EX-JUDGE A. H. TANNER HAS FINISHED HIS DIRECT TESTIMONY

(Continued From First Page.)

of this testimony, and Mr. Heney alleged it to show the false defense about to be put up by Mitchell. The court overruled Mr. Heney's contention, however, and sustained the objections of the defense.

Judge Tanner stated that all of the fees reserved for work done before the department had not been credited to the Senator as per agreement, for the reason that a large part of the work had been done in Portland. It had been considered, therefore, that it had not come under the clause in the agreement.

After the return of the Senator, subsequent to his indictment, the witness had held no conversation with him other than related to the dissolution of the partnership.

Another Kribs Agreement.

On December 2, 1902, the witness said, he had another agreement with Kribs concerning lands to be passed to patent. The defense objected to this testimony for the reason that it was outside of the allegation of the indictment and pertaining to other matters than those charged. Mr. Heney contended that as a transaction prior to the last payment shown in the indictment it was worthy of acceptance as tending to show knowledge and intent on the part of the defendant in the cases set out in the indictment. Mitchell might have received fees in one instance unwittingly, or, perhaps, in two instances, but with each succeeding time the chance of his not knowing that he was violating the law grew less. The Judge ruled in accordance with Mr. Heney and allowed the evidence to be introduced.

Continuing, the witness testified that Kribs had brought a list of lands to him in December, stating that they were lieu selections, the base of which were California lands. He wished to have them hurried through the land office as they were promised in sale as soon as patents were issued. He had paid $500 as a retainer and had promised $500 more as soon as the certificate of patent was issued. The witness identified a letter written to the Senator stating that Fred A. Kribs was a friend and client of Tanner's. Mitchell had answered the letter and promised to do what could be done towards having the list made special and passed through the department.

In May, 1902, the witness had made an agreement with John A. Benson by which the firm was to secure favorable action on a list of timber lands in Clark County, Washington. Benson had made a contract for the sale of the lands as soon as they should be patented and wished them hurried through the department. The firm was to have $500 for the work as soon as the list was approved.

In the afternoon Judge Tanner followed by identifying telegrams which had passed between himself and Mitchell concerning the Benson lands. Another letter had been written to Mitchell, in which was inclosed a letter from Benson saying that if his list of scrip was passed through the land office the firm would get a fee of $1500. It was also suggested in the letter that if the Senator had any delicacy about appearing before the department on account of his position as Senator he could say that he was interested in behalf of Oregon people.

Mitchell Aided Benson.

In April, 1902, Benson had passed through Portland, the witness said, and had called on him in his office. He had acknowledged that through the influence of Senator Mitchell, 1200 acres of his land had been passed. W. H. Dimond would keep track of the details of the transactions when they came and would keep the Senator posted. Tanner had told Benson that the Senator would not want to be known in the matter and would not care to have much acquaintance with Dimond. He could not see that it would do any hurt, however, to have occasional communication with him. Benson had agreed and had promised to send a substantial amount as a fee upon returning to San Francisco.

A letter was introduced, written from Mitchell to Tanner, asking for information about the Benson claims. The Senator stated that he desired a special letter stating of nothing else than these claims, in order that he might be fully advised when meeting them. As soon as he received the letter he would take up the question of their passage with the Commissioner.

The firm had made an agreement with the Oregon Land & Livestock Company, the witness testified, by which a test case was to be brought before the department to settle the rights of the company to select lands in the Cascade forest reserve. Tanner had prepared a brief in the matter and had sent it to the department. This brief had been considered by Hermann, who had decided against it. Letters were introduced showing the interest of the Senator in the work before the department. One of these was from Mitchell to Hermann, referring to the decision and noting that an appeal would be made to the Secretary of the Interior. January 14 a letter was written by Tanner to Mitchell inclosing a notice of appeal from Hermann's decision. He urged the Senator to have the appeal made at once, as the firm would be in position to receive a large fee if it could get the Secretary to reverse the Commissioner. Tanner wanted to get the matter into the Supreme Court.

Senator Showed Anxiety.

Senator Mitchell, after the filing of the brief, had written to Tanner to know if his name had been signed to the document. Tanner had replied on June 22, 1903, stating that he had not signed the Senator's name, as he did not think, on account of his position, Mitchell would desire to appear as an attorney for the company. Instead, he had signed his name individually. On February 23, the Senator had written to Tanner stating that he would give the lieu selection list his earnest attention as soon as it came up in the department. On May 13, 1904, a payment of $500 had been made by the company for the service done.

The witness testified that in May, 1902, an agreement had been made with W. E. Burke in regard to having a list of arid lands passed to patent. Burke had paid $500 as a retainer. Later, Tanner had written to Mitchell stating that if the Burke lands could be made special and passed to patent, the company could develop them by putting water upon them as intended, which would be to the advantage of the firm. Mitchell had replied by letter that he had seen the Commissioner and the lands would be made special. In his letter the Senator inclosed one from Hermann stating that the lands had been made special and would be considered immediately.

During the latter part of 1903 the firm had made an agreement to appear before the department in Chinese cases in regard to the action of Federal officers here in arresting Chinamen illegally. In February, 1904, the firm had been employed to appear before the department in regard to the detention of the wife and son of Lee Sue, and their threatened deportation. Mitchell was very fearful lest his name be mentioned in connection with the brief filed in this case, and Tanner had assured him that he had been careful about not signing the Senator's name to any papers sent to the departments.

This concluded the direct examination of the witness, and court adjourned until this morning at 10 o'clock.

HARRY MURPHY'S FACILE PEN DEPICTS FACES SEEN AT THE MITCHELL TRIAL.

FULL STENOGRAPHIC REPORT

The complete stenographic report follows:

A. H. Tanner on the Stand.

Court met pursuant to adjournment.

Direct examination of A. H. Tanner resumed.

By Mr. Heney:

Q. Judge Tanner, hand you Government exhibit No. 59, the letter which was last read in evidence and which you identified as in the handwriting of Senator Mitchell. Did you ever receive that letter?

A. No, sir; I never did.

Q. This letter says: "Your friend with letter did not arrive here until today. Your letter only received at 2 P. M." To whom does that refer?

A. That refers to my brother-in-law, Mr. H. B. Miller, going East at that time and who took a letter for me to the Senator.

Q. Did you keep a copy of that letter?

A. I did not.

Mr. Heney: I will ask counsel for the defendant if they are willing to produce the letter.

Mr. Bennett: I do not think we have it; I am not sure.

A. I can explain why I did not keep a copy of it if you wish.

Q. Yes.

A. Mr. Miller took dinner with me that evening and was about to start East, and I wrote the letter at my home in pencil, and gave it to him, asking him to hand it to the Senator. For that reason I did not make a copy of it.

Q. Can you state the subject of the letter?

Mr. Bennett: We object to that as immaterial and incompetent.

Mr. Heney: This letter is in answer to the letter which was sent to Senator Mitchell, so that it constitutes a conversation between the Senator and this witness in relation to this matter.

The Court: Are you going to follow it up by proof that the defendant received the letter?

Mr. Heney: He states so in his letter. "Your friend arrived with letter, it was received at 2 P. M. today."

Q. Did you send any other letter than that one?

A. Not by any friend. I wrote him by mail a time or two.

Q. But this is the only one you sent by a friend? and that was sent with reference to that date of this letter, at what time?

A. What is the date there?

Q. This is dated February 5, 1905.

A. That must have been sent about the 1st of February, I should judge.

Mr. Bennett: May it please your honor, I do not understand that the mere fact that he sent a letter to Senator Mitchell makes his unsworn statement in that letter evidence. There is nothing in this letter to call for the answer to that letter sent, or with reference to that, except the mere mention that he had received the letter.

The Court: Has this letter been introduced in evidence?

Mr. Heney: Yes, your honor.

The Court: Do you claim it is necessary to have this in order to know what that letter introduced in evidence means?

Mr. Heney: Yes, that letter was in answer to the letter of Judge Tanner, and it was a conversation between them with reference to this transaction, and to show the meaning of this letter it is necessary to know what was in the letter of Judge Tanner.

Mr. Bennett: I would like to have your honor read this. I do not see how it can be material. There is nothing in this letter, unless it is the first clause, that needs any explanation.

The Court: It is possible there may have been something in that letter that would throw light upon two or three sentences in this letter, but I do not know what it is that counsel expects to prove. There are two or three sentences there that might possibly be explained by some letter. I will overrule the objection.

Mr. Bennett: I would like to interpose, in addition to that, the objection—I do not think I made my objection cover everything—I want to object on the ground that it is incompetent, and secondary, and that no sufficient foundation for secondary evidence has been laid.

Objection overruled. Defendant excepts.

Q. You may state the substance?

Substance of the Letter.

A. I am not able, at this time, to recall all the letter, but it was recounting what had occurred up to that time in the investigation of the grand jury. And I told him, among other things, that the Government had compelled Kribs to give up the checks that had been given to the firm, and that I thought that by means of those checks they would be able to trace the money that had been paid to the Merchants' National Bank into his personal account, and in that way be able to show that he had received his part of the money that was paid in by Kribs. And, as I suggested, as it occurred to me, the only explanation left to make as to that——

Mr. Bennett—I submit to Your Honor that it is perfectly apparent that that is not explanatory of anything that was contained in the letter of Senator Mitchell.

Q. This was in the letter, was it?

A. Yes.

The Court—So far, I have not heard anything that has any bearing on the case.

Q. Proceed.

A. (Continued.) Would be that he had received this money in the nature of an overdraft or any overpayment of his account with the firm, to be accounted for in some way upon final adjustment of our partnership matters, something of that kind, some suggestion of that kind. I cannot recall anything else that was in the letter particularly.

Mr. Bennett—We move to strike it out, Your Honor.

Mr. Heney—If Your Honor pleases, this letter states, "Now, Judge, you will agree with me, I am sure, that these are the facts and I am also sure whatever entries you made, you never intended I should have any part of such cash or checks. If any, and that you intended that in some way, in settling accounts between us, no part of any such moneys or checks would be mine, but your individual property."

The witness has testified to a conversation between him and the defendant in which they arrange a plan of defense which was followed. It is always competent to prove such a plan of defense. Now, then, this was a continuation of the oral agreement by a written agreement in regard to that matter. If they had been together, if Senator Mitchell had been here, and Judge Tanner had stated orally at any conversation that they previously had in the manufacturing of this defense, that this would be the way to get around it, certainly that would be competent evidence. Now, the fact that it occurred in writing, that Mr. Tanner suggested this, telling him the facts which made it necessary, to wit: that Kribs had surrendered the checks, and then the defendant comes back with this letter, telling this witness what he is to testify in relation to that matter, preparing and manufacturing this defense, certainly it is competent evidence, it seems to me.

Mr. Bennett—Now, if Your Honor pleases—

The Court—I do not care to hear any argument on it. I think the testimony should be stricken out.

Q. This letter contains the statement, "You will remember several times I cautioned you not to mix me up in any way with any Land Office matters." Did you ever have any conversation with Senator Mitchell in relation to that?

A. Nothing more than he said on some occasions that he never wanted me to make any contracts or to take any fees for any services which he might do personally in any of those matters, but there was never any objection made to my doing work of this kind and taking cases of this kind and prosecuting them and charging for them, never in the world.

Q. Why were not all of the fees for this work credited to Senator Mitchell under that partnership contract?

A. For the simple reason that it was work that was done here. The contract was made here and the services performed by me mainly. And not considered as coming under the clause of the contract giving him the fees for anything he might do or might inaugurate or initiate there himself in Washington. I had nothing to do with that; never pretended to have anything to do with any matter of his, no service there in the department or in the Supreme Court.

Q. When did you next see Senator Mitchell?

A. You mean after he went East the last time?

Q. Yes, after he went East about the first of January, 1905?

A. I saw him, I think, three or four days after he came back here, in March last.

Q. Did you have any conversation with him at that time, with reference to that case?

A. No, sir; nothing to speak of.

Q. Did you at any time thereafter?

A. No, not to go into any details. Of course I met him; he came to the office two or three times and we had our business matters to talk over and divide up the library and business, and I met him in that way a few times, but there was no detailed conversation at any of those meetings, about any of these matters.

Q. Did you have any intention, as stated in this letter, or express any intention, of getting back the portion of the money that was paid to Senator Mitchell out of these fees?

Objected to as incompetent. Objection sustained.

Q. Now, I call your attention to the first page of the day book of the firm, at page 225. I will ask you to state whether you ever had any other agreement with Mr. Kribs with reference to land than those about which you have already testified?

A. Yes, I did.

Q. When was it?

A. About December 2, 1902.

Q. What was that agreement?

Mr. Thurston: We object to that as not tending to prove any charge of the indictment, being asked with reference to a matter entirely outside of the case at bar, irrelevant and immaterial.

Mr. Heney: This is offered at this time, if your Honor pleases, as a similar transaction occurring prior to the payment of the last $250 check, relating to the transaction in the indictment, and offered for the purpose of showing knowledge on the part of the defendant of the receipt of the former monies. I understand the rule to be that such evidence is competent, after the fact has been proven that the defendant did do the thing alleged but denies knowledge. The attorneys for the defendant announced in this case in their opening statement that the defendant does and will deny all knowledge of the receipt by him of any of these monies. We think we are entitled to show all similar transactions which may have occurred at any time prior to the last payment upon these contracts, set forth in the indictment and the last payment set forth in the indictment as facts having a tendency to prove knowledge on the part of the defendant; and if your Honor desires to hear authority on that, I have them here.

The Court: I will hear argument on that point.

Argument on Evidence.

Mr. Heney: I read from Wigmore on Evidence, Vol. I, Section 200:

"In the two foregoing chapters have been examined the principles upon which knowledge, intent and design may be evidenced. It remains to examine here the admissibility of similar offenses or acts (i. e., similar to the one charged), offered for the purpose of showing such knowledge, intent or design. Since the conditions may differ under which the same conduct will evidence one or another of these propositions, it is essential to compare the respective conditions before determining what test to apply to the offered evidence. Practically, the difference of theory may be important; for if these conditions are less stringent for one purpose than for another, and if the one purpose is by the nature of the issue a proper one, while the other is not, all will depend on the precise purpose involved and the requirements appropriate to it.

"It is worth while at this point to restate briefly the distinction between knowledge, intent and design. (1) Knowledge signifies a being aware (ante, Sec. 244); and, in the usual case of the present sort, this knowledge has to refer to the nature of a thing used in the alleged crime. Even where the doing of the act involved is not disputed, a knowledge existing at the time of the act may be in dispute. Thus, proof of knowledge becomes a usual necessity for certain offenses, such as uttering of forged or counterfeit paper and the possession of stolen goods; while it is rarely an element to be proved in other offenses, such as robbery, rape and homicide. (2) Intent involves often nothing more than knowledge or hostile feeling; or, what is practically not very different, if knowledge or hostile feeling (malice) can be shown specifically, there may be inferred immediately the criminal intent, without further evidence. But intent more frequently signifies (ante, Sec. 242) merely the absence of accident, inadvertence of casualty—a varying state of mind which is the contrary of an innocent state of mind, whatever may be pointed out by the nature of the crime as an innocent state of mind. Thus, in homicide the criminal intent may signify the absence of good faith as to self-defense or the absence of inadvertence; in assault with intent to rape the criminal intent is a design to rape, instead of any other design; in embezzlement, the criminal intent is a will to hold the money unlawfully, as distinguished from a will to hold it for the owner or from a merely inadvertent possession. This element, then, of intent—simple in its generality, yet changeable—is a different thing from knowledge. In a given offense—as in uttering counterfeit money—the proof of knowledge may practically affect the proof of intent; but in such a case the evidence is directed specifically to show knowledge and is governed by the rules appropriate to the subject. But if the issue does not involve specifically the element of knowledge, then the rules about evidencing knowledge have no application. In short, intent may sometimes be directly got at by proving knowledge; but this is not necessary nor is it (for most kinds of offences) usual; and since in any case intent may be conceived of apart from knowledge, the mode of proving intent is a problem distinct from that of proving knowledge, even where the latter is also concurrently available. (3) Design. The peculiarity of intent, as a factum probandum, is that an act is assumed as done by the defendant, and the issue is as to the kind of state of mind accompanying it. Design, or plan, however (with reference to present bearings), is not a part of the issue, an element of the criminal fact charged, but is the preceding mental condition which evidently points forward to the doing of the act designed or planned. (ante, Secs. 227, 242.) Thus, the peculiarity of design is that the act is not assumed to be proved, and the design is used evidentially to show its probable commission. It is obvious that something more definite and positive is here involved than in the case of intent. In proving intent, the act is conceded or assumed; what is sought is the state of mind that accompanied it. In proving design, the act is still undetermined, and the proof is of a working plan, operating towards the future with such force as to render probable both the act and the accompanying state of mind. The intent is a mere appendage of the act; the design is a force producing the act as a result.

Sec. 301. Theory of Evidencing Knowledge.—In resorting to former offences or other similar acts to show knowledge, it is sufficient to invoke the general principles of proving knowledge, as already set forth. It may perhaps be practicable to employ acts of conduct as exhibiting a posteriori the inward state of mind (according to the principle of Sec. 285, ante) as when a person finding his counterfeit coin closely examined by his vendor, attempts to run away. But such a case presents no problem of the present sort. The problem now to be dealt with—the use of evidence of former offences—involves the other general mode of showing knowledge, namely, the use of external circumstances likely a priori to have produced a knowledge. It has been seen (ante, Sec. 245) that this mode of proof rests on the following process of thought: When the fact X is used to show a person's knowledge of the fact A, it is assumed (a) that through fact X there probably was received an impression by the person; and (b) that this impression would probably result in notice or warning of fact A."

Therefore, if we can bring home to the defendant in this case absolute knowledge of other similar cases in which the firm accepted the employment and he received a share of the fees, we may fairly, reasonably and logically assume that that would bring to him an impression which would prove the result in notice or warning to examine the books to see whether there were any other occurrences of that kind taking place, and that he probably therefore would have known about it.

"Thus, (a) a prior injury to an employe by a machine would probably have come to the employer's notice in some way, and (b) the notice of the accident would probably reveal to him the defect in the machine. These two elements may not both be doubtful in a given case, but they are always impliedly present if the inference is to have any validity. Apply this to the class of cases we are now concerned with. Suppose A's knowledge of the poisonous nature of a substance X is to be shown; suppose the fact offered that he once gave it to a sick dog and that the dog died; if we are to base an inference of probable knowledge upon this, it is because we believe it probable (a) that the dog's death came to his notice, and (b) that the fact of the death would suggest to him that it was the substance X and not the illness that caused the dog's death. Again, suppose A's knowledge of the counterfeit nature of a certain silver dollar is to be shown; suppose the fact offered that he twice passed counterfeit ten-dollar banknotes; if we are to base on this an inference of probable knowledge, it is because we believe it probable (a) that in the course of the using of banknotes, at one time or another up to their final disposal, some one probably doubted to him their genuineness, and (b) that a doubt as to the genuineness of the banknotes would probably suggest a doubt as to the genuineness of the silver dollar. Again, if A's knowledge of the stolen character of a bar of iron is to be shown, and the fact is offered that he has also received and possessed a stolen bicycle, then our inference must assume (a) that A's receipt of the bicycle was under such circumstances as to suggest to its vendor or pledger to be a thief, or as to result in a reclamation by the owner and a warning to the defendant; so that (b) when the bar of iron was offered to A, by the same or another vendor or pledger, the circumstances were such that the former transaction would naturally suggest that this bar of iron was also stolen.

"Such, then, is the strict and legitimate scope of evidence of other similar acts to show knowledge. The process of thought is: The other act must probably have resulted in some sort of warning or knowledge; this warning or knowledge must probably have led to the knowledge in question. There may occasionally be a logical short cut or a condensation of this process—as where A, at a former attempt to pass the same counterfeit bill, was expressly told that it was counterfeit—but such cases cause no difficulty, and the difficulty that does arise can always be accounted for by a doubt as to one or the other of the above two elements. The principle is clearly enough seen in its application in the detailed rules of the ensuing sections; but it has also been expounded, more or less incompletely, in various judicial utterances."

Now, if Your Honor pleases, if we can show that during the time of these transactions, a large number of similar transactions took place, wherein this firm did business of a similar kind for other people, and that the fact that this firm was doing this business for the other people is brought home to the defendant by convincing proof, and it is shown that he knew that during this period of time exactly similar deals were being made with this firm, and that he was receiving one-half the proceeds of that business, does it not tend to establish a warning to this defendant to examine the accounts rendered him or to inquire as to where the money came from which he received, as has been shown, out of these Kribs checks? It is because these facts tend to raise an interest of the probability that he did acknowledge that they are competent evidence in this case, as it seems to me.

Mr. Thurston's Argument.

Mr. Thurston: If the court please, I am entirely familiar with the facts that in two classes of cases in this country evidence of other similar acts has been admitted. One is in the passing of counterfeit money, where other passing of counterfeit money is admitted to show guilty knowledge of the bogus character of the coin or bill. But even in those cases it is admitted because the fact that the defendant had in his possession at other times similar bad coins or bills, is a matter that tends to prove that he knew that the coins or the bills were bad. Also in some states and courts, but not in all, proof has been permitted in the case of a person charged with receiving stolen property, to show that at the time he had other stolen property in his possession. But up to the present time I have never known of a case, I have never read of one—and if there are any, I would like to have them presented, so that I may examine to see as to their authority—where the proof of the commission of another similar offense of any kind or character has been permitted when a defendant was being tried upon the one with which he is charged. The theory of the law is that it is enough for a defendant to be compelled to meet one criminal charge without forcing upon him in that trial the onus of being prepared to meet with testimony and evidence of another criminal charge. And all they are offering to prove here is a fact tending to show along similar lines with this case that this defendant did at another time commit another similar misdemeanor under the statutes of the United States. And if this evidence goes in, it throws the burden and responsibility upon him of defending against the other charges to the same extent and as fully as he must defend against this one.

I think there has never been a decision by a court of good authority in this country that such might be permitted. The very authority the gentleman cites, at section 200, says:

"This proof of knowledge becomes a usual necessity for certain offenses, such as uttering of forged or counterfeit paper and the possession of stolen goods, while it is rarely an element to be proved in other offenses, such as robbery, rape and homicide." And in the absence of any authoritative decision worthy of being followed by this court, I submit that it would be a dangerous departure, and be the doing of a grievous wrong to this defendant to now put him upon trial for any other offense than the one with which he stands charged in the indictment.

Mr. Heney: If Your Honor pleases, embezzlement as proven from the books is a crime very similar in its nature of proof to that which is now on trial here, and it is well settled and universally held that in an offense of that kind you may show other entries of a similar character upon the theory that one entry in the book showing an embezzlement might have been made by inadvertence or mistake. That if there were two entries, the probability of mistake is lessened. If three entries, it is still more lessened, and if 20 entries it is far more lessened. So in this case, if we could show that the general course of the business of this firm was to do exactly what was done in this case, the probability that the defendant had no knowledge of the source of this money which he received would be lessened to an extent where no one could question the fact.

There are many cases to which this rule applies. There is but one suggested, though the books are full of them, and this book is full of them. I did not wish to take up too much time in reading authorities, but under section 302 I desire to read the following:

Mr. Heney Cites Cases.

Cushing, C. J., in State vs. Lapage, 57 N. H., 245, 294: "Another class of cases consists of those in which it becomes necessary to show that the acts for which the prisoner was indicted were not accidental, e. g., where the prisoner had shot the same person twice within a short time, or where the same person had fired a rick of grain twice, or where several deaths by poison had taken place in the same family, or where children of the same mother had mysteriously died."

That first class included among those which in the first section says it is rarely necessary to resort to that evidence for the purpose of showing knowledge, but that does not mean that it is not necessary sometimes. It is necessary whenever the fact itself is proved to have been committed, and the sole question left to determine is the question as to whether the defendant had knowledge or not, and it matters not what sort of a case it is that that question arises in, whether a civil cause, or in a question of character or criminal action.

"In such a case it might well happen that a man should shoot another accidentally, but that he should do it twice within a short time would be very unlikely. So it might easily happen that a man using a gun might fire a rick of barley once by accident, but that he should do it several times in succession would be very improbable.

"So, a person might die of accidental poisoning, but that several persons should so die in the same family at different times would be very unlikely. So, that a child should be suffocated in bed by its mother might happen once, but several similar deaths in the same family could not reasonably be accounted for as accidents. So, too, in the case of embezzlement effected by means of false entries; a single false entry might be accidentally made; but the probability of accident would diminish at least as fast as the instances increased."

So in this case, Senator Mitchell might have received this money without knowledge, if it had only occurred in one instance; but as rapidly as the instances increase in number, the probability of his having received it without knowledge decreases.

Reason for Elimination.

Mr. Bennett: Might I say a word, Your Honor, before the court passes on it? What I would like to say refers more to what seems to me to be the natural reason of a rule of this kind than the authorities, because I confess that I have not carefully examined the authorities. To my mind the question in matters of this kind must always be to some extent within the discretion of the court, in the very nature of things, because it depends upon uncertain conditions, remoteness of the evidence, remoteness of the inference to be drawn by it, and on the danger of the defendant from the admission of that kind of testimony. I take it that the reason why other offenses are not always admissible is not because they do not always tend in some degree to make proof able, and thereby to make one step in the proof of the particular offense; because I suppose it is true as a matter of logic that there is no offense with which a man might be charged, that if you could prove he had committed it or some similar offense at some other time, there would not be some logic tending to make it somewhat more probable that he had committed the particular offense under consideration, and therefore it is not because there is not some tendency in these things to prove the offense under consideration that they are eliminated. The reason they are eliminated is because that tendency may be so remote and the danger to the defendant so great and the obstruction of justice in the way of delaying trial so great that the courts do not ordinarily, and except as has been said here, in extreme and exceptional cases, permit evidence of another act of the same kind. A man, for instance, is charged with stabbing another. He says it was accidental. Would any court tolerate proof that he had stabbed another man a year before, or several years before? Not because it might not tend to show in some degree that this particular stabbing was not accidental, but because the danger of proof of that kind would so overbalance and open up in every trial a vast number of collateral matters, are eliminated.

Prejudicial, Says Bennett.

The charge here is that certain fees were taken for certain services. The fact, if it was a fact, that in a similar matter other fees were taken by the firm and divided, the tendency to show that the defendant knew in this particular case that he was getting something that he ought not to get would be exceedingly remote and conjectural, even if they were approximate in time. But, as a matter of fact, I understand that this which they are trying to prove now happened a year or more before the matter alleged in the particular count which they are trying to sustain by this evidence.

Your Honor has heard the opening statement of the attorney for the United States in which it is intimated that they have some eight or ten of these matters that they desire to introduce evidence regarding. It has been well said by my Brother Thurston that if evidence is introduced concerning them, each will require its own careful investigation. It puts the burden upon the defendant to explain each one, as he does the same issue in the case. If he does not, he is, perhaps, met by the fact that an inference would be drawn from some other thing that if fully investigated would be found to be without any basis from which any just inference could be drawn. As Your Honor well knows, all these things would tend to prejudice him in the mind of the jury. And I submit to Your Honor that in these matters much is in the sound expression of the court.

Mr. Heney: If Your Honor will permit me, I would like to read Judge Story's statement of the rule in the case of Bromley vs. U. S., Story, Vol. 1, page 155, but I am reading from the first volume of Wigmore on evidence.

Mr. Heney then read quite a lengthy extract from the authority cited, and therewith closed his argument.

Ruling of the Court.

The Court: Since this case was opened by the attorney for the Government and the opening address to the jury announced that it was his intention to offer proofs of that character, proofs of other offenses of a similar nature, I have given a great deal of examination and thought to the question involved. It is, of course, a general rule when a man is put upon trial for one offense, he is to be convicted, if at all, by evidence which shows that he is guilty of that offense alone, and that under ordinary circumstances proof of his guilt of one or a score of other offenses is wholly excluded, but there are certain well-settled exceptions to this rule. Generally speaking, evidence of other crimes is competent to establish intent, and in the second place, to establish absence of mistake or accident. And I have reached the conclusion, after a great deal of consideration, that the question here presented falls under the second exception to the general rule, that evidence of other transactions of a similar nature may be received for the purpose of rebutting any contention or presumption of mistake or accident. The rule is this way stated in some of the cases: When it has been proved that the party charged did the act for which he is indicted, and a question still remains wether he committed it with guilty knowledge or whether he acted under a mistake, evidence which tends to prove that he was pursuing a course of similar acts, raises a presumption that he was not acting under a mistake, but with guilty knowledge and intent, and is admissible for that purpose.

Defense's Objection Overruled.

In the case of People vs. Seamans, reported in 107 Mich., 348, on a prosecution for manslaughter in committing an abortion, where the proof of the killing was circumstantial and the effort of the defense was that the premature birth was due to accidental cause, it was held proper to receive evidence that the respondent had performed other abortions in the same house and near the same time. I am satisfied that the proof is competent upon that for the purpose of rebutting any presumption or contention of mistake, but for no other purpose. Can be used for the purpose of aiding the prosecution in establishing the main facts with which the de-