brooklyn native, graduated from Columbia just before the Civil War and served as the Colonel of the 96<sup>th</sup> New York. For a history of the unit see Frederick A. Dyer, *A COMPENDIUM OF THE WAR OF THE REBELLION 1442* (Des Moines, IA. 1908). See After the war Cullen was admitted to the bar and became a Kings County assistant district attorney. Governor Samuel J. Tilden appointed him a Brigadier General of Militia in 1872. He had been elected to the Supreme Court in 1879 and was appointed as an interim judge of the Court of Appeals in 1900. Cullen was a fellow-member of the Military Order of the Loyal Legion and probably a sure vote to reverse Gen. Molineux's son's conviction. *Who Was Who*



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283. Judge Werner, a Buffalo native, and a Republican, had been on the bench since 1889, first as a county judge in Rochester, and then a Supreme Court judge for the seventh district. *Who Was Who* 1322. Judge Landon did not sit on the Molineux appeal and did not stand for election in 1902. He was a grauate of Union College and was a lecturer at Albany Law School on constitutional law. *Who Was Who* 701.

326. This account of Judge Parker's political career is taken from James G. Rogers, *AMERICAN BAR LEADERS*, 140-44 (1932)

327. Judge Cullen and Judge Landis took no part in the decision.

328. *People v. Molineux*, 168 N.Y. 264, 272, 61 N.E. 286 (1901).

329. *Id.* at 168 N.Y. 64-65.

330. *Id.* at 61 N.E. 304-05.

331. Section 1. Comparison of a disputed writing, with any writing proved to the satisfaction of the court to be genuine, shall be permitted to be made by witnesses in all trials and proceedings, and such writings and the evidence of witnesses respecting the same may be submitted to the court and jury as evidence of the genuineness, or otherwise, of the writings in dispute. *Laws*, N. Y. 1880, ch 36, § 1.

332. 95 N.Y. 73 (1884).

333. *Id.* at .

334. *Molineux*, 61 N.E. 306-07.

335. *Id.* at 307.

336. *Id.* at 309.

337. *Id.* at 310.

338. Did you tell anybody connected with the Health Board that Barnet had received through the mails a package of Kutnow powder containing cyanide of mercury? I did not. Now Barnet had told you that he received this package anonymously through mails hadn't he? Mr. Barnet told me that he had received a box of Kutnow powder through the mail, purporting to be. It was not a reception of the box, but that I had to account for a certain amount of mercurical stomatits, and for that reason I sent the box to be analyzed. *Molineux Trial*, 322.

339. *Id.*

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340. See, e.g., *People v. Hawkins*, 17 N.E. 371 (1888) (insanity defense to homicide: defendant's statement of past symptoms when seen by expert physician do not prove condition at time referred to in statement). There is an excellent summary of 19<sup>th</sup> century law on admissibility of hearsay declarations to physicians in *Davdson v. Cornell*, 30 N.E. 753, 576 (1892). Only statements referring to present pain and suffering were admissible; those relating to past pain and suffering were not.

341. See, e.g., *The West Chicago Street R.R. Co. v. Carr*, 48 N.E. 992, (Ill. 1897) which contains an excellent summary of the law taken from a number jurisdictions, including New York.

342. A hearsay statement about the source of disease or injury is admissible only when it is pertinent to treatment. See, e.g., *United States v. Ortiz*, 34 M.J. 831 (C.M.R. 1992) (Statement of wife that husband battered her admissible because necessary to proper psychological treatment of injuries). However, some Federal courts have admitted statements of medical history showing causality when not necessary to treatment, when the statement amounted to admissions of contributory fault. See, e.g., *Onujiogu v. United States of America*, 817 F.2d 3, 5 (1<sup>st</sup> Cir. 1987) (statement made by plaintiff's adult mother that plaintiff pulled hot water over on self admitted as declaration made for medical treatment)

343. *Id.* at 293.

344. 55 N.Y. 81 (1873).

345. A person cannot be convicted of one offence upon proof that he committed another, however persuasive in a moral point of view such evidence may be. It would be easier to believe a person guilty of one crime if it was known that he had committed another of a similar character, or, indeed, of any character; but the injustice of such a rule in courts of justice is apparent. It would lead to convictions, upon the particular charge made, by proof of other acts in no way connected with it, and to uniting evidence of several offences to produce conviction for a single one. There are, however, some exceptions to this rule when guilty knowledge is an ingredient of the crime; and the question is, whether this evidence falls within any recognized exception. *Id.* at 90-91.

346. 41 N.E. 405 (1895).

347. Shea was a murder prosecution. Shea was accused of shooting another man who tried to keep him from voting in a local election in Troy. Shea was a "repeater," a person used by the local machine politicians to cast multiple ballots in several different precincts. The altercation was the result of discovery that Shea had already voted. The District Attorney brought in other instances of Shea's "repeater" conduct to prove motive for the murder of the man who identified him. The Court of Appeals said: "Fifth. The counsel for the defendant challenge the

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correctness of the rulings of the trial court in admitting evidence of the repeating in the presence and under the supervision and direction of defendant at the different polls as stated in the point last discussed. Proper exceptions were taken to the decisions of the court in that regard and the question has been argued before us at great length. The objection taken is that the evidence was immaterial and had no proper or legitimate bearing upon the issues joined for trial, and that it simply tended to show the defendant guilty of some other, separate and different crime from that for which he was indicted and then on trial and to greatly prejudice him in his defense. The impropriety of giving evidence showing that the accused had been guilty of other crimes merely for the purpose of thereby inferring his guilt of the crime for which he is on trial may be said to have been assumed and consistently maintained by the English courts ever since the common law has itself been in existence. Two antagonistic methods for the judicial investigation of crime and the conduct of criminal trials have existed for many years. One of these methods favors this kind of evidence in order that the tribunal which is engaged in the trial of the accused may have

the benefit of the light to be derived from a record of his whole past life, his tendencies, his nature, his associates, his practices, and, in fine, all the facts which go to make up the life of a human being. This is the method which is pursued in France, and it is claimed that entire justice is more apt to be done where such course is pursued than where it is omitted. The common law of England, however, has adopted another and, so far as the party accused is concerned, a much more merciful doctrine. By that law the criminal is to be presumed innocent until his guilt is made to appear, beyond a reasonable doubt, to a jury of 12 men. In order to prove his guilt it is not permitted to show his former character or to prove his guilt of other crimes, merely for the purpose of raising a presumption that he who would commit them would be more apt to commit the crime in question. *Id.* at 99. The Court of Appeals affirmed Shea's conviction, holding that the evidence of his repeater conduct went to prove criminal intent. *Id.* at 103.

348. Molineux, 61 N.E. 294.

349. Molineux, 61 N.E. 294. Werner cited Wharton on Criminal Evidence § 48 and Underhill on Evidence § 58 in support of his prior and later discussion of the uncharged misconduct rule. Underhill was the latest published authority on the subject and Werner's exhaustive treatment shows little influence from this source. However, Wharton later re-wrote his entire section on uncharged misconduct to use Molineux as the archetype of his own presentation of the rule and its exceptions.

350. *Id.*

351. *Id.* at 295.

352. *Id.* Judge Werner cited *People v. Harris*, 136 N.Y. 443 (18 ) and *People v. Otto* 4 N.Y. Crim Rep. 149 (18 ).

353. *Id.*

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354. *Id.* at 296.

355. See, e.g., Edward J. Imwinkelried, *The Use of Evidence of an Accused's Uncharged Misconduct to Prove Mens Rea: The Doctrines Which Threaten to Engulf the Character Evidence Prohibition*, 51 OH. ST. L. J., 577 (1990).

356. *Id.*

357. *Id.*

358. *Id.* at 297.

359. *Id.*

360. 3 Fost. U& Finl. 681 (18 ).

361. *ID.*

362. 1 Cox Cr. Cas. 630 (1893).

363. Molineux, 61 N.E. 298.

364. Regina v. Geering, 18 L. Mag. Cas. 215 (18 ); Regina v. Cxottonb, 12 Cox. Crim. Cas. 400 (18 ); Regina v. Roden, 12 Cox Crim. Cas. 630 (18 ); Regina v. Higgins, 15 Cox Cr. Cas. 403 (18 )

365. *Id.* at 298-99.

366. *Id.* at 299.

367. 85 Pa. 139 (1878). Justice Woodward said:

When the offer was made to prove the existence of the Ancient Order of Hibernians, and its objects and operation, the court expressed the opinion that it was "on the very outer verge of any evidence" that had been given in the trials in which the character of the organization had been involved. It was admitted, however, so far as it related to facts existing in October 1868, but specific acts of others than those charged with complicity in the murder of Rea, committed either before or after that time, were excluded. Was this testimony irrelevant? It was not designed to be used to establish the commission of any independent crime. Nor was its object to affect general character, or to repel inferences from adversary facts. Its purpose was to explain the relations existing between the conspirators, the reason, motive and opportunity for their combined action, and the nature of the tie that bound them together. *Id.* at 156

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368. 4 N.Y.S. 736, 737 (1897).

369. Molineux, 61 N.E. 300. The cases were *People v. Murphy*, 135 N.Y. 450 (1892) (arson prosecution: two threatening letters identified by handwriting experts as in defendant's hand admitted to show plan or design of arson) and *Kramer v. Commonwealth*, 87 Pa. 301 (1878) (defendant lived in hotel that had been object of arson on 23 May; on 25 May he was discovered trying to start another fire in the hotel; second attempt held admissible to prove plan).

370. *Id.* at 301.

371. *Id.*

372. *Id.* at 302.

373. 71 Cal. 565 (1887).

374. *Id.* at 565-68.

375. 105 Mass. 451 (1870).

376. The jury were carefully instructed in regard to the use to be made of this box and block, to wit, that if the jury should be satisfied that the defendant made them, the evidence was not to be used to show that he made the box used at the alleged fire, but only to show that he possessed the requisite skill, materials, tools and opportunity to have made it, and that this is its sole use, unless the jury should find, in the one, such marks as show that one hand must have made both *Id.* at 457.

377. Molineux, 61 N.E. 303. Werner cited *Hope v. People*, 83 N.Y. 418 (1881) (robbery prosecution for taking the keys to a bank vault. Held: No error to admit evidence that defendant committed a bank burglary using the stolen key to identify him as one of the gang that perpetrated the robbery) and *Rex v. Clewes, & Payne* 221 (18 ) (murder prosecution: proof that accused murdered the man who had earlier killed a victim for hire admissible to show the identity of the person who paid for the murder).

378. *Id.* Judge Werner noted that the "Barnet" correspondence dealt with remedies for impotence and although "Cornish" had written to Kutnow Bros. for a free sample, that occurred after Barnet's death and there was no evidence showing that "Barnet" had ever written for a sample of Kutnow Powder.

379. *Id.* at 303-04.

380. *Id.* at 310.

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381. *Id.*

382. It is so difficult for the human mind to discard false theories that assume the disguise of truth, and so easy to substitute suspicions and speculations for evidence of facts that proof of the general bad character of the accused, or of participation in other crimes, which is practically the same thing, would no doubt be of great aid to the People in procuring a conviction. . . . but the law, for obvious reasons, does not permit it. *Id.* at 311.

383. If the defendant procured or caused the death of Barnett, he is liable to be indicted and tried for that offense, but it is contrary to the plainest principles of justice to require him, when accused of poisoning Mrs. Adams, to clear himself from all suspicion of participation in another crime of the same character. *Id.*

384. *Id.* at 312.

385. *Id.* at 313.

386. *Id.* at 315-16.

387. *Id.* at 316.

388. *Id.* at 315.

389. *Id.* at 316-17.

390. See, e.g., *Apprendi v. New Jersey*, 530 U.S. 466 (2000) (held: hate-crime penalty enhancement unconstitutional because a separate crime that should have been charged in indictment); *Jones v. United States*, 526 U.S. 227 (1999) (held: any fact other than prior conviction that would enhance penalty must be charged in indictment).

391. See, e.g., *In re Winship*, 397 U.S. 358, (1970) (4<sup>th</sup> Amendment requires that proof beyond reasonable doubt standard apply to juvenile adjudications);

392. *Molineux*, 61 N.E. 303.

393. E-mail from Reference Librarian, University of Rochester dtd December, 2002.

394. *Pejsa* at 227.

395. *N. Y. Times*, 11 Oct. 1902 at 16.

396. *Id.*, 18 Oct, 1902 at 16

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397. *Id.*, 21 Oct. 1902 at 1.

398. *Id.*, 22 Oct. 1902 at 1.

399. *Id.*

400. *Id.*, 23 Oct. 1902 at 1.

401. *Id.*

402. *N. Y. Times*, 24 Oct. 1902 at 6.

403. *Id.*

404. *Id.*

405. *N. Y. Times*, 25 Oct. 1902 at 3.

406. *Id.* Governor Black's cross-examination insinuated that Erhardt had come to new York City to help out the prosecution because the District Attorney promised to meet some young women; Osborne's re-direct brought out the story that Arnold, Molineux' friend, had told the witness to keep quiet about wrapping the toothpick holder shortly after Molineux was charged.

407. *N.Y. Times*, 29 Oct. 1902 at 1.

408. *N.Y. Times*, 30 Oct. 1902 at 2. Justice Lambert agreed that the District Attorney's position had some merit, but the California Supreme Court had construed its former testimony statute, adapted from the New York statute, to exclude the use of former testimony in a like proceeding. Lambert said he would give the benefit of the doubt to the accused.

409. *N.Y. Times*, 2 Nov 1902 at 1.

410. *Id.*

411. *Id.* at 2.

412. *Id.*

413. *Id.*

414. Q Who besides you lived at the Knickerbocker Athletic Club?  
A Henry C. Barnet, Cornish, Mr. Adams, Heiles and perhaps others

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Q Where was Barnett's room with reference to yours?  
A They were on the same floor.  
Q How long did you and Barnett live on the same floor?  
A All the time I was there.  
Q Did you keep up your acquaintance with Barnett up to the time of his death?  
A I did.  
Q When did you last see him?  
A In September, 1898.  
Q Did anyone else see you two together at that time?  
A No one that I know of.  
Q Was your marriage sudden?  
A I was engaged in September and married Nov. 20, 1898. *Id.*

415. Q Outside of testimony at the former trial, did you ever hear Mamie Melando state that she saw sixsheets of this paper in your desk?  
A I did not.

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Q Outside of evidence at the previous trial, don't you remember Farrell coming to you and saying "Roland, do you remember meeting me on December 21?" and your saying, "Yes?"  
A No. *Id.*

416. *Id.*

417. *Id.*

418. *N.Y. Times*, 5 Nov. 1902 at 16. Dr. Marshall D. Ewell, Warren A. Drake of Chicago and David N. Carvalho constituted the defense writing experts.

419. *N. Y. Times*, 7 Nov. 1902 at 2.

420. *N. Y. Times*, 7 Nov. 1902 at 1.

421. *Id.*

422. *N. Y. Times* 7 Nov. 1902 at 2.

423. *Id.*

424. *N. Y. Times*, 8 Nov. 1902 at 1.

425. *Id.*



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426. *Id.*

427. *N.Y. Times*, 11 Nov. 1902 at 1.

428. *N.Y. Times*, 12 Nov. 1902 at 1-2.

429. *Id.*

430. *Id.*

431. *Id.* at 2.

432. *Pejsa*, 10-11.

433. *Id.* at 11.

434. Mrs. Roland B. Molineux left the family home yesterday morning and drove over to the Murray Hill Hotel where she has staid for seveal weeks past. She gave up her room there, and returned to the Fort Greene Place house, where she will remain with her husband. All disagreements between young Mrs. Molineux and her mother-in-law, it is said, have been settled. *N.Y. Times*, 13 Nov. 1902 at 16.

435. *N.Y. Times*, 16 Nov. 1902 at 11.

436. *N.Y. Times*, 18 Nov. 1902 at 1.

437. *Id.*

438. *Id.* See also ARTHUR A. CAREY, *MEMOIRS OF A MURDER MAN*, 94 (1930).

439. Cheseborough Family History Site: <http://www.chesebro.net/lana2/wga46.html> (2 Sept. 2002).

440. The term comes from Edward J. Iminwkelried,

441. See, e.g., Francis Wharton, *A TREATISE ON THE LAW OF EVIDENCE IN CRIMINAL ISSUES*, §31 (O. N. Hilton rev. 1912); William P. Richardson, *OUTLINE OF EVIDENCE* §§ 135-44 (1925).

442. The uncharged misconduct rule did not fit Wigmore's complex scheme of proof of fact. First, Wigmore broke up traditional character evidence and placed that portion which directly related to proof of character qua character under the heading of Prospectant Evidence: Evidence of the Doing of a Human Act. He explained how reputational character evidence, as well as

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specific acts showing a character trait help to explain future action by the actor in conformity with the proved character trait. Wigmore put the uncharged misconduct rule in the classification of Evidence of Knowledge, Belief or Consciousness under Topic III, Evidence of Mental Capacity. He did so because the relevance of uncharged misconduct evidence is not to prove a character trait of the actor, but to prove the mental state of an actor when that mental state was relevant to a claim or defense. See John H. Wigmore, *A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW* §§ 51-80 (prospectant evidence & character), 91-97 (other acts to prove knowledge, intent, etc.) (3<sup>rd</sup> ed. 1923); *A POCKET CODE OF THE RULES OF EVIDENCE IN TRIALS AT LAW*, Rule 30 at 38-40 (prospectant evidence); Rules 59 through 68 (1910).

443. See, e.g., *Rowan v. United States*, 277 F. 777, 778 (7<sup>th</sup> Cir. 1921); *Campbell v. United States*, 221 F. 186, 190 (9<sup>th</sup> Cir. 1915); *Crenshaw v. State*, 87 So. 328, 330 (Ala. 1921); *Locklear v. State*, 87 So. 708, 711 (Ala. App.), *certiorari dismissed*, 87 So. 712 (Ala. 1920); *Burnett v. State*, 268 P. 611, 614 (Ariz. 1928); *People v. Sotelo*, 283 P. 388, 389 (Cal. App. 1929); *Willingham v. State*, 149 S.E. 887, 890 (Ga. 1929); *State v. Sullivan*, 199 P. 647, 659 (Idaho, 1921); *People v. Schwartz*, 131 N.E. 806, 807 (Ill. 1921); *State v. Bige*, 193 N.W. 17, 20 (Iowa, 1923); *State v. Scott*, 114 A. 159, 161 (Me. 1921); *State v. Lambert*, 71 A. 1092, 1093 (Me. 1908); *Commonwealth v. Goldberg*, 98 N.E. 692, 693 (Mass. 1912). See also *Gassenheimer v. United States*, 26 App. D.C. 432, 444-45 (D.C. App. 1906) (defendant tried to bribe juror after first trial: admissible to show consciousness of guilt); *People v. Spaulding*, N.E. 196, 202 (Ill. 1923) (killing accomplice admissible to show consciousness of guilt).

444. See, e.g., Thomas J. Reed, *Reading Gaol Revisited: Admission of Uncharged Misconduct Evidence in Sex Offender Cases*, 21 AM. J. CRIM. LAW 127 (1993).

445. For jurisdictions that required proof of uncharged misconduct by clear and convincing evidence prior to adopting the Uniform Rules of Evidence, see, e.g., *People v. Albertson*, 145 P.2d 7, 21-22 (Cal. 1933) (positive & substantial); *People v. Botham*, 629 P.2d 589, 602-03 (Colo. 1981); *Benson v. State*, 395 A.2d 361, 364 (Del. 1978); *Cross v. State*, 386 A.2d 757, 764 (Md. 1978); *State v. Billstrom*, 149 N.W.2d 281, 285 (1967); *State v. Hyde*, 136 S.W. 316, 331 (Mo., 1911); *Tucker v. State*, 412 P.2d 970, 972 (1966); *Wrather v. State*, 169 S.W.2d 854, 859 (1942).

446. See, e.g., *Ernster v. State*, 308 S.W. 2d 33, 34 (1957)..

447. American Law Inst., *CODE OF EVIDENCE TENTATIVE DRAFT NO. 2*, frontispiece (19 Mar. 1941). The group of advisors included Prof. Wilber H. Cherry, University of Minnesota, Prof. Laurence H. Eldredge, University of Pennsylvania, Prof. William G. Hale, University of Southern California, Judge Augustus N. Hand and Judge Learned Hand, U.S. Court of Appeals 2<sup>nd</sup> Circuit, Prof. Mason Ladd, University of Iowa, Judge Henry T. Lummus, Massachusetts Supreme Judicial Court, Prof. Charles T. McCormick, University of Texas, and Charles E. Wyzanski, Jr. of Boston, MA.

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448. *Id.* at 119.

449. Maguire's comment read:

The law is often assumed to be otherwise than as stated in this Rule. Nothing is more common than to find the unqualified assertion that if a party is charged with having committed a specified crime or civil wrong, no evidence of the commission by him of another crime or wrong is receivable against him. That is true where the series of inferences on which the relevance of the evidence depends is from the commission of the other wrong to a disposition to commit such a wrong or to commit crimes or torts generally, thence to the commission of the particular wrong. The cases are legion, however, which admit such evidence when offered to prove motive, intent, preparation, plan or identity. A careful examination of the pertinent cases in England and in the United States will reveal that the great majority of them reflect the doctrine expressed in this Rule. See Stone, *The Rule of Exclusion of Similar Fact Evidence*, 46 Harv. L. Rev. 954 (1933) England; 51 *id.* 988 (1938) America. *Id.*

450. *Id.* at 1023-30. Stone's preference for Judge Parker's view of the uncharged misconduct rule rests on his belief that the points of similarity between the two killings was sufficient to show that Molineux perpetrated the Barnet homicide. *Id.* at 1028.

451. American Law Inst., MODEL CODE OF EVIDENCE, 196-97 (1942).

452. The rule as to the exclusion of evidence of other crimes and wrongs when offered to prove the commission of a specified crime or wrong is by 311 put on a sound sensible basis which has support in innumerable cases though rarely clearly articulated. Such evidence is made inadmissible only where it is relevant solely as tending to prove a disposition to commit such a crime or wrong or to commit crimes or wrongs generally. If it is relevant for any other purpose, it is admissible. The courts at common law will not admit evidence of a person's criminal or tortious character as tending to prove his conduct on a specified occasion; *a fortiori* they will not admit specific instances of his conduct on other occasions as tending to prove such character. Rule 306 does, with certain exceptions, admit evidence of relevant traits of character in civil actions as tending to prove conduct, but it does not permit such character to be proved by evidence of specific instances. This might well be enough without a specific rule. But out of abundance of caution in this instance, the Code specifically excludes evidence of a person's commission of other crimes or torts as tending to prove the commission of the crime or tort charged when the only series of inferences by which the commission of the crime or tort has any probative value is from that commission to a disposition to *Id.*, Foreword by Prof. Edmund M. Morgan, 33-34.

453. James F. Bailey, III and Oscar M. Trelles, II, 1 THE FEDERAL RULES OF EVIDENCE LEGISLATIVE HISTORIES AND RELATED DOCUMENTS, 913 (prefatory note to 1973 ed. Unif. R. Evid. (1980) (hereafter "Bailey & Trelles")).

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454. Rule 55 read as follows:

Rule 55. Other Crimes or Civil Wrongs. Subject to Rule 47 evidence that a person committed a crime or civil wrong on a specified occasion, is inadmissible to prove his disposition to commit crime or civil wrong as the basis for an inference that he committed another crime or civil wrong on another specified occasion but, subject to Rules 45 and 48, such evidence is admissible when relevant to prove some other material fact including absence of mistake or accident, motive, opportunity, intent, preparation, plan, knowledge or identity. Nat'l Conference of Commissioners on Uniform State Laws, *Uniform Rules of Evidence* (1953) in 1 *Bailey & Trelles*, 193 (document 2).

455. See, e.g., *Deevy v. Tassi*, 21 Cal.2d 109, 130 P.2d 389 (1942) (assault; evidence of defendant's bad character for peace and quiet held inadmissible); *Vance v. Richardson*, 110 Cal. 414, 42 Pac. 909 (1895) (assault; evidence of defendant's good character for peace and quiet held inadmissible); *Van Horn v. Van Horn*, 5 Cal. App. 719, 91 Pac. 260 (1907) (divorce for adultery; evidence of defendant's and the nonparty-corespondent's good character held inadmissible).

456. Cal. Evid. Code § 1101 (1965).

457. As originally drafted in 1971, Rule 404(a) was as follows:

(a) Character Evidence Generally. Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:

(1) Character of Accused. Evidence of his character or a trait of character offered by an accused, and similar evidence offered by the prosecution to rebut the same;

(2) Character of Victim. Evidence of the character or a trait of character of the victim of the crime offered by an accused, and similar evidence offered by the prosecution to rebut the same;

(3) Character of Witness. Evidence of the character of a witness, offered to attack or support his credibility. 2 *Bailey & Trelles*, 55 (1971 edition of proposed Federal Rules of Evidence).

458. The text read:

(b) Other Crimes, Wrongs or Acts. Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. 2 *Id.*, 56.

459. *Communications from the Chief Justice of the United States transmitting The Proposed Rules of Evidence of the United States Courts and magistrates, Amendments and Further Amendments to the Federal Rules of Civil Procedure, and Amendments to the Federal Rules of*

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*Criminal Procedure Which Have Been adopted by the Supreme Court, Pursuant to 18 U.S.C. 2072 and 2075 and 18 U.S.C. 3401, 3771 and 3771 Together with the Report of the Judicial Conference of the United States Pursuant to 28 U.S.C. 331 (1978) in 2 BAILEY & TRELLES, 7 (pages numbered as in original document).*

460. The official commentary says that:

Subdivision (b) deals with a specialized but important application of the general rule excluding circumstantial use of character evidence. Consistently with that rule, evidence of other crimes, wrongs, or acts is not admissible to prove character as a basis for suggesting the inference that conduct on a particular occasion was in conformity with it. However, the evidence may be offered for another purpose, such as proof of motive, opportunity, and so on, which does not require that the evidence be excluded. No mechanical solution is offered. The determination must be made whether the danger of undue prejudice outweighs the probative value of the evidence in view of the availability of other means of proof and other factors appropriate for making decisions of this kind under Rule 403. *Slough and Knightly, Other Vices, Other Crimes*, 41 Iowa L. Rev. 325 (1956).

461. Hearings Before the Special Subcommittee on Reform of Federal Criminal Laws of the Committee on the Judiciary of the House of Representatives, 93<sup>rd</sup> Cong. 1<sup>st</sup> Sess. , 93 in 3 BAILEY & TRELLES.

462. *Id.* at 122-23. Hellerstein thought that the change from “This subdivision does not exclude the evidence when offered” to “It may, however, be admissible for” somehow changed the sense of the rule

463. *Id.* at 263.

464. H.R. 5463, 93<sup>rd</sup> Cong., 1st Sess.as amended by the Subcommittee on Criminal Justice House Committee on the Judiciary, *Id.* at 145.

465. *Id.* at 269

466. Fed. R. Evid. 404(b) (1975).

467. The Official Commentary and accompanying comments from the committees reads as follows:

Subdivision (b) deals with a specialized but important application of the general rule excluding circumstantial use of character evidence. Consistently with that rule, evidence of other crimes, wrongs, or acts is not admissible to prove character as a basis for suggesting the inference that conduct on a particular occasion was in conformity with it. However, the evidence may be offered for another purpose, such as proof of motive, opportunity, and so on, which does not fall within the prohibition. In this situation the rule does not require that the evidence be

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excluded. No mechanical solution is offered. The determination must be made whether the danger of undue prejudice outweighs the probative value of the evidence in view of the availability of other means of proof and other factors appropriate for making decisions of this kind under Rule 403. *Slough and Knightly, Other Vices, Other Crimes*, 41 Iowa L.Rev. 325 (1956).

Notes of Committee on the Judiciary, House Report No. 93-650. The second sentence of Rule 404(b) as submitted to the Congress began with the words "This subdivision does not exclude the evidence when offered". The Committee amended this language to read "It may, however, be admissible", the words used in the 1971 Advisory Committee draft, on the ground that this formulation properly placed greater emphasis on admissibility than did the final Court version.

Notes of Committee on the Judiciary, Senate Report No. 93-1277. This rule provides that evidence of other crimes, wrongs, or acts is not admissible to prove character but may be admissible for other specified purposes such as proof of motive.

Although your committee sees no necessity in amending the rule itself, it anticipates that the use of the discretionary word "may" with respect to the admissibility of evidence of crimes, wrongs, or acts is not intended to confer any arbitrary discretion on the trial judge. Rather, it is anticipated that with respect to permissible uses for such evidence, the trial judge may exclude it only on the basis of those considerations set forth in Rule 403, i.e. prejudice, confusion or waste of time.

468. LEXIS Shepard's citator search 23 Feb. 2003.