CORNELIUS *vs.* THE STATE.

As to the caption of an indictment showing that the grand jurors are good and lawful men of the county, &c.

Under sec. 155, chap. 52 Digest, a member of a grand jury by which an indictment is found, &c., cannot serve as a juror on the trial thereof; and under section 163, of the same chapter, if the disqualification of the juror is discovered after he is sworn, but before any of the evidence is introduced, the court may, in its discretion, discharge him, notwith-

standing the contrary provision of section 20 of chapter 94 of the Digest, because the former section having been passed after the latter, controls it under the rule of construction, as given in the 6th section of the 156th chapter of the Digest.

Where the defendant was permitted, without objection, to ask a witness if he was not prejudiced against defendant, and he answered that he was, it was erroneous for the court, against the objection of defendant, to permit the State to draw from the witness a statement of the reasons why he was so prejudiced; and the witness having, in giving his reasons for such prejudice, detailed matters prejudicial to the character of defendant, the court could not counteract the effect of erroneously admitting them, by telling the jury not to regard them as evidence.

But it is not proper to ask a witness, in general terms, if he is not prejudiced against defendant. He may be interrogated as to any particular acts or expressions in reference to the accused from which the jury may infer unfriendly feeling or prejudice.

General rules as to what declarations of a party constitute part of the *res gestae* stated, and cases illustrative of them referred to.

In this case the defendant was indicted for the larceny of a cow, belonging to one of his neighbors; the State proved by two witnesses, that on a certain night they secreted themselves near the cow-pen of defendant, having heard that the cow in question had been penned with his cattle on that evening, and that between midnight and day, the defendant, and his negro boy, came to the pen, with a torch-light, killed the cow, and were about to commence skinning her, when witnesses arrested defendant. The defendant then offered to prove that on the night the cow was killed, after his cattle were turned into the pen, and before the family and others at his house went to bed, he declared openly in his family, and in the presence of visitors, that he was going to kill the cow before day, and take her to the neighboring town to market; and declared, at the same time, that he had received a message from the owner of the cow, which authorized him to kill the cow and pay for her—that these declarations were made to some three or four grown white persons, who were at his house at the time, as well as directions given to the negroes in reference to the matter: HELD that under all the circumstances, these declarations of defendant constituted part of the *res gestae*, and were competent evidence to show the intention of defendant in killing the cow.

The defendant further proposed to prove by *S.*, that a short time before the cow was killed, she heard *W.*, who was then living with defendant, tell him that he had been down to the residence of the owner of the cow, and that the owner had told him to tell defendant that the cow had been running about his, defendant's place, the winter before, and that if she returned he was at liberty to kill her and pay him two cents a pound for her; and that after receiving this message, the defendant openly declared his intention of killing the cow. It was further shown that defendant had been unable to procure the attendance of *W.* as a witness: HELD that *S.* was a competent witness to prove the delivery of the message to defendant—that it was immaterial whether the message was true or false, if defendant acted on it in good faith,

and that a person who heard the message delivered to defendant, was as competent to prove its delivery to him, as the person who delivered it.

Defendant proved by *M.*, a resident of the neighboring town, that on the day before the cow was killed, he had engaged to deliver to him beef on the next morning, and then proposed to prove by *M.* that he told him that he had no beef of his own, but that there was one at his house belonging to one of his neighbors, which he would kill, and pay for, and that he had permission from the owner to do so: HELD that under all the circumstances in proof, these declarations of defendant to *M.* should go to the jury as part of the *res gestae* explaining the intention and motives of defendant in killing the cow.

The husband having been examined for the State, the wife was a competent witness, on the other side, to show that her husband testified under a bias or prejudice against the defendant. Had she been offered to contradict her husband directly, there might have been doubts as to her competency.

Where defendant shows that after the cause was submitted to the jury, part of them separated from their fellows, without consent of the parties, or order of court, and were exposed to undue influences, it will be grounds of new trial, unless the State affirmatively show that no improper influences were exerted upon them.

An affidavit that some of the jurors were seen passing about the streets, without naming them, is insufficient—the names of the jurors should be stated, to give the State an opportunity of showing that no improper influences were exerted upon them, &c.

Writ of Error to Saline Circuit Court.

ELIHU CORNELIUS was indicted, in the Saline Circuit Court, for larceny, tried, convicted, and brought error.

The following is the caption to the indictment:

"STATE OF ARKANSAS, }
COUNTY OF SALINE. }

At a Circuit Court begun and held in and for the county of Saline, in the State of Arkansas, on the 2d Monday after the 4th Monday of March, A. D. 1849, present the Hon. Wm. H. Field, Judge, &c., amongst other proceedings were the following:

APRIL 9th, 1849.

GRAND JURY:—The following named persons were returned by the Sheriff as summoned to serve as Grand Jurors for the present term, *to wit:* David Dodd, &c.,[*naming them*] sixteen in number; David Dodd was sworn as foreman of the Grand Jury, and the

others as members thereof, and they, after receiving the charge of the court, retired to consider of the duties of their station."

The transcript shows that, on the next day, the Grand Jury returned an indictment, in the usual form, against Cornelius, charging him with the larceny of a cow belonging to one Joseph Clift, to which he pleaded not guilty. The indictment commences thus: "The Grand Jurors of the State of Arkansas duly returned, empanneled, sworn, and charged to enquire in and for the county of Saline, upon their oaths, present," &c.

The cause was continued twice on the application of defendant, on a showing that his witnesses were not in attendance. The trial came on at the April term, 1850, and the defendant was convicted, and sentenced to the Penitentiary for one year. During the trial, he took various exceptions to decisions of the court; made them grounds of a motion for a new trial, which being overruled, he took a bill of exceptions setting out the facts, which are as follows:

A venire having been returned, and the cause being called for trial, Tillford Terry and six other persons were called to the stand, elected and sworn as jurors. Afterwards it was discovered that said Terry was a member of the Grand Jury that found the indictment, whereupon the court discharged said juror, against the objection of defendant, and he excepted.

After the jury were sworn, and the indictment submitted to them, *George Keesee* was sworn on behalf of the State, and testified as follows:—"We went down to old Mr. Cornelius', and went into a small patch place on the south of his cow-pen. We stood there until we saw a light—the light came from the house, and came into the cow-pen—a negro boy holding the light, the old man had a rope or lariat. They tried to catch this cow with the rope—they failed—returned back to the house and got a gun. They brought the gun into the pen. They tried to shoot for some time in there, and failed. They let down a cross fence betwixt that pen and another, drove the cow through into the other pen, and put up the cross fence. He shot the cow then, and killed her. We were upon him just as the cow was lying trembling

I asked him if he intended to resist, or would he submit? He said he would submit, if it put him in the Penitentiary. He also said it was the first time that he had been guilty of the like. He proposed that we might name our own price, he would pay it to us, and he would leave the State in one month. Nothing more, only I continued at the place until the other witnesses came—they were Harlan Cliff, and Mr. Kinlho—they were persons that knew the cow. I sent for them. It was betwixt three and four o'clock in the morning when defendant and the negro brought the light into the cow-pen. The cow was killed betwixt three and four o'clock. The old man shot off the gun. The pen they drove her into was smaller than the one she was first in—cross-pen between them. This took place in this county. The time was the 30th October, 1848. The cow was red and white; worth $20."

Cross-Examined by defendant.—"It was some two or three hours after supper when I started from home to go to Cornelius' house; was on horseback, and it took me about half an hour to get there. It was dark and raining when I got there, and I went into a patch on the south side of the pen; got off my horse, and part of the time I stood, and part of the time I sat. It must have been three or four hours from the time I got there, to the time the light came out. Wm. Whitley went with me to Cornelius'. He came to my house for the purpose of getting me to go with him to Cornelius' house. When we got to the patch near the cow-pen, Whitley and I stood together. I had a rifle gun loaded, which I took with me, but Whitley was not armed that I know of. I am prejudiced against Cornelius at this time, and think it likely Whitley was. When we got near the pen, I saw cattle in the pen, but it was so dark I could not see the cow in question. When the cow was shot down, both Whitley and myself jumped over into the pen—I with my gun in my hand, and spoke to the old man in a low and determined tone of voice, and told him to hold on, and asked him if he would submit or not. I had the gun in my hand when I jumped over the fence and accosted him. Defendant is *about sixty-five* or *seventy years of age*, and a man of feeble frame. I am a much larger and stouter man than de-

fendant. Whitley is a middle aged man, and also a stouter man than defendant. When Whitley and myself got to the patch, we tied our horses some two or three hundred yards from the place near the pen where we took our stations to watch. I think when we jumped over the fence with the gun, and accosted the old man, it was calculated to shock and alarm him. We stayed there until 10 o'clock next morning. The negro boy that came to the pen was named *Peter*, and belonged to defendant. I had told Whitley before that time, if ever I found out there was a cow in the pen, I would go and watch it. On the night of the above occurrence, Whitley came to my house, and hallooed to me, and said *it was a good night to catch wolves.* I understood what he meant, and got up, and went with him to defendant's as above stated. I don't remember that I ever said if I could not put defendant in the Penitentiary, I would leave the State. Don't remember that I ever said that if I could get the least hold on defendant, I would put him in the Penitentiary, because a little hold won't do, I discover. I do not recollect of saying that I would keep a close watch on defendant, and if I could get the least hold on him, I would put him in the Penitentiary or break him up. But I have kept a pretty close watch on him, and could give my reasons for it. I have never sent persons to watch defendant's premises—never sent any person but myself. Defendant lives four or five miles from Benton.

When myself and Whitley arrived at Cornelius' patch, all was quiet at his house. Saw no light. It was about 150 yards from the place where we took our station to defendant's house. There is a public road running in a few steps of defendant's cow-pen that people frequently travel."

Re-examined by the State.—"The State's Attorney asked the witness to state to the jury the reasons why he was prejudiced against defendant. The defendant objected to his doing so. The witness said he wished to do so. And the court decided that he might do so; to which decision of the court defendant excepted. Whereupon the witness stated as follows:—For the last ten years past we have lost a great deal of stock in our county. It was

believed that he killed them. I tried for some five or six years to catch him in the woods; at length there came a man to me, and told me that he did not kill them in the woods; that he would drive his own stock through the bottom, close upon some other person's stock, and turn out a good fat one from among somebody's else among his own; he would drive them home, pen up in his cow-pen; he would go in the night and kill the fat one; turn out his own stock then, and butcher that one in the night. That man told me that he had killed more than a hundred in that way, and skinned them, and sunk their heads and hides in that big lake—that man told me all these things. To all which testimony defendant objected, but the court permitted it to go to the jury. But the court then told the jury that the above statement was no evidence in the case, further than to enable them to determine whether the prejudice of the witness was proper; and the defendant excepted to the opinion and decision of the court in permitting said statement to go to the jury for that purpose or any other."

Re-Cross examined by defendant.—"It was John Robinson that told me the above story about defendants killing so many cattle, and hiding their heads and skins in the lake. Robinson told me the above tale a few months before the cow in question was killed. Have not seen Robinson since a short time after that, and do not know any thing about him. He was working in the county awhile, but did not stay long in Cornelius' neighborhood. Never heard he was deranged about that time."

WM. WHITLEY, sworn on behalf of the State, testified as follows: "Some time about the last of Nov., 1848, on Sunday night, Keesee and myself went together to Cornelius'. We tied our horses some 150 yards from his cow-lot, and went around and got in behind the lot, in a little field. When we got there it was between 10 and 12 o'clock at night. We stayed there until some time near 3 o'clock, may be before, and may be a little after. We heard somebody splitting pine—a short time after that we saw a light coming toward the cow-pen—the old man Cornelius and a negro boy was along. The boy had the light and Corne-

lius a rope. They went into the cow-pen—there they tried to catch the cow—they failed. They went off to the branch, got a pole and came back to the pen—the old man put the rope on the end of the pole, the boy would run the cow round, and he would try to fling the rope over her head, but failed in this—then went to the house, got his gun, returned to the pen, tried to shoot the cow in that pen, and failed—then run her into another little pen, hemmed her up, and shot—all the pens were joining. When he shot the cow, he drew his knife, and Mr. Keesee hallooed, hold on! By that time we were both over the fence—I got over a little first, as I had nothing to hinder me, and he had his gun. We walked up to the old man, and observed that we had watched him a long time, but caught him at last. The old man observed it was the first act of the kind that ever had been done about his house. We observed, not by thousands, from his motions. The old gentleman then proposed, could there be any way provided that he could satisfy us, and him quit the State, or something to that amount, in a month. The old man then sat down or squatted down by the pen, and cried, and said Lord have mercy upon him. He then proposed again that he would not be insulted at any proposals we would make to him to let him go, and he would quit the State in one month. We told him we could not do it, it would be him stealing and us concealing, and the law might take its course. It was then raining, and we were cold. We took him to the house; his negro made a fire for us. It was four o'clock when we went to the house. We stayed until it was broad day light—good day light—then took the old man out near to where the cow was shot, and there I left him and Mr. Keesee, and went on to Mr. Keesee's, Judge Calvert's, Mr. Clift's, and got the neighbors, returned again, and took the old gentleman to town. This is about all. Took place in Saline county. I speak of Elihu Cornelius. The cow was a pale red and white *plaid* cow. She was very fat."

Cross-Examined.—"I left Mr. Wayland's to go to the house of Keesee a few minutes before 9 o'clock of the night referred to, to get him to go with me to Cornelius'. We had an understand-

ing to watch the old man before. *Question:* 'How did you know the cow was at Cornelius'?' I got it from three different sources: first, my little boys had seen the cow that day in the bottom, back of the lake; next, I understood that defendant's son had seen him pen the cow in the evening before she was killed about sun down; and the next information I got was from a negro boy belonging to Cornelius. I did not get information that she came up with defendant's cattle, but that defendant drove her up. I got the information from the old man's negro boy, Peter, that defendant drove the cow up, and heard that defendant's son in passing the house about sun down saw her in the lot. I never offered the negro a bribe to give me information of any kind on his master, but told the negro I would not begrudge $10 or $20 if I could find out when there was a cow in the pen; but I never paid the negro any thing; he never called on me for the money. I can't say that I was prejudiced against defendant. *Question*: Did you ever send defendant word that if he would give you $300, or any other sum, you would quit the country, and not appear against him as a witness? No sir, I never did. Might have said sometimes, if the old man would give me so and so, I had better leave, but said it in a joke; but can't say I ever named any sum of money. I had been watching the old man a long time, and this was the first time I ever caught him.

When we jumped over the fence, where the old man shot the cow, Keesee walked *up with his gun on his shoulder,* and the old man advanced towards him, after he had been accosted, and said 'I want to talk to you,' when Keesee jerked his gun off his shoulder, and held the muzzle before him, and said, stand back, I would not risk you a moment—the old man had the beef knife in his hand. Previous to that time, I do not recollect of saying that I intended to break Cornelius up, or cause it to be done. I had suspected the old man, but I know that innocent persons are sometimes suspected, for some persons have said I stole hogs. I have said probably, in speaking of the matter, that it took a rogue to catch a rogue. We lay and watched the old man all the time he was in after the cow, but never said a word to him

until he shot the cow. *Question*: Did you not on the day after defendant was arrested, when you found out he had got bail, ride up and down the lane at Judge Hughes' with your gun on your shoulder, and threaten to kill defendant, because you were disappointed in not getting him put in jail? *Answer*: I did not—but if I did, I was in liquor, and do not recollect it. I got drunk about that time. We did not have any liquor when we watched the old man, but after we went to the house, the old man treated us very kindly. I do not recollect that the old man said to Keesee and myself, when we were talking to him at the cow, that he had not killed the cow with any dishonest intention, but he did say he had killed her and could pay for her. There was a road running close to Cornelius' cow-pen, upon which persons were frequently traveling."

HARLAN CLIFT, sworn for the State, testified as follows: "I went to Cornelius' in the morning after the cow was killed—found Keesee and other persons there. They were sitting out in front of the cow-pen. We went to where the cow was—the cow was lying there dead. She was a red and white cow, and belonged to my father, Joseph Clift. Cornelius walked with me to where the cow was, and on the way remarked that he expected I knew the cow—cow worth $10—good large fat cow—lying dead in the small pen.

Cross Examined.—When defendant observed to me, as we started to where the cow was, that no doubt I knew the cow; he also said he did not kill the cow with the intention of stealing. The road that leads by Cornelius' cow-pen is a wagon road, and frequently traveled. I do not think this cow run with defendant's cattle the winter before—if she did, I did not know it."

Here the State closed.

"The defendant then offered to read to the jury the following certificate, not as evidence on the merits of the case, but for the purpose of counteracting any prejudice that might have been made on the minds of the jury by the court permitting the witness, Keesee, to detail to the jury certain statements which one Robinson had made to him about Mr. Cornelius killing cattle—

the Robinson whose name is appended to this certificate being the same man spoken of by Keesee, but the court excluded the certificate, and defendant excepted: Here follows the certificate:

"STATE OF ARKANSAS. }
COUNTY OF PULASKI. }

John H. Robinson, late of Saline, but now of Pulaski county, states that some time in the spring of 1847, and while he was not in his right mind, two or three persons in Saline county, whose names he does not think it necessary to mention, induced him by promises to compensate him, to make incorrect statements about Elihu Cornelius, of said county of Saline; the substance of these statements was, that said Cornelius was a dishonest man—that he had taken property that did not belong to him, and used it as his own, and other statements of a similar character, impeaching the honesty of said Cornelius. The said Robinson, now sane, and in his right mind, without any solicitation on the part of said Cornelius, deems it an act of justice to declare most solemnly that he never did, and does not know any thing whatever against the honesty of said Elihu Cornelius—that he never knew him to take or use any property, or thing, or chattel, which did not belong to him the said Cornelius. That the said Robinson, if he had been in his right mind, could not have been induced to make any statement of the character alluded to, or any prejudicial to said Elihu Cornelius, because the said Robinson never did know any fact upon which said statements could be predicated. JOHN H. ROBINSON."

Sworn to and subscribed before me, this 16th day of Oct., 1847. }

WM. S. HUTT, *J. P.*

Mrs. SEYMORE, witness for defendant, testified as follows:—"I was at the house of defendant at the time the cow was killed. I knew the cow in question. She ran with the cattle of defendant for some two winters before she was killed. On the evening before she was killed, I do not know whether she came up with his other cattle, or was driven up with them by some of the family. She was with the cattle on that evening. She had come

up with them once before during that fall. I think some of the black ones found the cattle on the evening before the cow was killed, and the cow in question with them."

"The defendant then proposed to prove, by the witness, that on the night the cow was killed, after the cattle of defendant were turned into the pen, and before the family, and others at his house went to bed, he, the defendant, declared openly in his family, and in the presence of visitors, that he was going to kill the cow in question before day, and take her to Benton to market; and declared at the same time that he had received a message from Clift, the owner of the cow, which authorized him to kill the cow and pay for her. That these declarations were made to some three or four grown white persons who were at his house at the time, as well as directions given to the negroes in reference to the matter. To the introduction of which declarations of defendant, the Attorney for the State objected, the court excluded them, and defendant excepted."

"The defendant's counsel then offered to prove by the witness, that, a short time before the cow in question was killed, she heard Marion Williams, who at the time was living at the defendant's, tell the defendant that he had been down to Clift's, the owner of the cow, and that Clift told him to tell defendant that the cow in question had been using about his, defendant's place, the winter before, and if she returned, he was at liberty to kill her, and pay him two cents a pound for her; and that after getting said message, defendant openly declared his intention of killing the cow; but the court excluded said evidence on the objection of the State, and defendant excepted."

"Defendant then showed that Marion Williams had been subpoenaed; that the cause had been twice continued on account of his absence, among other witnesses; that he lives twelve or fourteen miles from Benton, in Hot Spring county, and that at the commencement of this court he was said to be very sick; and upon this showing, defendant again offered to prove by the witness that she heard said Williams deliver the message

aforesaid, to defendant as aforesaid, but the court again excluded it, and defendant excepted."

"It was proven that Joseph Clift, the owner of the cow, died on the 4th January, 1849."

JAMES PELTON, sworn for defendant, testified as follows. "That about the last of December, 1848, the State's witness, Wm. Whitley, told him if old Cornelius would give him $300, he would not appear against him at court, and that he would be glad the old man knew it. That witness lives near defendant. Whitley made the same remark twice to defendant. Said Whitley has been arrested since his examination in this case, on a charge of hog-stealing, and is now in jail. At the time Whitley said if Cornelius would give him $300, he would leave the State, and not appear against him, he, Whitley, was talking of going to Texas. Did not exactly know whether he was in earnest or not."

WM. CORNELIUS, sworn for defendant, testified as follows: "I passed the house of defendant the evening before the cow in question was killed, about an hour or an hour and a half by sun. Don't remember whether the cattle were up at that time or not. I stopped at the house about a quarter of an hour, and had a conversation with defendant."

"The defendant then offered to prove, by the witness, that, in that conversation, defendant told him there was a cow of Clift's at his house, which he intended to kill, and pay Clift for—that he felt authorized to do so from a message he had received from Clift, but the court excluded the evidence, and defendant excepted."

"Witness further stated that on the night the cow was killed, a gentleman by the name of John Seymore, and Mrs. Seymore, stayed all night at Cornelius'. Witness does not know whether other persons came in after he left or not. Defendant, at the time, had a pretty extensive stock of his own—was very well off as to property."

Cross-examined: "I am certain I did not see Whitley that even-

ing, and did not tell him the cow was up in the pen, or that old man Cornelius drove her up. I am defendant's son."

MRS. WHITLEY, sworn for defendant, states: "That she is the wife of witness, Wm. Whitley—that she has separated from him; living apart from him, but is not divorced—have been separated three weeks last Thursday."

"Defendant then proposed to prove by witness that she knew Wm. Whitley to be greatly prejudiced against defendant, and had frequently heard him threaten to ruin and break up the old man—to which evidence, the State's counsel objected, on the grounds that she could not testify to any thing that would go to discredit the testimony of her husband, or impeach his statements, and the Court excluded the evidence, and defendant excepted."

"Defendant then offered to prove by said witness, that said Wm. Whitley, her husband, had bribed defendant's boy, *Peter,* and paid him part of the money, for carrying the information that defendant was going to kill the cow in question, or had her up in his lot with his other cattle, which evidence the Court excluded for reasons above stated, and defendant excepted."

BRADFORD MORRIS, sworn for defendant, testifies as follows: "Mr. Cornelius was at my house, in Benton, the day before the cow in question was killed, and come to get me to fill a wagon wheel. He wanted it done next day, so he could use it the day after in going to Little Rock. He told defendant if he wanted the wheel done in a day, he must bring it soon in the morning; and told him that he wanted some beef, and if he would bring the wheel soon in the morning, and bring him some beef, he would fill the wheel. Defendant told him he had no beef killed, but he would get up long enough before day to kill one, and get into Benton by sun up, if he could get the beef up. It is six miles from Benton, where witness lives, to defendant's. Defendant then proposed to prove by the witness that, in this same conversation, defendant told him he had no beef up of his own, but there was one at his house belonging to one of his neighbors which he would kill and pay for; that he had the liberty from

the owner to do so. To the introduction of which evidence, the State's Attorney objected, the Court excluded it, and defendant excepted."

Here the defendant closed.

The jury found the defendant guilty, and fixed his punishment to one year in the Penitentiary. He moved for a new trial, reserving and making all the above exceptions grounds thereof, the Court refused a new trial, and he excepted.

Affidavits were filed in support of the motion for a new trial by defendant, and counter affidavits filed by the State's Attorney, in reference to the separation of the jury during the trial, without leave of the Court or consent of the parties, the substance of which will appear in the opinion of the Court.

Defendant brought error, but died before the mandate of this court was sent down.

E. H. ENGLISH, and WATKINS & CURRAN, for the plaintiff. The indictment is defective in not stating in the caption, or otherwise, that the grand jurors were from the body of Saline county. 1 *Ch. Cr. Law Marg. p.* 333. *Woodsides v. State, 2 How. Miss. R.* 655. *Tipton v. State, Peck. (Tenn.) Rep.* 165.

The Court erred in discharging Terry after he was sworn as a juror; *Sec.* 20, *chap.* 94 *Dig., p.* 630, (which went into operation 20th March, 1839,) and therefore superseded sec. 163, *ch.* 52 *Dig.*, which took effect on the 1st March, 1838. *State v. Williams,* 3 *Stew. Rep.* 454.

The Court erred in permitting the witness, Keesee, to state the reasons of his prejudice against the defendant. The fact of prejudice is legal testimony, as it affected the credibility of the witness, (*Phill. Ev. Cowen & Hill's notes, 2 vol. p.* 729, 2 *Ed.*,) but the particular reasons of the prejudice should not have been stated. *Id.* 730. *Swift's Ev.* 148.

The declarations of the defendant at the time of doing the act charged as a criminal offence, being part of the *res gestae*, were competent as evidence to show the *quo animo. Roscoe's Crim. Ev.* 23, 25. *Sessions v. Little,* 9 *N. H.* 271. 1 *Phill. Ev.* 233.

1 *Stark. Ev.* 34, 35, 36: *note at page* 35. 2 *Phill. Ev., Cowen & Hill's notes, p.* 589 *to* 606, *note* 452.

The fact that the defendant had been informed that the owner of the cow said he might kill and pay for it, might be proved as well by any one who heard the message, as by him who delivered it. The real question was, did the defendant receive such a message, and believe it was sent? If so, the act of appropriating the property could not have been larceny.

The husband of Mrs. Whitley was no party to the suit, had no interest in the result, nor could the verdict be used against him in any event; and the only effect of her testimony would have been to affect his credibility, by showing prejudice, and should have been received. *Roscoe's Cr. Ev. p.* 148-9, and cases cited.

The separation of the jury, without the consent of parties, is cause for a new trial, unless the record affirmatively shows that no improper influence was the result. *McCann v. The State of Miss.*, 9 *Sm. & Marsh.* 465.

CLENDENIN, *Attorney General*, contra, contended that the Circuit Court properly exercised its discretion under *secs.* 155 and 163, *ch.* 52, *Dig.*, in discharging the juror; that, as the Court instructed the jury that the facts stated by the witness as the reasons of his prejudice were not evidence, the defendant was not prejudiced; that the declarations of the defendant were not evidence; that hearsay evidence will not be permitted. (*Arch. Cr. Law* 155.) That the wife cannot be permitted to give testimony contradicting her husband—the husband and wife cannot be witnesses for or against each other. *Arch. Cr. Law*, 148 *Gill. Ev.* 133, 134. *Roscoe's Cr. Ev.* 112, 113; that as no conversation with other persons, or improper conduct is shown, the mere separation of the jury does not affect the verdict.

Mr. Chief Justice JOHNSON delivered the opinion of the Court.

The first point made, relates to the legal sufficiency of the indictment. It is objected that it is no where shown in the caption of the indictment, that the grand jurors were from the body of

the county of Saline. Precisely the same question was presented and decided in 1 *Howard's Miss. Rep.* at *p.* 171, in the case of *Byrd v. The State.* The Court in that case said: "The second question is, does the caption of the indictment show with sufficient certainty that the grand jurors, who found the indictment, were of the county of Warren? By the common law, every man was entitled to a trial by his peers, which peers were good and lawful men of the county where the offence was charged. This principle of the common law is recognized and established by the Constitution of this State; and the right thus secured should be beyond legislative action. It should appear, then, with reasonable certainty, in the caption of the indictment, that the grand jurors empanneled and sworn to inquire of and presentment make of the guilt or innocence of the party charged, were of the proper county. The caption of the indictment in this case is in the following words, to wit: "The grand jurors of the State of Mississippi, empanneled and sworn in and for the county of Warren," &c. The grand jury is constituted to inquire on the part of the State, in the commission of felonies, &c., in their county. The grand jury of any county may therefore, with strict legal correctness, be styled the grand jurors of the State of Mississippi. And when the words are added, that they "were empanneled and sworn in and for the body of the county," it appears with that degree of certainty required in indictments, that they were of the county for which they are sworn. This legal certainty, so far at least as the prisoner's safety is involved, is strengthened by the presumption that the court could not issue a *venire* to any other county in the State; and that it could have issued to summon only the house-holders and free-holders of the county.

Courts of Justice are disposed to release the rigor of the ancient forms, when no injury can possibly result to the liabilities or rights of the accused. Under the process of summoning and drawing the grand jury, the accused can always ascertain whether the jurors drawn are good and lawful men of the county, by referring to the list which the clerk is required to keep of those from whom the grand jury must be drawn. See *Acts* of November

session, 1830, *page* 25. I am therefore of opinion that in this respect there is no error." The phraseology of the indictment in the case before us, is the same in substance with the one before the court in that, and every facility for ascertaining all the facts in regard to the residence, and other requisite qualifications of grand jurors, that can be desired, are afforded by our Statute in reference to that subject. See *chap.* 94 of the *Digest.* The remarks of the Court, in that case, are strictly applicable to this, and perfectly conclusive of the question. There is no error therefore, in this respect.

We will now proceed to dispose of the several other objections made to the judgment of the court below, in the order in which they are presented and discussed in the argument of the defendant's counsel.

The first relates to the action of the court in discharging a juror after he had been sworn in chief. The 155th and 163d sections of chapter 52, of the Digest, declare that "No person who was a member of the grand jury or inquest by which any indictment was found in any cause, or who was a member of a jury of inquisition held by the coroner or other officer, shall serve as a juror in the trial of such cause." And that, "If the cause of challenge be discovered after a juror is sworn and before any part of the evidence is delivered, he may be discharged or not in the discretion of the court." These two sections were approved February 13th, and went into operation from and after the first of March, 1838. The 20th sec. of chap. 94 of the Digest, also declares that "No exception against any juror on account of his citizenship, non-residence, age or other legal disability, shall be allowed after the jury are sworn." This section was approved Dec. 18th, 1837, but not put into operation until by the proclamation of the Governor, on the 20th March, 1839. The 6th sec. of chap. 156 of the Digest, provides that, "For the purpose of construction, the revised statutes, passed at the present session of the General Assembly, shall be deemed to have been passed on the same day, notwithstanding they may have been passed at different times; but if any provisions of different statutes are re-

pugnant to each other, that which shall have been last passed shall prevail; and so much of any prior provisions as may be inconsistent with such last provisions shall be deemed repealed thereby. This section was approved and put in force March 5th, 1838. Under this last provision, in case there is any repugnancy in the several statutes above quoted, the one approved 13th February, 1838, must prevail as the statute settling the construction of the Revised Statutes, looks alone to the time of the passage, and not to that of their going into operation. The juror who was discharged after he was sworn, having been a member of the grand jury that found the indictment, was clearly laboring under a legal disability and the court had a discretion whether to discharge him or not before any part of the evidence was delivered. 'Tis true that the bill of exceptions is silent as to whether any evidence had been delivered or not, yet the legal presumption is that such was not the case, as but six persons had been sworn besides the one discharged, and for the further reason that such presumption tends to support the action of the inferior court. There is no error, therefore, in this respect.

The next objection is that the court below permitted Keesee to state in detail, the grounds of his prejudice against the accused. He stated on cross-examination that he was prejudiced against accused, and on re-examination by the State, he was asked to state the reasons why he was thus prejudiced, the defendant objected to this question, but the court overruled the objection, and permitted him to go on in detail and state the grounds of his prejudice. In this the court most clearly erred. A witness may be asked, in cross-examination, for the purpose of contradicting him, whether he has not had a controversy with the party against whom he is called and threatened to be revenged on him. (*Atwood v. Welton, 7 Conn. Rep.* 66, 67.) The witness' state of mind and interest in respect to the party are always pertinent inquiries, for they go to his credit. (16 *Mass. Rep.* 185. *Swift's Ev.* 148. 1 *Starkie's Ev.* 135.) Personal controversy with the party may always be shewn, though the particulars shall not be inquired into. (*Swift's Ev.* 148.) The witness in this case does

not state any particular act that he has done, or any expression that he has made in reference to the accused, from which the jury might infer a bias or prejudice against him, but he has said in broad terms that he is prejudiced against him. The question submitted to the witness which led to the answer that he was prejudiced, if submitted at all, was clearly illegal, as was the answer, and would have been overruled by the court in case that objection had been interposed in proper time. The witness could have been interrogated as to any particular acts or expressions in reference to the accused from which the jury might have inferred unfriendly feeling or prejudice, but it was clearly illegal to have proposed the question in general terms as the answer did not involve a mere matter of fact, but a matter of legal inference to be drawn by the jury from a certain fact or facts. A witness may be asked whether, in consequence of his having been charged with robbing the prisoner, he has not said that he would be revenged upon him, and in case of denial he may be contradicted. In such a case, the inquiry is not collateral, but most important in order to show the motives and temper of the witness in the particular transaction. A long and tedious detail by the witness of the numerous charges which he has heard against the accused, could not aid the jury in the least possible degree in their deliberations, as they could not thereby ascertain the extent of his prejudice, and consequently could not determine how far such charges should be permitted to go to throw discredit upon his testimony. This is the only possible use that they could have of a knowledge of such charges, and to what extent they could affect the mind of the witness it could not be within their power or province to decide. The consequences of the opposite doctrine would at once demonstrate its utter futility and absurdity. The question for the jury to determine is not what it is that constitutes the basis or foundation of the feeling or prejudice that may be entertained by the witness towards the accused, but on the contrary it is as to the existence of such prejudice, and that too to be derived as a matter of legal inference from particular acts or expressions of the witness. An answer of a witness that

he is prejudiced against a party might prove much or even nothing at all, depending entirely upon the peculiar notions of the jury and the force and effect that they might put upon such expression. And it must be admitted that if the general question and answer should be conceded to be admissible, it would necessarily follow that the witness upon re-examination might be permitted to go through a long and elaborate detail of the grounds of his prejudice, in order that the State might have an opportunity of showing that no such grounds existed in fact; and that, therefore, he was necessarily free from all bias or prejudice, or, in some instances, that, in consequence of the witness' ignorance of the force and meaning of language, he really did not mean to convey the idea that his expressions would ordinarily import. The effect of such a procedure would be to do indirectly that which the law will not permit to be done directly. When a party is put upon his trial for a particular offence, it is not permitted to the State to show that he has been guilty, or suspected of having been guilty of divers others, unless he shall first throw the gauntlet. In this case, the defendant had not thrown himself upon his general character, and the effect of the re-examination was to disclose his general character and that too by particular acts. We are satisfied therefore that the court erred in overruling the objection of the defendant and permitting the witness to state the specific grounds of his prejudice. The court, it is true, after the witness declared the grounds of his prejudice, informed the jury that the statement was not evidence in the case further than to enable them to determine whether the prejudice of the witness was proper or not. The exclusion of the statement altogether, for every purpose, would not have relieved the defendant from its previous effects upon the minds of the jury. The defendant made his objection at the earliest moment in his power, and it was his right to prevent all irrelevant and illegal matter from going to the ears of the jury, and thereby to insure a fair and impartial trial. The court therefore, in permitting the witness to state illegal matter to the jury, against the objection of the defendant, clearly compromitted his rights and consequently erred.

The next ground of objection is, that the court excluded the declarations of the defendant, which, it is contended, constituted a part of the *res gestae*. The defendant offered to prove, by a Mrs. Seymore, "that, on the night the cow in question was killed, after the cattle of the defendant were turned into the pen, and before the family and others at his house went to bed, he, the defendant, declared openly before his family and in the presence of visitors, that he was going to kill the cow in question, before day and take her to Benton to market, and declared at the same time that he had received a message from Clift, the owner of the cow, which authorized him to kill the cow, and pay for her; that the declarations were made to some three or four grown white persons who were at his house at the time, as well as directions given to the negroes in reference to the matter." This the court excluded from the jury. The defendant then proposed to prove, by the same witness, that a short time before the cow was killed, she heard Marion Williams, who at the time was living with the defendant, tell the defendant that he had been down to Clift's, the owner of the cow, and that he, Clift, told him to tell the defendant that the cow in question had been running about his, defendant's, place, the winter before, and that if she returned he was at liberty to kill her and pay him two cents a pound for her, and that, after receiving said message, the defendant openly declared his intention of killing the cow. This the court also excluded. The defendant then showed that Marion Williams had been subpoenaed, that the cause had been twice continued on account of his absence amongst other witnesses; that he lived twelve or fourteen miles from the court house in Hot Spring county, and that at the commencement of the court he was said to have been very sick, and upon this showing the defendant again offered to prove by the same witness that she heard Williams deliver the message aforesaid to the defendant, but the court still refused to permit her to testify to the delivery of the message. The defendant excepted to the decision of the court in thus excluding the evidence offered by him, and saved the several points by a bill of exceptions in the usual form. The ques-

tion now to be determined is, whether the matter proposed to be thus introduced to the jury, was mere hearsay, or such matter as constituted a part of the *res gestae.* Evidence of facts with which the witness is not acquainted of his own knowledge, but which he merely states from the relation of others, is inadmissible upon two grounds: First, that the party originally stating the facts does not make the statement under the sanctity of an oath; and secondly, that the party against whom the evidence is offered, would lose the opportunity of examining into the means of knowledge of the party making the statement. Where, however, the particular circumstances of the case are such as to afford a presumption that the hearsay evidence is true, it is then admissible. Where the enquiry is into the nature and character of a certain transaction, not only what was done, but also what was said by both parties during the continuance of the transaction, is admissible: for, to exclude this would be to exclude the most important and exceptionable evidence. In this case it is not the relation of third persons unconnected with the fact, which is received, but the declarations of the parties to the facts themselves or others connected with them in the transaction which are admitted for the purpose of illustrating its peculiar character and circumstances. Where evidence of an act done by a party is admissible, his declarations made at the time having a tendency to elucidate or give a character to the act, and which may derive a degree of credit from the act itself are also admissible as part of the *res gestae.* (See *Sissions v. Little,* 9 *N. H.* 271.) There are some cases, in which the declarations of a prisoner are admitted in his favor, mainly upon the principle of being part of the *res gestae;* as to account for his silence when that silence would operate against him. *U. S. v. Craig,* 4 *W. C. C. Rep.* 729. So, to explain and reconcile his conduct. *State v. Ridgely,* 2 *Har. & McHen.* 120. In the case of the *United States v. Craig,* WASHINGTON, J., who delivered the charge to the jury, stated that the materiality of his (the prisoner's) declarations to a witness, that he was going to Johnson's house for the purpose of obtaining bail for his brother-in-law, Gleeson, which, contrary to his

first impressions, he was now satisfied was proper evidence for the consideration of the jury, (1 *Stark. Ev.* 46, 47 and 48 and cases cited;) depended very much, if not entirely, upon the accordance of his subsequent conduct with these declarations. From that conduct the jury were to judge whether the prisoner was sincere in the avowal of his purpose in going or merely intended to serve a purpose and to provide testimony in his favor in case of need. If in the opinion of the jury the latter was intended, then the prisoner's declarations of the motive which took him to Johnson's ought to be entirely disregarded." The prisoner was found, in that case, by the officer and arrested at the house of a certain Bernard Johnson, and at the time of his arrest he was surrounded by circumstances of the most suspicious character, and in order to rebut the presumption arising from his situation he was permitted to introduce evidence of his own declarations previously made as to the motives that induced him to be at that place. These previous declarations were a part of the *res gestae,* as they tended to explain the prisoner's motive for going to Johnson's. When the state of mind, sentiment or disposition of a person at a given period, become pertinent topics of inquiry, his declarations and conversations, being part of the *res gestae,* may be resorted to. (See *Bartholemy v. The People,* 2 *Hill* 248.) It is laid down by Starkie, in his first volume at pages 46 and 47, that whenever the declaration or entry is in itself a fact and is part of the *res gestae* the objection ceases. The distinction between a mere recital, which is not evidence, and a declaration or entry, which is to be considered as a fact in the transaction, and therefore is evidence, frequently occasions much discussion, although the test by which the admissibility is to be tried seems to be simple. If the declaration or entry has no tendency to illustrate the question, except as a mere abstract statement, detached from any particular fact in dispute and depending for its effect entirely on the credit of the person who makes it, it is not admissible in evidence: but if, on the contrary, any importance can be attached to it as a circumstance which is part of the transaction itself and deriving a degree of credit from

its connection with the circumstances, independently of any credit to be attached to the speaker or writer, then the declaration or entry is admissible in evidence. Hence it is, that when the nature of a particular act is questioned, a contemporary declaration by the party, who does the act, is evidence to explain it. Where, for instance, in cases of bankruptcy, the question is with what intent the party absented himself from his house, his declaration contemporary with the fact of departure is evidence to explain that intention. (See *Thompkins v. Saltmarsh,* 14 *Serg. & Rawle* 275.) In Lord George Gordon's case, it was held that the cry of the mob might be received in evidence as part of the transaction. 21*st Howell's St. Tr.* 542. In the case of *Digby v. Steadman and others,* where the question was, whether the defendants had delivered to Sir J. M. a gold watch which the plaintiff had sent to them to be repaired, and which he had directed them to deliver to Sir J. M.: a witness having sworn that he saw the watch delivered by one of the defendants to Sir J. M., an entry, made by one of the defendants in the usual course of business, of the delivery of the watch to Sir J. M., which entry the witness had seen soon after it was made, was allowed to be read in evidence in confirmation of the testimony of the witness. It is to be observed, in such cases, the declaration does not depend so much on the credit due to the party who makes it, as to its connection with the circumstances. In the case of the bankrupt, the declaration which he makes at the time of leaving his house, if his intention of so doing is founded not upon his character for veracity but on the presumption arising from experience, that where a man does an act his cotemporary declaration accords with his real intention, unless there be some reason for misrepresenting his real intention; its connection with the act gives the declaration greater importance than that which is due to a mere assertion of a fact by a stranger, or a declaration by the party himself at another time. Such evidence does not rest upon the credit due to the declarant, but might be admissible even although the declarant, in ordinary cases would not be believed upon his oath. (*See Pool v. Bridges,* 4 *Pick.* 378.)

In order to convict the defendant in the case at bar, two distinct facts were necessary to be found by the jury. First, that he took the cow; and secondly, that he did so take her with a felonious intent. Here he made declarations previously to, and almost in immediate connexion with the act of killing, calculated to explain itself and to reconcile itself with common honesty. The declarations were just such as the experience of every one, acquainted with human transactions, fully attests to be the natural and ordinary result of honest and upright intentions. The defendant was aware that the cow belonged to Clift, and he also knew that this fact was well known to his family, and those by whom he was surrounded. Therefore, it was natural that he, when he formed his design to kill her, and take her to market, in order to explain his conduct in so doing, and to avoid even a suspicion of having done wrong, to make known such determination in advance and proclaim the fact. This course, therefore, in thus declaring the fact openly, and without restraint, was perfectly natural and just, such an one as a man conscious of the entire honesty of his motive would pursue under like circumstances. This being true, the declarations of the defendant as to his intention or object in killing the cow, do not depend in the slightest degree upon the credit that might be awarded to him as a man, but solely and exclusively upon the presumption arising from experience, that his contemporary declarations accord with his real intentions. We are fully satisfied, therefore, that the declarations referred to, and which were excluded by the Court, cannot be regarded as mere hearsay evidence, technically so called, but on the contrary, they constitute facts in themselves as forming a part of the transaction under investigation, and as such were clearly admissible, and should have been placed before the jury for what they were worth as tending to elucidate or explain the conduct of the defendant.

The Court also erred in refusing permission to the witness, to testify in relation to the message which the defendant claimed to have received from the owner of the cow, and by which he insisted he was authorized to do what he had done. The rejection

of this testimony cannot be justified either upon the ground of hearsay, or upon that principle of the law which requires the best evidence of which the nature of the case is susceptible. The evidence itself was clearly competent as tending to negative a felonious intent, and the party who bore the message to the defendant would have been no better witness, than one who was present and heard it delivered, as it was wholly immaterial whether the message was true or false, in case the defendant acted in good faith, and under a belief that it was true. If the truth of the message had been involved, the aspect of the case might have been somewhat different; but when it is considered that the defendant was authorized to act upon it, whether true or false, it is obvious that the fact of its delivery was the only material matter, and that consequently, it could be proven by the person who was present and heard it delivered, as well as by him who actually bore and delivered it.

We think that the same doctrine which we have already held in relation to the defendant's declarations to his family, and others at his house, immediately preceding the act of killing, would clearly admit those which he made to Morris a short time before, since they were made with direct reference to the transaction involved, and tend more or less to explain the nature of it, and to negative the idea of a felonious intent arising from its having been in the night time. After having proved by Morris that the defendant had engaged to bring him beef on a particular morning, he offered to prove by him, that he told him (witness) that he had no beef of his own, but that there was one at his house belonging to one of his neighbors, which he would kill and pay for, and that he had permission from the owner to do so. Here was a declaration made by the defendant the day before the cow was killed, and directly in reference to that matter, and thereby announcing his intention to kill the cow openly and without the least reserve. This, therefore, formed a fact in itself, which formed a part of the very transaction, and consequently, was competent to go to the jury, to weigh more or less according as it should accord with the subsequent conduct of the defendant

These declarations should have been received, not as testimony going to disprove a felonious intent in the killing of the cow, but merely as a fact to rebut such a presumption arising from silence and secrecy in the movements of the defendant.

The next objection relates to the admissibility of the evidence of Mrs. Whitley. She was introduced to show that her husband testified under a bias or prejudice against the defendant. This evidence was ruled out by the court. It is stated in *Roscoe's Cr. Ev.*, at *p.* 148, that "It is not in every case in which the husband or wife may be concerned, that the other is precluded from giving evidence. It was indeed in one case laid down as a rule, founded upon a principle of public policy, that a husband and wife are not permitted to give evidence which may tend to criminate each other. Per ASHURST, J., *R. v. Clinger*, 2 *T. R.* 268. But in a subsequent case, the court of King's Bench, after much argument, held that the rule, as above stated, was too large, and that where the evidence of the wife did not directly criminate the husband and never could be used against him, and where the judgment founded upon such evidence could not affect him, the evidence of the wife was admissible. *R. v. All Saints Worcester,* K. B. Easter Term, 1817. If the wife in this case had been introduced to contradict her husband under oath, a doubt might have arisen, as it would have been virtually to charge him with perjury, but such would not have been the effect in case she had been permitted to testify. He did not state positively whether he had ever threatened the ruin of the defendant or not, but simply that he did not recollect what he had said upon that subject. If therefore, she had sworn in the most positive and unequivocal terms, that she had heard him make the threat, it would not have contradicted him, and consequently would not have criminated him. We think therefore, that, under the state of case here presented, she might have been permitted to answer the question propounded by the counsel for the defendant.

The next and last ground of objection is, that the jury who sat upon the trial separated without leave of the court or consent of the parties. The High Court of Errors and Appeals of the State

of Mississippi, in the case of *McCann v. The State,* after referring to the authorities, said, "Thus some modern authorities can be found of instances where juries have separated without authority of court, or jurors have separated from their fellows, or persons have intruded upon juries in their retirement, in which the irregularity has been held not to impair the verdict. 1 *Dev. & Bat.* 500. 1 *Black.* 25. 12 *Pick.* 496. But these are mostly cases where evidence excluded the presumption that there was either influence, partiality, or undue excitement on the part of the jury —cases of a mere exposure to undue influence, but in which that exposure has been affirmatively shown to have produced no consequences of any kind. The effect of such an exposure, however, of which no explanation is given as to the extent of its influence, presents a subject of different consideration. Under such circumstances the jealousy with which the purity of verdicts is watched becomes immediately aroused, for the latest authorities hold, that if the irregularity has a tendency to affect the rights of the party, it is sufficient to warrant its being set aside. Such a conclusion may be legitimately deduced from the opinion in the case of the *Commonwealth v. Roby,* 12 *Pick.* Nor is this a new doctrine, for it was said by all the judges in Lord Delamere's case, 4 *Harg. St. T.* 232, that "an officer is sworn to keep the jury, without permitting them to separate, or any one to converse with them, for no man knows what may happen; although the law requires honest men should be returned upon juries and without a known objection, they are presumed to be *probi et legales homines,* yet they are weak men, and perhaps may be wrought upon by undue applications." The evil to be guarded against is improper influence, and when an exposure to such an influence is shown, and it is not shown that it failed of effect, then the presumption is against the purity of the verdict. In the case before us, one of the jurors, Silas McMurran, is shown to have been separated for a short time from his fellows, but as to him it is shown affirmatively that no improper or undue influence could have been exercised. It seems that others also were seen passing in the street, but it is not shown who they were, or that

any influence was exercised over them. It should at least have appeared who they were, as without that fact it would have been impossible for the State to have negatived the legal presumption of undue influence. This objection, therefore, was not well taken.

We are satisfied, from a full view of the whole case, that there are divers errors in the judgment of the Circuit Court, and that consequently the same ought to be, and is hereby reversed, annulled and set aside, and it is ordered that this cause be remanded to said Circuit Court, to be proceeded in according to law, and not inconsistent with this opinion.