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DR. F. N. STAPLES

MRS EMILY MAUD HOXIE.

STAPLES' MURDER CASE.

Supreme Court Sets Aside the Death Sentence and Orders a New Trial.

Full Text of an Interesting and Sweeping Decision.

In Bank. People of the State of California, plaintiff and respondent, vs. F. N. Staples, defendant and appellant. Crim. No. 1310.

The defendant was indicted for the murder of his wife in Amador county, convicted, sentenced to death, and appeals from the judgment and an order denying his motion for a new trial. Many grounds are urged for a reversal, but it is mainly insisted that the verdict of the jury was not warranted from the evidence.

Before we approach the consideration of this claim, however, it is necessary to dispose of other points raised by the defendant prior to the actual trial, which were ruled on adversely to him, and upon which he predicates error.

These points are that the court erred in refusing to grant the motion of defendant to be permitted to withdraw his plea of not guilty, so that he might move to set aside the indictment filed against him, and also erred in denying his motion for a change of venue.

As to the motion to permit a withdrawal of his plea. It appears that upon the arraignment of defendant, March 9, 1905, he was represented by an attorney, and the time for receiving his plea continued until March 11, 1905, at which time he entered a plea of "not guilty," and the time for trial, by consent of said attorney, was fixed for April 10, 1905. Neither at that time nor prior thereto was any motion of that character interposed. Subsequent to the arraignment and plea, defendant having procured additional counsel, they gave notice that on March 27, 1905, they would move the court to grant a continuance of the time for trial for a month, and to permit defendant to withdraw his plea of "not guilty," and make such motion relative to the indictment as he might be advised, said motion being based on the grounds that defendant could not prepare for trial on the day set, and that the plea of "not guilty" was inadvertently entered. The motion was based upon affidavits which were addressed mainly to a showing for a continuance, although as to the motion for leave to withdraw the plea it appeared therefrom that the attorney representing defendant on the arraignment and at the time he plead, was inexperienced and unacquainted with the practice in criminal procedure, and for that reason it was claimed failed to make a motion to set aside the indictment before the defendant plead. Upon the hearing the court granted the motion for a continuance, but denied the motion to allow a withdrawal of the plea.

As there was no proper showing addressed to the motion to withdraw the plea of "not guilty" and be permitted to interpose a motion to set aside the indictment—nothing to show that there existed any ground upon which such motion might be based if an opportunity to present it was granted—the order denying the motion to set aside the plea was correctly made. Undoubtedly a defendant has a right, notwithstanding a plea of not guilty is interposed, to move at any time prior to the trial for leave to withdraw it for the purpose of demurring or moving to set aside the indictment. (People vs. Villarino, 66 Cal., 230) but he has no absolute right upon motion to have the order made, and whether it shall be granted or not is a matter resting in the discretion of the court, to be exercised upon proper and sufficient showing, and it cannot be said that such discretion is abused where a bare motion to be permitted to withdraw the plea and attack the indictment is presented without any suggestion or showing that, if granted, he defendant has any grounds whatever upon which to base the motion which he claims he desires to interpose. It would be an idle act upon the part of the court to further delay the trial of a cause which was advanced so far as to have the plea of the defendant entered, by granting a motion to withdraw that plea and permit an attack upon the indictment, without any showing at all that valid, reasonable or even any disputable grounds existed upon which an attack could or would be based. While inexperience of counsel may supply a reason why the motion to set aside was not made before the plea of defendant was entered, it in no wise tends to show that there then existed any grounds upon which a motion could have been based had he been more experienced in criminal procedure. The showing of inexperience should have been supplemented by some showing, by affidavit of the existence of facts or grounds upon which a motion to set aside the indictment could have been based had his counsel been advised of the legal right of defendant to do so, or at least by proffer for filing of a motion to set aside the indictment upon specific grounds should the motion to withdraw the plea be granted. As no affidavit was presented and no proffer made, there was hence nothing to indicate that any grounds existed upon which to predicate a motion should the plea be withdrawn, and under these circumstances there was no abuse of discretion on the part of the court in denying the motion for leave to do so.

The motion of March 27, 1905, having been properly denied, the defendant, through the same counsel who had presented the original motion, but without any leave or permission of the court to do so, on April 27, 1905, again moved the court to permit the withdrawal of defendant's plea and for leave to file a motion to set aside the indictment upon a number of specific grounds. The motion was based upon affidavits setting forth that certain of the grand jurors participating in finding the indictment against defendant were biased and prejudiced; that others were not citizens of the United States; that others were not on the assessment roll, and also setting forth other grounds as a basis for the contemplated motion to set aside. It was also accompanied by a proffer of a motion to set aside the indictment upon all these grounds.

We are not advised, from anything in the briefs of appellant, where he found authority in law warranting him in making this second motion. Possibly the court upon application could have permitted the defendant to renew his motion, but we know of no rule of procedure which entitled the defendant as a matter of right to renew it.

Independent of this, however, the affidavits which accompanied the second motion do not show that counsel and the defendant were not not fully advised of the existence of all the facts recited in their affidavits accompanying the renewed motion when the original motion was made; nothing to show their inability to present these facts upon that motion. For all that appears upon the renewed motion and affidavits accompanying it the defendant and his counsel were in possession of all the facts when the first motion was made as grounds for setting aside the indictment urged on their second application. Not a particle of excuse, if any existed, is suggested why they did not then present them. In the absence of any showing by counsel of ignorance of the facts upon which the second motion was based when they made the first one, it is only reasonable to infer that they knew of their existence, and that by failure to present them at that time they waived them. Treating the second motion as in the nature of an application to set aside the previous order, and to allow an additional or further showing, the refusal of the court to do so cannot be said to be error. As the granting of a motion to set aside a plea is discretionary with the court, if on the original application there is nothing to show at all to warrant the order then applied for, or such weak showing as to justify its refusal, it cannot be said to be an abuse of discretion to refuse to set aside the order so as to allow another different or additional showing. If such a rule could obtain, the right of counsel to renew such motions and predicate error upon their denial would be unlimited and unrestrained. Of course, no such right exists. For these reasons the second application was without warrant and properly denied.

As to the denial of the motion of defendant for a change of venue. The affidavits on his motion were directed to the point whether defendant could obtain a fair and impartial trial in Amador county, where the alleged crime was committed. Those presented on the part of the defendant tended to show a general prejudice existed in that county against him that he could not. Those on the part of the prosecution tended to show that no prejudice existed sufficient to preclude him from having a fair trial. We think from a perusal of the affidavits, without detailing the facts disclosed by them, that the defendant made a very strong showing in support of his motion, but upon settled principles of law we do not think the defendant is in a position to claim any error in the action of the court in regard to it. When the motion was made the court did not make final disposition of it, but denied it temporarily, saying: "The rule involved has been in existence in this state from the 9th California down to the present time—nearly unbroken line of authorities—and is to the effect that the court may compel, if it so desires, at least an attempt to draw a jury before passing upon a matter of this kind finally . . . . . The order of the court is that the motion for a change of venue be denied temporarily. You understand, of course, (addressing counsel for defendant) that the denying of the motion temporarily means that hereafter if it develops that there is any ground for it the court will entertain the motion again."

Of course, counsel were familiar with the case referred to by the court—People vs. Plummer, 9 Cal. 298—and the subsequent cases of People vs. Goldenson, 76 Cal., 328, and People vs. Fredericks, 106 Cal., 304, holding that it is no error for the trial court to postpone the consideration of an application for a change of venue until an attempt is made to empanel the jury, where leave is granted to counsel to renew his application if the facts disclosed on the empanelment should further warrant it, and that where counsel fails thereafter to renew his motion, he cannot claim that error was committed by the court in failing to order a change of venue. In those cases it was held (notably in the latter case) that the failure to renew his motion, where it was denied temporarily only, was an abandonment and waiver of the whole question, and fatal to any claim based upon the original application. In the case at bar no ultimate disposition of the motion was made, and defendant was accorded the right to subsequently renew his motion. He did not do so, and he cannot, within the rule of the above cases, now insist that the court erred, when his right to move was only postponed, and he did not see fit to avail himself of his opportunity to subsequently renew the motion.

Having disposed of these objections we now come to a consideration of the principal point insisted upon by appellant, that the verdict was not warranted by the evidence.

Giving a general outline of the evidence, preliminary to a particular consideration of it when we reach the salient points in the case, it appears that defendant, a physician, and his wife, a trained nurse, took up their residence in Amador City in 1902, where defendant engaged in the practice of his profession. In June, July and August, of 1904, there was an epidemic of typhoid fever in that city, and defendant was employed professionally in many cases growing out of it, his wife assisting him in the care of his typhoid patients. In August of that year, while nursing a little girl suffering from that disease his wife was taken ill—it is claimed on the part of the defense from a attack of typhoid fever, a matter which will be considered later—and took to her bed on the 14th of that month. Next morning defendant employed a Mrs Reeves as housekeeper, and on August 17th engaged Miss McCarthy, a professional nurse, to take charge of his wife; called Dr Gail of Jackson into consultation, and at the time Miss McCarthy came to nurse, called in Dr Quinn, who prescribed for her and attended her thereafter until the morning of August 29th. On August 30th, Mrs Staples having become somewhat convalescent, she discharged Miss McCarthy as nurse, telling her that as Dr Quinn was not coming any more she thought she could also dispense with her services. The nurse left, and Mrs Reeves thereafter regularly attended to Mrs Staples. During the night after the nurse left, Mrs Staples became worse; nervous, with a slight rise in temperature, which increased as the night advanced, so that about the middle of the night defendant was required to call up Mrs Reeves, who had retired, to assist him. Enemas having been administered by the defendant, Mrs Staples became apparently stronger and better, in which condition she remained practically during the day time of the 31st, and until about 7.30 in the evening. At that hour, while defendant was in the yard, Mrs Reeves called him, saying his wife was worse. When he entered the sick room he found her very weak and in a semiconscious condition. He sat down beside her bed, felt her pulse, and immediately reached up to the bureau for a whiskey glass which was resting there, containing a colored liquor, which he administered to her little by little with a spoon, and then placed the glass back on the bureau. She did not rally or become conscious, and about quarter past eight died.

Within a little over an hour after her death her body was embalmed by John Daneri, an undertaker and embalmer of Amador City. He was sent for by defendant to prepare the body for burial. Nothing was said to him by defendant about embalming the body, only to prepare it for burial, and this he proceeded to do, as he says, in his own way. He opened the femoral artery in the right leg and injected into it in the direction of the heart two quarts of the embalming fluid. The body was still warm while the fluid was being injected, and there was no impediment after the fluid started, to its flow through the artery; the flow was continuous and unimpeded, until the required quantity was injected. Daneri, when he came to the house, had asked the defendant if he intended shipping the body east, and received a reply in the negative, had given simply an arterial embalment. No puncture of the stomach or any of the organs of the body was made, nor was there directly injected therein any embalming fluid, a process which the embalmer said he would have employed had the defendant intended to send the body away. The embalming fluid used consisted of zinc, bichloride of mercury, alum water, arsenic, formaldehyde and salt. The body of deceased was buried in one of the cemeteries in Amador county. The defendant remained in Amador City for a month subsequent to the death of his wife, disposed of his property in that place, and in the latter part of September left for San Francisco, where he opened an office in the Galt house in that city.

Immediately prior to the time when defendant's wife was taken ill he had built a home in Amador City which they occupied at the time of her death. Near them resided a family named Hoxie, consisting of husband and wife and young daughter. On September 13th Mrs Hoxie deserted her husband and child, and subsequently went to live at the Galt house with the defendant, as his mistress. This conduct on the part of the defendant doubtless awoke the indignation of the residents of Amador City against him, and generated a suspicion as to the cause of his wife's death. At least investigation was put on foot to determine it, and on the 18th of October, 1905, the body of Mrs Staples was exhumed and an autopsy held. The exhumation was made by Daneri, the undertaker who had embalmed and buried the body, and it was found in an excellent state of preservation. The autopsy was held about the center of the cemetery, a hedge surrounding the place precluding any observation from the outside, and was made by Drs Gall and Endicott, physicians of Amador county. As to that examination, the testimony of Dr Gall was quite general. It was to the effect that he examined all the vital organs of the body except the interior of the stomach, and could find no apparent cause of death; that he examined internally about two feet of the intestines in the vicinity of the iliocaecal valve, and found no indications of any disease from such examination. Dr Endicott testified with more particularity. He states that they examined the brains, heart, kidneys, liver, intestines and all the vital organs of the body; used the knife and made their examination with the naked eye; examined the intestines externally throughout their full course, and internally for about two feet above and below the iliocaecal valve; that neither of them made any chemical tests or microscopic examinations, nor did they take any cultures. They removed the stomach, sealed it, and sent it to Price & Son, chemists in San Francisco, for examination and report. Thomas Price, of that firm, an analytical chemist and taxicologist of large experience in his profession, made tests to discover the presence in the stomach of veratrum viride, strychnine or arsenic. The stomach when opened by him for that purpose was entirely empty, containing no fluid—simply a moisture and no solids. He first tested for veratrum viride and then strychnine, but found neither of these two compounds. He then tested for arsenic, and the test disclosed the presence of 1.26 of a grain.

So much for the general facts in the case.

The theory of the prosecution is that the death of Mrs Staples was occasioned by the administration to her by defendant of veratrum viride or arsenic or both.

The evidence as to these matters was, it may be said, almost entirely circumstantial, and consisted of the testimony of experts called upon both sides, whose opinions as to the essential facts in the case were at radical variance.

At the outset it may be said that there is no room for doubt but that the illness with which Mrs Staples was prostrated on the 14th of August was typhoid fever. This is abundantly shown from the evidence, not only of the defendant but of disinterested witnesses who were actually in attendance on her, and whose testimony and opinions in that respect are not questioned. It was established by the testimony of the trained nurse, by Dr Quinn, who was attending physician from the time of her illness until two days before her death, and by the testimony of Dr Gall, one of the autopsy physicians who had been called into consultation with defendant when his wife first took ill, and diagnosed her case as one of typhoid fever. It was further confirmed by the testimony of experts on the trial, who declared that some of the symptoms specified were marked evidence that the disease was typhoid fever. However, we do not understand this to be contested by the prosecution, its position being that, though the disease with which Mrs Staples was prostrated was typhoid fever, yet that disease was not the cause of her death; that her death was caused by the poisons specified, administered by defendant while she was suffering from that disease.

Now as to the evidence that the death of Mrs Staples was occasioned by either of these poisons, and first, as to the claim that it occurred from veratrum viride. Half an ounce of that drug contains, as testified to by the druggists who sold it, about 580 drops, and would not fill an ordinary whiskey glass quite half full. The druggist who sold it testified that veratrum viride is of a reddish brown color and translucent. The official dose of the drug is from two to five drops, and the evidence shows that anything over that might be fatal, and in some cases it might take thirty drops to cause death. The only evidence in the case upon which the theory of the prosecution can be based with reference to the administration of veratrum viride is that on the afternoon of the day upon which Mrs Staples died the defendant purchased it, and when she became semi-conscious before her death he administered to her from a glass a liquid which had the appearance of veratrum viride. There is nothing else in the evidence to indicate poisoning from this drug. Neither the autopsy nor the chemical analysis of Dr Price revealed its presence at all in the body of deceased, nor was there any evidence of any clinical or pathological symptoms or conditions indicating that death had been occasioned from it. On the contrary, as to these symptoms and conditions, the direct evidence, if it does not show that she did not die from the effects of veratrum viride, at least very strongly indicates that she did not, and the preponderance of the expert evidence tends to confirm this conclusion. The purchase by defendant of veratrum viride was not, itself, an incriminating circumstance. As to that purchase the defendant testified that "about four o'clock in the afternoon (August 31st) I felt of her pulse and examined her thoroughly. This rapid pulse gave me a suggestion of the disease of uraemia, which I have known to follow cases of typhoid fever, and led me to examine Mrs Staples, urine; I found the urine contained albumen, and this strengthened the theory that uraemia might set in as a complication. In uraemia with convulsions I always use veratrum viride, tincture of veratrum viride, and in order to be prepared for this complication, if it arose, I went to the drug store about five or a little after, and purchased one-half ounce of veratrum viride,." He purchased it at the drug store where he was accustomed to deal, and the druggist testified, as did the defendant, that when the defendant entered the drug store and asked for the tincture of veratrum viride, the former inquired of him how Mrs Staples was; the defendant said she was worse, and that he wanted the tincture of veratrum viride for her. The druggist asked if he should label it, and defendant answered, "Yes, you had better, because I might want it for some of my other patients." These are conditions and circumstances under which the purchase was made; openly, and with the declared object for which it was purchased. The undisputed medical testimony in the case shows that while poisonous when administered in excessive doses, tincture of veratrum viride is a well recognized official drug, administered principally in cases of uraemic convulsions which sometimes arise in cases of typhoid fever. So that as far as the purchase of the drug is concerned, under the circumstances detailed, to meet possible complications in Mrs Staples' case, it not only appears that the drug was a proper remedy, openly purchased for the purpose the defendant claimed and desired, it, but as a physician, tearing the complications he indicated, it was his professional duty to get it and give it should they arise. Defendant testified the complications he feared did not arise and that he did not administer any of the drug to his wife.

It is insisted, however, that the liquid was administered when Mrs Staples was in a semi-conscious condition. This is the time when it is claimed by the prosecution that it was given—at about 7.30 p. m., and that the liquid administered at that time was veratrum viride. But that the liquid administered then was this tincture is, under the evidence, purely conjectural. The defendant testified that the liquid he gave his wife was whiskey and water. Mrs Reeves, who was present when he was giving it, testified that the liquid was in a small whiskey glass, and had the appearance of whiskey and water. It was given without any secrecy, in the presence of the housekeeper, and it is not contended that whiskey or water in her then condition was not a proper stimulant to give her.

Now as to the clinical symptoms and pathological conditions.

Dr. Morgan, a physician and chemist and toxicologist of many years' experience, called on behalf of the defense, testified: "Veratrum viride, when taken in poisonous doses, acts upon the system, first, the same as mustard and water, it being a powerful irritant. It irritates the lining membrane of the stomach, and causes vomiting. After that, if it is absorbed into the system, the patient becomes depressed, becomes weak, and is covered with a cold perspiration. In case that death follows veratrum viride poisoning, it is not until quite a time after the administration of the drug

The shortest time in which death has occurred following veratrum viride poisoning being thirteen hours, and it has been prolonged until death has occurred 24 hours after having taken the dose. . . . The first symptoms of veratrum viride taken in poisonous doses is the irritation of the stomach and vomiting." Dr. Endicott for the prosecution testified that, "the symptoms of veratrum viride, when given in poisonous doses, is a partial collapse, then slight pulse, usually covered with a cold perspiration, and, as a usual thing, suffering from nausea. Vomiting does not frequently accompany it, but it taken internally vomiting would accompany it in a large majority of cases, but not immediately; sometimes produces intense burning in the stomach."

This is a fair embodiment of all the testimony in the case as to the effect of veratrum viride upon the stomach when administered in poisonous doses. From it, it appears that veratrum viride is a slow poison, and that death would not result from it within at least thirteen hours, after it was given. This is the only evidence in the case as to the time within which death would earliest ensue. Defendant obtained the drug about five p. m. Assuming that he administered it, or commenced doing so, immediately after obtaining it (which is not claimed (still, as Mrs. Staples died at 8:15 p. m. it would appear from the only expert evidence on the subject that a sufficient time (three hours and a quarter) had not elapsed for the poison to have occasioned her death. Respondent insists that, owing to the weakened, debilitated condition of Mrs. Staples, the administration of a poisonous dose of veratrum viride, administered at the time it is claimed it was, (7.30 p. m.) would cause death in a much shorter time than if administered to one in good health. This may or may not be true. Whether veratrum viride in poisonous dose would operate more speedly on Mrs Staples, on account of her debilitated condition, so as to cause her death, and within what time it would so operate, were pertinent and essential matters of proof in the case, and neither jury, counsel, nor this court, can indulge in a speculation on the subject contrary to the only evidence in the case upon that point. But aside from this, there was an absence of the symptoms which accompany poisoning from veratrum viride. There was no vomiting. This is testified to by the defendant. But laying his testimony aside, it is also testified by Mrs Reeves, the housekeeper, who was present from the time the liquid, which is claimed by the prosecution to have been veratrum viride was administered, until Mrs Staples died. Whatever may be said of the testimony of the defendant, the integrity of Mrs Reeves as a witness, and the accuracy of her observations in the sick room, are not questioned. She testifies that during that period there was no vomiting, and the evidence clearly shows that at no period during Mrs Staples' sickness was there any. To meet this testimony, it is again insisted by respondent that the slight vitality of Mrs Staples prevented the exhibition of these symptoms. But it nowhere appears from the evidence that this debilitated condition would prevent this characteristic symptom of the poisoning from appearing. No witness testifies that it would, but, on the contary, all testified that it is a symptom which will appear. The position of counsel seems to be that while the death of Mrs Staples was occasioned by the administration of the poison, yet, before the symptoms showed that she was so poisoned she died. Whatever merit there may be in this position, nothing in the evidence in the case furnishes any basis for it being taken. If she was poisoned by veratrum viride, the expert evidence shows that this symptom of it would have manifested itself; as it did not, it is evidence strongly tending to show that she was not so poisoned.

We now come to the autopsy, and consider its bearing first, on the matter of poisoning by veratrum viride. The exhumation of the body was 48 days after death. As to the autopsy itself, the testimony of the two autopsy physicians is that they found no pathological or diseased condition sufficient in their opinion to account for the death of Mrs Staples; there was no apparent cause of death which they could ascertain, which of course must be taken to include that they did not find any evidence of poisoning by veratrum viride or any other poison. Mr Price, the chemist making the antopsy, testified that as far as veratrum viride was concerned, he found no evidence of its presence in the analysis of the stomach which he made. This evidence, if the presence of veratrum viride would have been discovered by an autopsy or by chemical test after death, would be almost persuasive proof that veratrum viride had not been administered to the deceased. To meet this, however, the prosecution introduced the evidence of the autopsy physicians, testifying as such, and not as chemists or toxicologists, to the effect that veratrum viride being a vegetable drug, if administered, all traces of it would disappear between two and three weeks after death. To be specific, Dr Endicott was asked: "Q. How long after it (veratrum viride) would be administered could it be found? A. It could not be found any great length of time after death in my opinion, because it is a vegetable compound; it would decompose. Q. How long would it take this particular drug to decompose, being a vegetable matter, after being administered? A. I could not state a definite period of time.

Q. Well, can you give about the time? A. Well, I should say in two weeks anyway that there would not be a trace found." On the sbject Dr. Gall testified: "Q. How long would it take, being a vegetable drug—how long would it take to decompose? A. I don't know; it is a difficult question to answer; it would depend a good deal.

Q. Just about? A. On about two or three weeks I should think." And on cross-examination he stated, "I never saw any one die from it (veratrum viride) I never saw any sample that would demonstrate to me that it would decompose or disappear in two or three weeks; only say from my own general knowledge, because when decomposition sets in generally those vegetable properties decompose. Well, you would allow two or three weeks for decomposition to start, that is all; there was a certain amount of decomposition in this body. But for a body that had been buried seven weeks it was remarkably well preserved; no evidence of decomposition in the heart."

Now it will be observed from this testimony that the evidence of the physicians as to inability to detect the presence of veratrum viride poisoning in a body proceeds upon the the theory that veratrum viride in their opinion is a vegetable drug and disappears with the decomposition of the body; otherwise it could be detected. But there was no evidence that the body was decomposed at the time of the autopsy, or that decomposition had set in. Dr. Gall's own evidence largely negatives that proposition, and the testimony of Daneri, the embalmer, is that when he exhumed the body for the autopsy it was just as natural as the day he put it down and buried it; almost petrified; that to touch it was like putting your finger on a piece of iron. If then the only reason why veratrum viride, if administered, could not be discovered in a dead body would be because decomposition had set in, as it had not set in in the body of deceased, there was no reason why a proper examination or analysis to discover it would not have revealed its presence.

The evidence of the autopsy physicians is the only evidence in the case that veratrum viride disappears within a few weeks. In fact this testimony and that of the two following witnesses is the only evidence on the point.

Professor Price, the chemist and toxicologist, testifying as to his analysis of the stomach, was asked whether veratrum vitride administered fifty days prior to an autopsy could be discovered in then making an analysis of the stomach, to which he responded, "I have no personal experience myself to enable me to say that how long this veratrum viride will remain in the stomach after death, and from all my investigation among the authorities they are silent on that subject." He also designated veratrum viride as an alkaloid. Dr. Morgan, a physician and also a chemist and toxocologist of experience, testified that, "there is no evidence upon which we can base a positive opinion as to how long veratrum viride taken into the stomach would remain before decomposition would set in, it is an alkaloid; morphine will remain in the human body one or two years after death, and strychnine will remain in the human body as long as ten years. Morphine, strychnine and veratrum viride are all alkaloids, and we could reasonably expect to find them in the body for a period of a year or two, any one of the three."

Before proceeding to a further consideration of the case, it is proper at this point to say that when the defendant was on the stand he did not state, nor did his counsel make inquiry of him as to what had become of the veratrum viride which he purchased. This doubtless was an oversight on the part of defendant's counsel, and at best, only shows that he did not account for it. His failure, however, to testify on direct examination on this subject did not preclude the prosecution from making inquiry in that direction, if it so desired; hence it was a possible oversight on the part of the defense and prosecution that the subject was not gone into.

We do not think that any further discussion of the evidence upon this branch of the case is necessary, and without commenting upon it further than we have, we now pass to a consideration of the evidence bearing upon the claim of the prosecution that the deceased came to her death from arsenical poisoning.

This branch of the case, in our judgment, requires less discussion than we have devoted to the claim of poisoning by veratrum viride. There is no evidence that defendant had procured or had in his possession any arsenic. As a physician he may have had it, but there is no proof that he did. Neither at any time during her illness did Mrs Staples exhibit any symptoms of arsenical poisoning. As to those symptoms there is no dispute. Dr Morgan testified: 'The first symptoms of arsenical poisoning is a burning sensation in the throat and stomach and an intense desire for water; then follows vomiting, which is so severe that it cannot be controlled, the patient constantly desiring water, and as often as it is given constantly vomiting it. After that we usually find a diarrhoea and the vomiting becomes streaked with blood, the diarrhoea is of a peculiar character known as the rice water stools, and contains patches of mucous membrane from the intestines. The patients, if they die, usually die in from six hours to two days."

Dr Tiffany said, "Arsenic irritates the lining membrane of the stomach and intestines, and it creates more or less vomiting and purging, running off condition of the bowels. Vomiting takes place when it is used beyond physiological action to a poisonous extent, as soon as there was enough irritation of the stomach. The administration or receipt of arsenic in poisonous doses in the stomach would cause irritation within a few hours. In the case of taking by the mouth of arsenical poisoning, the irritation would leave on the internal organs a congested condition, an aridness, an inflamed condition. . . . . If one poisonous dose was administered at a time it would produce vomiting."

The sickness of the deceased covered a period of over two weeks, and there is no evidence whatever that at any time the symptoms attending arsenical poisoning exhibited themselves. There was no vomiting or purging. Neither did the autopsy or the chemical analysis of the stomach show any irritated condition of either the stomach or of any other internal organ of the body. Arsenic, it is true, was found in the stomach. But the evidence shows that its presence there could have resulted through the process of embalming, and, as far as the evidence on this point is concerned, it is quite apparent that it did. There is only one witness—Dr Morgan—who testifies upon this subject. Professor Price, who made the analysis, nowhere says (and there is no pretense that any other witness testified on the subject) that it could not have gotten into the stomach as the result of embalming. The most that can be claimed for his testimony (which is the deduction that the prosecution arrives at from it; but not what the Professor said) is that as the chemist did not find chloride of zinc, bichloride of mercury, formaldehyde or alum, but only arsenic, in his analysis, that therefore the arsenic could not have gotten into the stomach from the embalming fluid; that if it did, the other ingredients of the fluid would also be found there. The professor did testify that he found no chloride of zinc or bichloride of mercury, but did not say why he did not find them. He testified also that he found no trace of formaldihyde or of alum, but the reason for this, as he says, is because he did not look for them. As to the presence of arsenic in the stomach, he did not testify that it could not have gotten into the stomach from the embalming fluid. His only testimony on that point was that he found there the quantity of arsenic stated.

Dr Morgan, an equally reputable chemist, stated his belief that the arsenic in the stomach came from the embalming fluid, and in addition said: "My experience has taught me to believe that it is impossible for an organ in the human body to be within a few inches of embalming fluid for the period of forty-eight days without absorbing some of the arsenic. The embalming fluid injected into the right femoral artery would travel up the femoral artery a few inches and reach the aorta, which is the largest artery in the body, and being mixed with blood would pass on up to the heart. Now the stomach lies right over the aorta, not being separated from the interior of the aorta by more than an inch, and it would only have to travel that small distance of tissue in order to reach the stomach." He further testified, giving his reasons therefor, which space prevents quoting, that it was possible for arsenic to pass from the embalming fluid to the stomach without the chloride of zinc or bichloride of mercury showing itself there; that arsenic when injected into a dead body will commence diffusing itself through the tissue at once, while the other salts will not immediately commence to do so, nor will they "until such times as the body turns to liquid," when they will all travel. In addition to this, he made an experiment with the embalming fluid of Mr Daneri upon the stomach of a deceased person, which actual experiment confirmed the opinion he entertained and expressed. The opinion of Dr. Morgan with respect to these matters was not disputed by any medical or other opinion given in the case. So much for the evidence relating to arsenical poisoning.

In addition to these particular facts relative to the claim of the prosecution that the death of deceased was occasioned by poisoning there was other evidence, to be referred to generally.

Reputable expert physcians testified that the autopsy made by the autopsy physicians was incompete, and was not sufficient to determine whether the deceased had died from typhoid fever or not, while the same physicians testified that from the symptoms attending the sickness of deceased, they were satisfied that she died of typhoid fever. It was further shown by the evidence of disinterested parties that defendant and his wife had lived happily together, and that during her illness he treated her kindly, and seemed to do everything that he could to help her and alleviate her sufferings.

This is as far as we deem it necessary to state the evidence in the case. We do not concern ourselves with many suggestions, more of an argumentative character than otherwise, (but even as such quite cogent) made by counsel for appellant, which he claims are inconsistent and incompatible with the theory of the prosecution that the death of deceased was occasioned through poisoning. We content ourselves with the evidence as we have stated it, which in our judgment, did not warrant the verdict of the jury.

It will be perceived that the evidence in the case relied on to establish the guilt of the defendant is practically circumstantial, and it is elementary law that where the evidence is of such a character it must be not only consistent with the hypothesis of guilt, but inconsistent with any other rational conclusion. The deduction to be drawn from these circumstances is, ordinarily, one for the jury, but where, in a case such as this every circumstance relied on as incriminating, is equally compatible with innocence, there is a failure of proof necessary to sustain a conviction, and the question presented is one of law for the court. The prosecution has the burden of proof. The defendant is presumed innocent until the proof satisfies the jury beyond a reasonable doubt of his guilt The right of a jury to return a verdict of guilt is not an arbitrary right. The sufficiency of their verdict must be tested by determining whether the evidence upon which that verdict is framed was of such a character that they could say from it that in their judgment no reasonable doubt of the defendant's guilt existed. Now considering the evidence in the case at bar under these elementary rules of law, there was no proof in the case that the wife of defendant died from arsenical poisoning; in fact, the evidence is not only consistent with the claim of defendant that she did not, but it may be said that the preponderance of evidence in the case is to the effect that she did not. As to poisoning by veratrum viride. Aside from the opinion of the experts that Mrs Staples died of typhoid fever, from which she was concededly suffering, the clinical and pathological conditions tend to show that she did not die from the administration of that poisonous drug. The only evidence at all as to veratrum viride is that the defendant got it, and that he administered to her a liquid which looked like it. The most that can be said of this particular evidence is that it might have been sufficient to have raised a suspicion in the mind of the jury that he did administer it. Certainly it was not effective for any other purpose. This, however, could only be a suspicion, and no jury has a right to declare forfeited the life of a defendant upon mere suspicion. Especially is this true when the facts upon which the suspicion might have been generated are entirely consistent with innocence, and could exist without the defendant being guilty of the heinous offense of which he was accused. No man can be convicted of murder upon evidence which, at best, leaves the question of criminal agency in causing death, if not reasonably doubtful, at least merely conjectural.

We are not unmindful of the claim of the prosecution that there existed a motive for the death of Mrs Staples; a desire on the part of defendant to get rid of her so that he might enjoy the society of Mrs Hoxie. Assuming (which the evidence does not clearly show) that a meretricious relationship between them existed before Mrs Staples' death (the evidence is clear

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