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The Case of DeCasto Earl Mayer and Mary Ellen Smith

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THE CASE OF DECASTO, EARL MAYER AND MARY ELLEN SMITH

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I.

HISTORICAL OUTLINE

ON SEPTEMBER 5, 1928, James Eugene Bassett left his sister's home at Bremerton, Washington, with the intention of returning that evening, but was never seen again. Bassett's disappearance aroused nationwide interest and he was made the object of a most intensive but unavailing search. The unanswered question remains: Could a legally sufficient case be made against any defendant for the murder of Bassett, assuming overwhelming evidence of the defendant's connection with whatever catastrophe may have befallen him, but almost no independent evidence that he was dead and not merely missing? Due to an unfortunate chain of events, the question was never answered by a court of last resort. It is the purpose of this article to discuss the applicable rule and its policy, against the background of the activities of the two people who were responsible for Bassett's disappearance.

It is a belief often expressed by laymen that there can be no conviction of murder without a body. Although a variety of cases proves the contrary, certainly it becomes difficult to raise the proof of the corpus delicti to the required level when the body of the victim has been placed beyond reach. Aware of this state of the law, Decasto Earl Mayer and a woman said to be his mother, Mary Ellen French Smith, planned a murder so thoroughly that in the course of its execution they disposed completely of the victim's body. A brief resume' of Mayer's background, and of his and his mother's activities immediately prior to their meeting with Bassett will help to explain his fate. Mayer had a long criminal record, and had served time in the penitentiaries.

I am indebted to Dean Judson F. Falknor, of the University of Washington Law School, for allowing me access to his collection of data on this case. Included in Dean Falknor's file is a letter to him from Ewing D. Colvin, dated February 20, 1939. Mr. Colvin was prosecuting attorney for King County, Washington, at the time of Bassett's disappearance, and was instrumental in bringing Mayer and Mrs. Smith to trial for grand larceny. His letter to Dean Falknor, consisting of some thirty odd pages of historical matter, has been most helpful, and is the source of the information relative to Mayer's and Mrs. Smith's activities prior to their meeting with Bassett.
of at least three states. He was believed to have stolen more than 300 automobiles, and was suspected of having committed at least three murders prior to Bassett's disappearance, for three persons had apparently been seen for the last time in his company. He was paroled from the United States Penitentiary at Leavenworth only a few weeks before he encountered Bassett, and from there, he went almost immediately to the vicinity of Seattle, Washington, where he joined his mother, who had only recently preceded him. He told his mother that he was going into the real estate business, and had been offered employment with a Seattle broker, but that he must have an automobile as a condition of employment. It was then that he started along the path that led him to Bassett. He and his mother decided to watch the newspaper advertisements and to make contact with a seller who was planning to leave the city. In order to facilitate disposal of the owner of whatever automobile they should buy, they rented a house in the country north of Seattle, which came to be known as the "little brown house," and which Mrs. Smith described as "ideal for the purpose."

Young James Bassett was a citizen of Maryland. He had been given a secretarial position in the office of a high naval commander at Manila in the Philippine Islands, and was to embark from Seattle. He bought a new Chrysler roadster and motored across the continent, arriving at Seattle a few days earlier than necessary to meet his ship, in order to visit his sister in Bremerton. Bremerton is a short distance from Seattle, and is separated from it by a short span of water, which is regularly traveled by ferry. When he reached Bremerton, his sister's husband, a Commander Winters of the United States Navy who had spent considerable time in the Philippines, prevailed upon Bassett not to ship his roadster, but to sell it before sailing and to buy a light automobile at his destination. Accordingly, Bassett advertised his roadster in a Seattle daily newspaper, and stated in the advertisement that he was leaving for the Orient.

Mayer had already "tried out" several automobiles, but had not found a situation suited to his talents. Then he saw Bassett's advertisement and responded with alacrity. He went to Bremerton and looked at the roadster. He told Bassett that it was just what he wanted, but that he must show it to his "aunt" in the north end of Seattle, that if Bassett would bring it in the next day, he would have a certified check ready for $1,600 and would close the deal if his "aunt" liked the auto-
mobile. The next day, Bassett left Bremerton for the avowed purpose of showing his roadster to "Mr. Clark's" "aunt," and was seen in the company of Mayer and Mrs. Smith that day. Like at least three victims before him, he then disappeared. Just how the couple disposed of him was destined to remain a mystery until ten years later when a confession was elicited from Mrs. Smith. But the connection of Mayer and Mrs. Smith with Bassett's disappearance soon became apparent. They were found driving his blue roadster at Oakland, California, in possession of his watch, belt, cuff links and other effects. Extradition was prompt, and soon the pair was confined in jail in King County, Washington.

The prosecutor, Ewing D. Colvin, was faced with a difficult task. Except for the fact that he was missing, there was almost no evidence that Bassett was dead. Some slight evidence of that fact did develop, however, and the evidence connecting Mayer and Mrs. Smith with whatever could be proved to have befallen Bassett was overwhelming. In order to convey a clear picture of the state of the evidence that was available for a murder prosecution, it is set out below. This is not to say that all of the evidence set out was introduced at the subsequent trials. But it is intended to portray the available known admissible evidence, in order to afford the reader a basis for evaluating the legal sufficiency of the case which might have been made against Mayer and Mrs. Smith at that time, and thus to establish a basis for a discussion of the policy behind the corpus delicti rule.

Identification of Mayer by Bassett's nephew—Bassett stayed with Commander and Mrs. Winters at their home in Bremerton while awaiting the sailing of his ship. It was on September 4, 1928, that Mayer answered Bassett's advertisement of his automobile; he appeared with him at the Winters' home where he was seen by Theodore Winters, Jr. Mayer gave his name as "Mr. Clark."

Bassett's declarations of intention—On the next morning, Bassett left Bremerton in his automobile. He said, in effect, that he was going to meet the person who was to buy his automobile, that he was going to drive him to the country north of Seattle where they would show the automobile to "Mr. Clark's" "aunt" for her approval, and that he would then return to Bremerton. This was the last time he was ever seen by his relatives.

Bassett last seen in the company of Mayer and Mrs. Smith—Later
the same morning, Bassett and Mayer were seen together in a notary public's office in Seattle. Still later, both Mayer and Mrs. Smith were seen with Bassett by a Mrs. Gonnella at her place of business, although their purpose in being there is not clear. This was the last time any person other than Mayer and Mrs. Smith is known to have seen Bassett.

**Bassett's automobile at Mayer's house, strange conduct of Mrs. Smith**—It will be remembered that Mayer and Mrs. Smith lived in a house in the country, which was known throughout the proceedings as "the little brown house." At about noon of the day of Bassett's disappearance, one Womer, a grocer, appeared at the "little brown house" to deliver a pound of butter. Upon rapping at the front door he received no answer and started around to the back of the house. He was intercepted by Mrs. Smith, who, in a gruff and nervous way, took the butter from him. Womer saw a blue Chrysler roadster standing in front of the house.

**The telegram**—At about six o'clock, Mrs. Winters received a telegram purporting to come from Bassett, advising her that he had met a friend and was going to go to Vancouver for a couple of days—that he would return on Friday. Bassett was a stranger in the Pacific Northwest, known only to his relatives, and people he had met through them. The telegraph operator who took the message could not remember from whom she had received it, but the original, which was written in longhand, was submitted to a handwriting expert, whose uncontradicted testimony was that the writing either was in Mayer's hand, or at least, not in Bassett's natural hand.

**Abortive search for Bassett**—Commander Winters caused an extensive search for Bassett to be made through the newspapers, by the police, and in Vancouver hotels. He also made inquiry of the Border Patrol at the Canadian border, and requested the captain of the ship on which Bassett was to have sailed to make a search both before and after sailing. No trace of Bassett was found.

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* A matter that arose at the grand larceny trial in connection with this telegram was made the basis of the state's argument against one assignment of error on appeal, and is discussed herein.

* The admission of this testimony was assigned by the defense as error on the appeal from the grand larceny conviction. But the court made no reference to it in its opinion. Of course, the testimony of Commander Winters as to what the captain of the ship and others had told him of the result of their search for Bassett would be hearsay if used as proof of the truth of the matter asserted, i.e., if submitted on the issue of whether Bassett had been or could be found. But having himself conducted a search, Commander Winters was qualified to
The bill of sale—Shortly before noon on the day of Bassett's disappearance, Mayer and Bassett entered the office of a notary public in Seattle and requested him to acknowledge a bill of sale. It was not filled in, and Mayer explained that the "deal was not closed yet" and that when the deal was closed in the country, they would fill in the blanks. After Bassett's disappearance, Mayer engaged a stenographer in Tacoma to fill them in.

The license plates—On the day Mayer engaged the stenographer, he also appeared at the Capitol building in Olympia and bought a set of license plates for Bassett's roadster. He was seen outside the building putting them on the automobile. When the "little brown house" was searched, Bassett's Maryland license plates were found there.

Apprehension of Mayer and Mrs. Smith, Bassett's property in their possession, incriminating conduct—On September 13, 1928, Mayer was arrested in Oakland, California, in the company of Mrs. Smith, and while driving Bassett's blue Chrysler roadster. In the pair's possession were a wrist watch, a pair of cuff links, a billfold and a belt, all identified as belonging to Bassett. The arresting officer stepped onto the running board of the automobile, and directed Mayer to drive to police headquarters. En route, Mayer on one occasion sideswiped another vehicle and on a second swerved his automobile so suddenly as to indicate clearly an attempt to throw the officer off. Bassett's watch was jammed down between the cushions of the roadster, but was running and on correct time. Mrs. Smith asked a police inspector of Oakland to get rid of the watch, offered to make it "right" with him, and said that she was afraid it would get her boy into trouble. She refused to give her name and asked to be booked as "Jane Doe."

Mayer told conflicting stories about how he "paid for" Bassett's automobile. He said on one occasion that he gave Bassett sixteen hundred dollars in the notary's office, but it was established that he and his mother had no such amount of money and that they paid no money in the notary's office.

Scheme, design, or plan—A Eugene Levy, one O'Niel, and one Rowe, testify in court as to the results of the search. "Good faith and diligence in a search, either for a document said to be lost, or for a witness said to be absent, may be evidenced by the replies made to inquiries which thus appear to be fruitless; and the information thus given becomes admissible for its circumstantial value." 6 Wigmore, Evidence (3d ed. 1940) § 1789. Accord, Nehring v. McMurran, 94 Tex. 45, 57 S.W 943 (1900); State v. Wentworth and Stone, 37 N. H. 196, 217 (1858).
each reported that shortly prior to Bassett’s disappearance Mayer had answered advertisements of their automobiles for sale. To two of these persons, Mayer introduced himself as “Mr. Clark,” to the other as “Mr. Walters.” In each instance he told the seller that the automobile was just what he wanted, but that he was buying it for someone else and must show it to her. He did not buy any of these automobiles. When Rowe demonstrated his automobile to Mayer, a friend was with him. Mayer asked Rowe to drive him to the Colman Dock, where he introduced Mrs. Smith as his “aunt.” He then arranged to meet Rowe at Richmond Beach, an out-of-the-way place north of Seattle, and left, but did not meet Rowe again.

He told O’Niel that he wanted his “lady friend in the north end” to see the automobile, and arranged to meet O’Niel for that purpose. Mayer was very inquisitive about O’Niel’s plans, whether he was going to leave the city or not, and about his business. Before parting, O’Niel introduced Mayer to his wife, and Mayer never returned.

In Levy’s first meeting with Mayer, Levy was alone. Mayer arranged to go with Levy to show the automobile to his “aunt,” but Levy became suspicious and when he met Mayer for the second appointment, he brought a friend. Mayer got out of the automobile after a few minutes, saying he had some very important business and could not go with Levy to see his “aunt” that day, but that he would bring his “aunt” in the next day. He never returned.

The corpus delicti—No blood stains or other indications of violence could be found in the plumbing, in the septic tank, or anywhere in the “little brown house.” The woods for miles were searched without avail. However, there was some evidence of the corpus delicti. On the evening of the day of Bassett’s disappearance, one Schmidt and his son were driving along the Bothell highway when a roadster bearing a Maryland license passed them at high speed. The roadster attempted to make a turn onto a dirt road but slid into a ditch. Schmidt stopped and directed a spotlight into Mayer’s face; he and his son were able positively to identify Mayer and Mrs. Smith at the murder trial some ten years later. In the trunk of the roadster were several gunny sacks covered with red stains which Schmidt’s son said looked like dried blood. Schmidt said the sacks appeared stained with paint or blood and that one bundle “was not solid enough; it wobbled a little, like jelly.” Tied to the side of the roadster was a shovel. Mayer backed
out of the ditch and disappeared down a lonely road. Schmidt took the license number, and it proved to be the number on record for Bassett's Chrysler roadster.

The prosecutor was of the opinion that if he brought Mayer and Mrs. Smith to trial for murder on this evidence, he would run a serious risk of a directed verdict for acquittal, because of insufficiency of proof of the *corpus delicti*. Further search yielded nothing, and so he determined to try the pair for grand larceny, and thus to gain time in which to make a further search for Bassett’s body. Both were convicted, and on appeal, the conviction was affirmed as to Mayer, but reversed as to Mrs. Smith. Mayer was sent to the state penitentiary for life as an habitual criminal, on retrial, Mrs. Smith was again convicted and was sent to the penitentiary to serve a ten-year sentence.

Mayer’s record was known to the state and county officers generally, and they were convinced that he and his mother had killed Bassett; they were the more convinced because Mrs. Smith had already confessed while under the “truth serum” but said it was so dark when they buried the body that she could not tell where it was. Therefore, after Mayer’s conviction of grand larceny and while he was awaiting transportation to the state penitentiary, he was subjected to seven days of the most rigorous examination. It was obviously not the purpose of the examination to secure a judicially admissible confession, but to elicit information that would lead to Bassett’s body. The ordeal which Mayer went through is depicted in the following extract from the report of the Wickersham Commission.

> "The case of Decasto Earl Mayer is one of the outstanding third degree cases in the United States. The case is exceptional and is included not as revealing the situation in Seattle, but because of its general interest: Mayer was believed to have killed one Bassett, but the *corpus delicti* was never established. The purpose of the questioning was not so much to obtain a confession for use in court as to find out where Bassett’s body had been buried. The case involved days and nights of sleeplessness and protracted questioning, the Oregon boot, chloroform, ‘truth serum’ injections, and the ‘lie detector.’"

Progress was made with the “truth serum,” Mayer had orally confessed under its influence and the prosecutor was confident that sufficient information would be elicited to lead authorities to the body. But the expert who was administering the drug became ill, and the

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*State v. Mayer, 154 Wash. 667, 283 Pac. 195 (1929),
*From the Report to the President (June 25, 1931) of the National Commission on Law Observance and Enforcement, treating of Lawlessness in Law Enforcement, and particularly of third degree methods in the United States."
serum was abandoned for the "lie detector." Using a large map divided into squares, Mayer's reactions were measured by the machine, as the prosecutor and his assistants pointed to one square after another. By a process of elimination, the examiners were able to confine their activities to a smaller and smaller area. Mayer at first laughed at the experiment, then became serious, then alarmed. At first, he said, "This is another one of the crazy-fool experiments. Well some of them may have worked if you had had me seventeen years ago, but I have seen too much in the last seventeen years to ever fall for anything like this. It won't work."

But after the second night of the examination (the examinations were conducted at night while during the day new maps and data were prepared) Mayer, without warning, suddenly jumped to his feet and struck the machine with his bare fists, smashing it to pieces. The machine was repaired the next day, and the examination was resumed. Very soon, Mayer's reactions had guided the examiners to a place on the map known as Canyon Park, north of the town of Bothell, and the place toward which Mr. Schmidt had seen Mayer and his mother driving. At that point, Mayer asked to speak to the prosecutor alone. When everyone else had left the room, he admitted the killing; he said that he knew the law and that admissions could not be used against him under the circumstances; that he had hit Bassett on the head and cut the body up, burying it in different places. The outcome of the conversation was that Mayer agreed to submit to a test the next day, riding in an automobile over the area beyond Canyon Park, while the machine recorded his reactions. In the meantime, however, Mayer's attorney had secured an injunction against further questioning of Mayer in the absence of his attorney unless he had been offered an opportunity to be present, and before morning the order was served. That ended the questioning, and Mayer was taken to the penitentiary without further delay.

* All of the information concerning the examination of Mayer was taken from Mr. Colvin's letter to Dean Falknor, supra note 1. Mr. Colvin made it plain that the purpose of the examination was to obtain information leading to Bassett's body, and not to secure a judicially admissible confession.

* The report of the Wickersham Commission, supra note 5, quoted from the opinion of Judge Malcolm Douglas, of the Superior Court of King County, Washington, as follows:

"It is not for this court at this time to pass on the abstract question of whether the use of this particular machine [lie detector] under any circumstances would be illegal and would be prohibited by the court. The issue here is whether or not the treatment accorded to the defendant, Mayer, between the 14th of November and the 21st of November at the hands of the officers of the law
All further search proved futile, and it appeared that the apparent homicide of Bassett would remain legally unsolved. Then, in 1938, Mrs. Smith wrote several letters to one Wheeler, and attempted to get them out through the penitentiary "underground." Her confidante turned them over to prison authorities, and they were found to contain a complete account of how Mayer had lured Bassett to the "little brown house" with a preconceived plan to murder him so that he and his mother might take his automobile; of how Mayer stood over Bassett with a hammer and compelled him to write the telegram to his sister; of how he killed him with the hammer as soon as the telegram was written, while Mrs. Smith held an iron bar in readiness; of how they immediately dissected Bassett's body and placed it in gunny sacks which were burned some in one place, some in others; of how they removed and burned the scalp, and burned the head in one place, the hands in another; of how they removed all traces of blood from the house and planned their crime so well that none could be found in the plumbing or septic tank, or on the meat saw or butcher knife which were used in dissecting the body. It is suggested that the reader having him in charge was illegal and improper, and whether it should be permanently restrained.

"The Constitution gives to every individual certain guarantees, one of them being that he shall not be compelled to give testimony against himself. While as an abstract question of law that probably should be interpreted as a rule of evidence, its spirit at least should be a rule of conduct for the courts, who have, and the officers who have, custody of prisoners. The right given by that constitutional guarantee is just as great for the man who has committed a dozen murders as it is for the man who is innocent of any wrongdoing.

"This court considers that the showing made of the treatment of this defendant being subjected to long hours, day after day, of interrogation as to the crime of which he is accused, in connection with the hypodermic injection, in connection with the other attendant circumstances, such as the use of the Oregon boot, the handcuffs, the chloroform mask, the long hours of questioning, amount to a serious violation of his constitutional rights and tend to reflect discredit upon the administration of justice. This court will not countenance that method of handling any prisoner."

Mrs. Smith wrote Wheeler, in part:

"My darling sweet gentle Wheeler:

How I wish we could talk instead of all this kind of writing but I'm keeping nothing from my most darling one. Now for fear Ruth has told you wrong and I not knowing how much Earl has told her I'm going to tell you the truth: An automobile was advertised for sale by Eugene Bassett. Earl answered the ‘ad’ and went over to see Bassett at his sister's home. It was a most beautiful car and he wanted it as he had two very good positions offered by Real estate men. As I was getting my divorce from Smith at that time I had not yet seen the car, so he told me he was going to bring Bassett to our house the next day and do away with him. We took the Doctor Clark house for this kind of a purpose, as we knew
bear these facts in mind when considering the policy of the corpus delicti rule, infra.

Confronted by the warden of the penitentiary, Mrs. Smith admitted the letter was in her handwriting and that the matters related therein were true. Shortly thereafter, she wrote the warden a note corroborating her oral acknowledgment and, four days later, she signed a formal confession setting out the letter almost verbatim. When Mrs. Smith's confession was first related to Mayer, in her presence, his reply was, "You're crazy, Ma." But later it was read to him again and he said that it was substantially correct. Thus, Mayer adopted the confession as his own and it became admissible in evidence against him. He signed the following statement:

whatever car we got we would have to do away with the owner, and this was an ideal spot for the purpose.

Earl went and got him. Earl said we could not close the deal until he spoke to his mother and she would have to write out the check—he brought him home and I was sitting on the couch where I had a rod of iron hidden in a quilt in case of a struggle.

B. sat in chair in front of fireplace, as I stepped into the kitchen, Earl stepped up behind B—and handed him a blank telegram and said I'm going to have your car and I won't pay for it. You write this telegram as I dictate. B. refused—but Earl said you write it or I'll kill you, so he wrote as follows. Mrs. Commodore Winters, Navy Yard, Bremerton, Wn. I have sold my car, met a friend, and going to Vancouver for 3 days. 'Gene' As Earl took the telegram he picked up a hammer and hit B—on the head. I heard his body fall and went in and he was gurgling—I stepped out and E—gave one more blow and it was all over at once, we dragged the body in the bathroom undressed it and put body in bathtub where he desected it at once. I cleared the mess and burned the close and the scalp also was burned. E—was so sick and weak I gave eggnogs to keep him up.

At night we took the pieces of body minus the head and hands—and drove way out to a big patch of woods somewhere between Cathcart and Bothell and put them under some brush clump. The next morning we took the hands and head miles away to another patch of woods and buried the hands on one side of the road at a distance and the head on the other side into an old abandoned woodchuck hole at an arms length.

This is all to the Bassett case."

Shortly thereafter she wrote:

"I want to show you how brave I was for when Earl took the telegram downtown I was all alone in that house with Bassett's body all cut up in the galvanized wash tub in Earl's bed room and I often think I was not very polite to him for I never once stepped in the room to pay my respects, and do you know how I worked to clean up all that bloody mess and I carried it out and poured it around the grape vine so I could have plenty grapes the next year and they even cheated me out of even the grapes"

She wrote the warden, in part:

"First I want to say as I have confessed and told you the truth please take that into consideration, and as I told you yesterday these crimes were not committed from a point of maliciousness, it was just because the boy needed money or car to start life, and he never allowed his victims to suffer."
"After a discussion with Warden McCauley and after seriously considering the situation I have decided to plead guilty to the murder of Bassett. I will disclose the details to the proper authorities."

But he made no further disclosures. Officers took Mrs. Smith (Mayer refused to go) to the "little brown house" where she re-enacted the crime. She then made several efforts or apparent efforts to find the body, but without success.

However, the state was in a far better position as to the *corpus delicti* than it had been ten years before. It had a detailed confession by Mrs. Smith, adopted by Mayer, which, with the aid of corroborating circumstances and circumstantial evidence, might well be sufficient to support a verdict of guilty of murder in the first degree. Trial had become more important, for Mrs. Smith's term in the penitentiary had expired and she would no longer be securely behind bars while the state made further attempts to find the body  

Every effort had been made, and it was now unlikely that it would ever be found. The risk of acquittal was no longer a sufficient reason to delay trial.

At the trial the defendants moved to dismiss and for a directed verdict of acquittal on the ground that the *corpus delicti* had not been proved by sufficient evidence to support a verdict. The trial court handed down a seven-page memorandum decision which reviewed the common law rule and its development, its relaxation and modification in

Although Mayer had been incarcerated for life as an habitual criminal, it will be remembered that his mother received only a ten-year sentence for grand larceny.

After Mrs. Smith had confessed a state patrolman was sent to her cell dressed as a Catholic priest. The purpose of his visit was to secure information leading to the body. Although Mrs. Smith did make a confession to him, she could not or at least did not tell where the body was buried. At the trial, the patrolman was put on the stand, but his testimony was excluded. The court held that the priest-penitent privilege is applicable where the accused reasonably believes that he is talking to a priest. It is submitted that this is a sound decision. The attorney-client privilege has been held applicable where the "client" reasonably believed he was talking to an attorney. If the barrier of the privilege could be surmounted, the confession rule would present no obstacle, for confessions secured by trick are not for that reason inadmissible unless the trick is of such a nature as to be likely to induce a false confession.

The state relied on the confessions and circumstantial evidence, particularly on the testimony of Schmidt and his son, who saw the red-stained gunny-sacks in the trunk of Bassett's roadster on the evening of the day he disappeared.
some jurisdictions, and reached the following conclusion.\textsuperscript{18}

"I am of the opinion that the severity or strictness of the common law rule relative to the establishment of the corpus delicti in homicide cases has been relaxed and that in this state the rule is:

"First: That the corpus delicti in a homicide case can be established by (a) direct evidence, or (b) circumstantial evidence, or (c) corroborated confession or a combination of such different kinds of evidence, subject only to the provision that each element must be independently established by the evidence beyond a reasonable doubt.

"Second: That, in passing upon a motion to dismiss or for a directed verdict, the court cannot weigh the evidence, but must deny such a motion if there is any evidence from which the jury might find that the elements of the corpus delicti had been so established.

"Applying this test to the case at bar, I am of the opinion that the state has established herein prima facie the elements of the corpus delicti by (1) circumstantial evidence, and (2) by corroborated confessions.

"In my opinion the evidence in the case at bar is stronger than that held to be sufficient in the comparatively analogous cited case of People v. Clark "

On the eve of almost certain conviction, Mayer committed suicide in the county jail and his mother changed her plea to guilty. It is unfortunate that Mayer's suicide intervened to prevent an appeal which would have settled the law in Washington. But it is submitted that the trial court reached a just decision, in accord with reason and principle, and the trend of considered judicial thinking.

Thus ended the career of this odd couple who had so nearly escaped justice by disposing of the body of their victim. Much credit is due Prosecutor Ewing D Colvin, who exercised great patience and sound judgment in refraining from prosecuting for murder at a time when there was no assurance of a conviction, and who secured the conviction of the pair for larceny, thus affording time to obtain evidence that would convict them of murder; and to Prosecutor B. Gray Warner, who, when this evidence was obtained, ended their careers for all time.

II.

THE CORPUS DELICTI

Now, let us consider this problem of sufficiency of the proof of the corpus delicti, first from the standpoint of circumstantial evidence alone: for the really important question raised by this case is whether our law is adequate to protect society against such persons as Mayer and Mrs. Smith; whether, in the absence of a confession, they could

\textsuperscript{18} Court's Opinion on Motion to Dismiss, Chester A. Batchelor, Judge of the Superior Court for King County, Washington, Cause No. 19873.
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in the first instance have been successfully prosecuted for murder. If not, then were it not for a fortunate turn of affairs which resulted in the interception of Mrs. Smith's letters, she would again have been turned at large to prey upon society. Clearly, the trial court was of the opinion that the circumstantial evidence was sufficient without the aid of a confession. This raises the question: What is the *corpus delicti* rule, and how strict is it at common law? Can it be satisfied by circumstantial evidence, or must an eyewitness be produced who has seen the dead body?

Every crime would seem to be composed of three component parts: (1) the occurrence of the specific kind of injury or loss, e.g., missing goods in case of larceny, the house burned in case of arson, the forged check in case of forgery; (2) somebody's criminality as the source of the loss, and (3) the accused's identity as the doer of the crime. The *corpus delicti* is the subject matter of the wrong, and includes the first two of these elements. These two elements taken together mean simply that a crime has been committed, and the rule of *corpus delicti* requires that the fact a crime has been committed and the fact that the accused committed it each be established as independent facts, and beyond a reasonable doubt.¹⁴ Perhaps the most frequently cited authority for the

¹⁴ 7 Wigmore, Evidence (3d ed. 1940) § 2072. Mr. Wigmore would do away with the second element as a part of the *corpus delicti*, but he concedes that nearly all courts do consider the fact of death by a criminal agency to be a part of the *corpus delicti*. The Washington statute, REM. REV. STAT. § 2391, would appear to have done away with the second element. "No person shall be convicted of murder or manslaughter unless the death of the person alleged to have been killed, and the fact of killing by the defendant, as alleged, are each established as independent facts, beyond a reasonable doubt." In State v. Gregory, 25 Wn.(2d) 773, 171 P(2d) 1021 (1946), the judgment of conviction for murder was reversed, in part because the defendant had requested an instruction on *corpus delicti* in the terms of the statute, and the court had given the instruction in a manner less favorable to the defendant. It remains to be seen what the court will do if a defendant requests an instruction on criminal agency as the cause of death and it should be refused. The statute does not seem to have been construed, but it is submitted that it is merely declaratory of the common law, and will not be held to cut down the accused's rights. The second element has been definitely included by the court since the statute was passed. In State v. Richardson, 197 Wash. 157, 84 P(2d) 699 (1938), there was some question as to whether the direct cause of death had been scalding, criminally inflicted, or pneumonia. The court decided there was sufficient evidence that scalding had caused death and held that the *corpus delicti* is a compound fact made up of two things: First, the existence of a certain act or result forming the basis of the criminal charge, and second, the existence of criminal agency as the cause of this act or result. That the second element was included before the statute, see State v. Downing, 24 Wash. 2d 690, 64 Pac. 559 (1931). In that case, a body was found, but the case was reversed because there was not sufficient evidence that death was the result of a crime. It was not adequately proved that lacerations
common law rule of *corpus delicti* is the expression of Lord Hale, “I would never convict any person of murder or manslaughter unless the fact were proved to be done, or at least the body found dead.” And this quotation is often cited for the proposition that the *corpus delicti* must be established by direct proof, that is, that the body must be found, or an eyewitness produced who has seen it. But it will be noted that Lord Hale offers an alternative; the body must be found or the fact proved to be done. Mr. Wigmore says of this, “Lord Hale’s remark appears to be nothing more than a general expression of caution, not a

in the neck of the deceased (whose body was found in the water) were caused by other than gulls and fish of prey.

A few jurisdictions, notably Missouri, include in the *corpus delicti* all three component parts of the crime. Of such a view, Mr. Wigmore says that it is absurd, ibid. It is set out in State v. Joy, 315 Mo. 19, 285 S. W 489 (1926) as follows: “Nor was there a sufficient proof of the *corpus delicti*. To establish this essential to a conviction, both the criminal act, and the agency of the defendant in its commission must be shown. There was ample proof that the death of Mrs. Joy was not due to natural causes, or to accident, but from a violent assault criminally inflicted. The defendant’s agency, however, in its commission was not shown.” It is submitted that although the defendant’s agency is an essential element to be proved, it is not, as the concurring opinion points out, a part of the *corpus delicti*. Wherein does the term have any meaning, if it involves the whole of the offense? Over a period of many years, the Washington Court followed the orthodox rule. State v. Pienick, 46 Wash. 522, 90 Pac. 645 (1907) (an arson case), State v. Gates, 28 Wash. 689, 69 Pac. 385 (1902); and see the definition of the court in State v. Richardson, supra. But in State v. Gregory, supra, the court used some unfortunate language: “There are two elements which go to make up the *corpus delicti* on a charge of murder: (a) The presence and identification of a body, and the fact of killing; and (b) the criminal agency which effected death.” (Italics mine.) A comparison of the second part of this definition with that in State v. Richardson will show that the two are almost identical, but that the word “the” was inserted before “criminal agency” in the Gregory case. This might be said to have been the result of inadvertence (for the court in the Gregory case cited the Richardson case as authority for the definition), were it not that the court went on to say* “ in other words, it is necessary for the state to establish the identity of the slayer, as well as that of the slain.” Clearly, the identity of the slayer must be established, but not as a part of the *corpus delicti*; insofar as identity has any connection with the *corpus delicti*, it has to do with identity of the slain. This language was not necessary to the decision in the case, and it is to be hoped therefore that it will not be the basis for further similar definition of *corpus delicti*. Of course, as long as it is kept clearly in mind that certain elements of the crime must be proved by evidence that is independent of other elements, no real harm can result from an improper definition. But it is confusing, and if persisted in, could reduce the term to little more than jargon.

14 Sir Matthew Hale, Pleas of the Crown, II, 290 (1680) Lord Hale refers to the case of an uncle, charged with the murder of a niece who had disappeared, whereupon he produced another child to impersonate the niece; the fraud was discovered and he was hanged; but the niece had run away, and at the age of sixteen returned to claim her property.
definite rule of law." And indeed, the doctrine that the body or a part thereof must be found was very early repudiated, particularly in the maritime cases. In an early American case, Judge Story said,

"(This) proposition (that the body must be found) certainly cannot be admitted as correct in point of common reason or of law. A more complete encouragement and protection for the worst offences of this sort could not be invented than a rule of this strictness. It would amount to a universal condonation of all murders committed on the high seas."

And in an early Massachusetts case, it was said,

"It may sometimes happen that the dead body cannot be produced, although the proof of the death is clear and satisfactory; as in a case of murder at sea, where the body is thrown overboard in a dark and stormy night, at a great distance from land or any vessel; although the body cannot be found, nobody can doubt that the author of that crime is chargeable with murder."

The necessity for relaxing the rule exists in any case where the body is completely destroyed, or cannot be found, and although direct evidence must be furnished if available, it is almost universally the rule, that where no one can be found who has seen the dead body, circumstantial evidence will suffice.

"Wigmore, Evidence (3d ed. 1940) § 2081.
United States v. Gibert, 2 Sumn. 19, 27 (1834)
Wigmore, Evidence (3d ed. 1940) § 2081.
In Lee v. State, 98 Fla. 59, 117 So. 699 (1928), the court said: "While the discovery of the body necessarily affords the best (but not necessarily the only) evidence of the fact of the death, and of the identity of the individual, and most frequently also the cause of death, still, in homicide cases the corpus delicti cannot be said to be proven until it is fully and satisfactorily proven that such death was not caused by natural causes, accident, or by the act of the deceased. In homicide cases when proof of the corpus delicti rests upon circumstances, and not upon direct proof, it must be established by the most convincing satisfactory and unequivocal proof compatible with the nature of the case, excluding all uncertainty or doubt. Like every other essential element of the offense, the corpus delicti must be proven beyond a reasonable doubt, by evidence of the character just mentioned."

And in Wharton, Homicide (3d ed. 1907) § 588, it is said: "In case of the entire destruction or disappearance of the body of the person alleged to have been killed the corpus delicti may be proved circumstantially or inferentially," citing Edmonds v. State, 34 Ark. 720 (1879) This case contains an excellent discussion of the problem of circumstantial evidence in proving corpus delicti.

In Timmerman v. Territory, 3 Wash. Terr. 445, 17 Pac. 624 (1888), the court said, "The fact of death need not be proved by direct evidence; like every other material fact, the corpus delicti must be proved beyond a reasonable doubt, and when so found by evidence, circumstantial or direct, the law is satisfied." This case has never been overruled. There is dictum in the Washington cases to the effect that a body must be found. But no case in which a body has not been discovered has ever been before the Washington Supreme Court. And there
But this proposition standing alone, i.e., that circumstantial evidence will suffice, does not support the first ruling in the memorandum opinion, to the effect that the *corpus delicti* had been established by circumstantial evidence. Reserving the matter of the corroborated confession, the question is: What kind of circumstantial evidence is required? Must it establish the *corpus delicti* directly, beyond a reasonable doubt, without reference to the guilt of the accused? This involves the question of what is meant by the requirement that the *corpus delicti* be established as an independent fact.

The fact of death resulting from a criminal agency might rationally be established by evidence which, for our purposes, may fall into any of three classifications: First, direct evidence of the *corpus delicti* which has no tendency to prove the defendant's connection with the crime; second, evidence, either direct or circumstantial, which tends to prove the *corpus delicti*, and at the same time tends independently to connect the defendant with the offense; and third, all evidence which tends to prove that the defendant may have killed the deceased. An eyewitness to the dead body could supply evidence in the first classification. But the second classification is not so easily distinguished from the third in all cases. The distinction is important, because evidence of the second classification tends to establish the *corpus delicti* as a fact independent of the defendant's guilt, while that of the third classification does not. Suppose in a case of arson that the fact of a fire has been proved by direct evidence of the burned building, and it remains to prove the second element, i.e., that a criminal agency was the cause. The testimony of an eyewitness who saw the defendant ignite the fire would at one and the same time tend to prove both the *corpus delicti* and the connection of the defendant with the crime. The two inferences arise independently of each other out of the same evidence; neither inference arises out of the other. Or suppose that an eyewitness saw the defendant push the victim off a cliff, and that his

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is dictum the other way, together with numerous holdings, like the one in the Timmerman case, that the identity of the deceased may be established by circumstantial evidence, even though the body itself may be beyond recognition. (A body was found in that case, although it is not clear from the opinion.) In State v. Anderson, 10 Wn. (2d) 167, 174, 116 P. (2d) 346, 349 (1941), the court said: "The corpus delicti must, of course, be established beyond a reasonable doubt. But the fact of death may be found either by direct or circumstantial evidence or both." The body was charred beyond recognition, but was identified by a belt buckle found nearby. Accord, State v. Montgomery, 16 Wn. (2d) 130, 132 P. (2d) 720 (1949) (body identified by special corset)
body disappeared into the sea and was never recovered. The fact of
death would be proved circumstantially by the same evidence which
would connect the defendant with the crime. Or take the case of a man
who goes into a wine cellar sober, without the means of getting drunk,
and who comes out drunk. Two matters must be established as inde-
pendent facts: First, that there is wine missing from the cellar, and
that whoever took it did not have authority; second, that the accused
took it. If the wine is not so inventoried that the loss can be accounted
for, the case against the defendant must fail unless we are able to
reason from the fact that he is drunk to the fact that there is liquor
inside of him and from this to the fact that the liquor came from the
 cellar (assuming it could have come from nowhere else). The corpus
delicti is thus established; and the defendant's guilt is not a necessary
chain in the reasoning, but an independent conclusion. In none of
these cases does the relevancy of the evidence depend upon an inference
to the guilt of the defendant. In each case, it is independently relevant
 on the issue of the corpus delicti, although it independently tends to
 connect the defendant with the offense.

But evidence which tends to connect the defendant with the homicide,
assuming a homicide has been committed, generally tends to prove
also that the victim is dead, and that he died as a result of criminal
means. Thus, if A has disappeared, and the issue is whether he is
missing or dead, evidence that B had a motive to kill him, and the
opportunity, together with a preconceived plan or design as evidenced
by threats, would be relevant on the issue of corpus delicti. But the
evidence is relevant on this issue only because it gives rise to an
inference that B did kill A, which in turn gives rise to an inference
that A is dead as a result of a criminal agency. Is the third kind of
evidence utterly inefficacious—is it precluded from bearing on the
corpus delicti by the requirement that the corpus delicti be established
as an independent fact? If the corpus delicti must be established only
by evidence falling in one or both of the first two classifications, it then
becomes exceedingly difficult to support a conviction of Mayer and
Mrs. Smith on circumstantial evidence alone, and it becomes apparent
that in the absence of a confession, a conviction probably could not
have been secured.

The problem is a serious one. A mere showing of absence, un-

20 See discussion in Reg. v. Burton, Dears. Cr. C. 282, 18 Jur. 157 (1854), re-
printed in part in 7 Wigmore, Evidence (3d ed. 1940) § 2081.
accounted for, is universally held to be insufficient, even though accom-
panied by suspicious circumstances. And if the corpus delicti is to be estab-
lished by a mere showing of absence under suspicious circum-
stances, together with evidence which is relevant only because it points
toward the guilt of the accused, the rule of corpus delicti would in the
ordinary case become an empty shell, and the requirement that it be
established as an independent fact, meaningless. Thousands of persons
every year disappear without a trace, and many of them are later
found to be alive. If, whenever there is such a disappearance, anyone
who is so unfortunate as to have been last seen with the missing person
is liable to be convicted of murder, because he also may have had a
motive to wish the deceased out of the way (e.g., beneficiary of insur-
ance policy) or may at one time have had a quarrel with him, or is
found with some of his property in his possession, the policy of the rule
is defeated. On the other hand, society is not secure if any person
fiendishly clever enough to dispose of the bodies of his victims may prey
at large with impunity These two conflicting interests, the interest of
each member of society in being secure on the one hand from conviction
for crimes never committed, and on the other hand, against criminals
with whom the law may not be equipped to cope, present a troublesome
problem. But it is submitted that in a proper case, the corpus delicti
can be proved at least in part by evidence falling in this third classifi-
cation.

Once the fact of death has been proved, it is established that the
second element of the corpus delicti, criminal agency as the cause of
death, can be proved at least in part by evidence of the third classifi-
cation. Thus, in Ducett v. State, the victim was found dead of a bullet
wound. The issue was whether she had died of her own hand, or as the
result of homicide. The fact that the defendant was alone with the

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21 Haynes v. State, 77 Miss. 900, 27 So. 601 (1900) (murder of an infant) It
is the very basis of the corpus delicti rule in murder cases that the fact of the
disappearance is insufficient. See Edmonds v. State, 34 Ark. 720 (1879) The
court said: "It is dangerous to infer the fact of the death of a person from
his sudden disappearance even when followed by long-continued absence, and
even although such circumstances may be connected with others, appar-
ently casting suspicion on a certain individual."

22 186 Ala. 34, 65 So. 351 (1914)

23 The rule is generally stated: "Proof that the deceased died as a result of a
criminal agency." But the term "criminal agency" means the criminal agency of
another. In short, the corpus delicti in a murder case is the fact a homicide was
committed, and proof of death by criminal means which might as well have been
suicide will not suffice.
deceased when she was wounded, that he had seemed to invent an occasion for her father to be temporarily absent, and the fact that she was killed by the defendant's pistol were held to be circumstances properly tending to prove the second element of the corpus delicti. There was, however, one item of evidence which did not depend for relevancy upon an inference to the guilt of the accused; there were no powder burns on the body.

In State v. Davis, the deceased was found dead in her bed of asphyxiation. The issue was whether the asphyxiation was caused by choking, or by an internal disorder aggravated by smoke. The deceased was seventy years old, and physicians testified that she was afflicted with a kidney and lung ailment, which, combined with fright resulting from smoke which had entered her sleeping room, might conceivably have caused her death. The consensus was that this was unlikely, however. Her grandson, who was sleeping in the same room, said that he either heard her call or dreamed that he heard her call him, and that he either heard or dreamed that he heard footsteps in the room. There was a footprint outside her window. This was all of the evidence of the corpus delicti which did not depend for relevancy upon an inference to the guilt of the accused. The state then introduced evidence that the defendant entertained hostile feelings toward the deceased (who was his wife), that he had previously used physical violence toward her, that he had threatened to kill her, and that he had strong personal and pecuniary reasons for desiring her death. The footprint outside the deceased's window fit exactly the shoe of the defendant, but inasmuch as the defendant lived in the deceased's house, this was of doubtful significance. Perhaps the most damaging evidence against the accused was testimony that before anyone but the murderer could have known of the tragedy, and before he saw the body, the defendant said that his wife was dead, and pretended to cry but did not. The court held that all the evidence was properly admitted as tending to prove death by criminal agency, saying:

"All of the evidence of defendant's supposed guilt was introduced along with the other evidence, for the purpose not only of showing that he was in fact guilty, but also that the offense was really and in fact committed by some person, or in other words, of proving the corpus delicti."

But in some cases, evidence of the third classification has been held properly admitted in support of both elements of the corpus delicti.

24 48 Kan. 1, 28 Pac. 1092 (1892)
In the case of *State v. Clark*, one Schick, living an apparently normal life, went to his office in the morning, and was never seen again. He had no apparent reason to leave home; he had just bought a new business and was in no financial difficulties. He had written regularly every week to his mother in the East, but after the day of his disappearance, she received no more letters. The defendant was in Schick's employ, was living in a house which Schick owned, and by his own admission was the last person to see Schick before he disappeared. On the night of the day on which Schick disappeared, a commotion occurred in the house the defendant was living in, there were loud voices of two men, and unusual noises, such as chairs being knocked over, and then all was quiet. The next day there was a fire in the rear of the defendant's house, kindled underneath an oil drum, which gave off an offensive odor, like burning bones or egg shells. The defendant had never before burned anything in that manner at that place. The defendant said to police officers, "You can't convict me without a body." On the morning of the day Mr. Schick disappeared the defendant called on Mrs. Schick and told her that her husband had been called out of town. That evening he appeared driving Schick's car and told Mrs. Schick that Schick had gone to Mexico because detectives were after him. He and his wife moved into Mrs. Schick's house and carried out a systematic plan to get her money.

In affirming the conviction, the court said.

"It is clear that the general rule requiring either the production of the body or some circumstance from which death would necessarily follow cannot be applied in all cases. If the circumstances surrounding the disappearance be such as to convince the mind to a moral certainty as to his death, the demands of the law will be satisfied. Nor is it necessary in establishing the *corpus delicti* that the means by or through which such death resulted be established beyond a reasonable doubt. The only requirement is that there be some evidence to justify the conclusion that criminal agency was the direct cause."^{25}

In the last statement, the court goes farther than any reported case that has come to light; of course, the court does not mean that the guilt of the defendant does not have to be proved beyond a reasonable doubt; but it is submitted that the court is referring to our first and second classifications of the evidence, leaving it to the third classification, that which depends for relevancy upon an inference to the guilt of the accused, to add whatever is needed to raise the level of the proof.

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^{25} 70 Calif. App. 531, 233 Pac. 980 (1925)
^{26} 233 Pac. at 985.
to that necessary for a criminal conviction. Although there was a confession, the tenor of the opinion leads one to believe that the conviction would have been affirmed without the confession.

No case right in point with the Mayer case has ever been decided in Washington. The case of John Henry Timmerman v. Territory of Washington\(^7\) is closer than any other, but although the opinion is silent as to whether the body was found, an examination of the transcript of the trial shows that a body was found which was circumstantially identified as that of the deceased. State v. Downing\(^8\) would seem at first glance to be repugnant to a conviction in the Mayer case, on circumstantial evidence alone. The body was found washed up onto the shore. The issue was whether the throat had been cut, or whether deceased had drowned and his neck been eaten by gulls and fish of prey. The evidence was in conflict, and no one was able to testify positively that the throat had been cut. The conviction was reversed, and the court held that the second element of the corpus delicti had not been proved sufficiently to take the case to the jury. There was some evidence connecting the defendant with the offense, if an offense was committed: The deceased had last been seen with the defendant near the defendant's shack; the two had had a quarrel only recently, and there was some other evidence. The case is not a clear holding that the corpus delicti could not have been established by circumstantial evidence, or in part by evidence depending for its relevancy upon an inference to the guilt of the accused. There simply was not enough of any kind of evidence to sustain a conviction.

However, in State v. Anderson,\(^9\) decided in 1941, the Washington Court expressly recognized evidence of the third classification, in deciding that the corpus delicti had been sufficiently established to corroborate a confession. The facts were these: The defendant had stated in his confession that he had killed the deceased and thrown him in the river. In an effort to find the body, the authorities dragged the river, but to no avail. However, a body, charred beyond all recognition, was found in a burned barn near the place where the deceased had lived.

\(^7\) 3 Wash. Terr. 445, 17 Pac. 624 (1888)

\(^8\) 24 Wash. 340, 64 Pac. 550 (1901)

\(^9\) 10 Wn. (2d) 167, 116 P (2d) 346 (1941) If a body had been found at the place where the defendant had said it was, it would not have had to be identified in order to constitute corroboration. But since it was found at a different place, then, it is submitted that it would be no corroboration unless identified as the body of the person the defendant had said he had killed.
Near the body was a belt buckle with the initial "D" engraved upon it, which was positively identified as the deceased's buckle. This was all of the evidence of the corpus delicti which did not depend for relevancy upon an inference to the guilt of the accused. But the court went on to say that there was additional competent evidence of the corpus delicti, that the corpus delicti could be established (at least in part) by evidence which tends to connect the defendant with the crime, and that all of the following tended to establish it: The defendant said, when confronted with the fact that a body had been found in a burned barn near the deceased's place, "That can't be true that couldn't be true, if I put him in the river, could it?" In the defendant's diary was the following, "Johnson (the deceased) was very sick, gunshot sound," and "big fires break out in Ida." And the defendant sold the deceased's revolver shortly after the latter's disappearance. It is to be remembered that the case involved a confession, and the confession itself tends to establish the corpus delicti as an independent fact. The court was seeking some other evidence of the corpus delicti, however, in corroboration, and it is significant that it held that evidence of the third classification could be considered in that connection.

It is suggested that the following general rule is consistent with all of these cases, and with the current trend of judicial thinking on this subject: The corpus delicti cannot be established solely by circumstantial evidence the relevancy of which depends upon an inference to the guilt of the accused; but if there be substantial other evidence of the corpus delicti either direct or circumstantial, and if from all of the evidence in the case a reasonable man could believe beyond a reasonable doubt that the person alleged to have been killed is dead as a result of the criminal act of another, then the corpus delicti will be deemed sufficiently established to take the case to the jury. This conclusion is not without its theoretical difficulty; for it is hard to see how the corpus delicti is established beyond a reasonable doubt as an independent fact where part of the evidence relied upon is of our third classification. But it is submitted that this "independent fact" requirement is to be applied in the light of common sense, and that where there is some substantial evidence, circumstantial or direct, which points directly toward the corpus delicti, and the other evidence in the case is overwhelming, there being no reasonable hypothesis consistent with innocence, the requirement should be deemed met, or frankly brushed aside.
This is in effect what has been done in some of the modern cases. The rule might be stated thus: The corpus delicti must be established by evidence some substantial part of which proves the fact of death as an independent fact, and all of which, taken together, proves the killing of the alleged victim by the criminal act of another beyond a reasonable doubt, to a moral certainty, and to such a degree that there is no reasonable hypothesis consistent with the contrary.

The cases cited are convincing that the suggested rule is not inconsistent with the policy of the corpus delicti rule, but has been made necessary by the ever increasing facility of disposing of a human body. It has long been invoked in the maritime cases. The doctrine that the commission of a crime must be proved beyond a reasonable doubt as an independent fact was laid down at a time when it was not possible to transport a body a great distance, when it was extremely difficult to spirit it away undetected. Now, the murderer can carry his victim in an automobile to a remote place; or he may drop it from an airplane into an inaccessible place in the mountains; the study of chemistry is disclosing new methods of disposal, and this knowledge is becoming available to an ever increasing number of people. More stringent rules of law become necessary if society is to be protected.

It is submitted that the circumstantial evidence against Mayer and his mother would not have met the requirements of the suggested rule, had it not been for the testimony of Schmidt and his son. There was no other substantial evidence of corpus delicti which did not depend for relevancy upon an inference to the guilt of the accused. The mere fact the victim is missing is everywhere insufficient. Schmidt's testimony then, devolves upon us the question whether, taken in connection with the fact that Bassett had been missing for ten years, it furnished substantial evidence of the corpus delicti. Entirely apart from other circumstances of the case, it is of little value. But evidence that on the very night that Bassett disappeared under most suspicious circumstances, never to be seen again, several red stained gunny sacks were in the trunk of his automobile, that a shovel was tied to the side of the automobile, and that it then disappeared into the woods down a deserted road, might well be deemed substantial. The balance of the evidence (exclusive of the confession) connecting Mayer and his mother with the crime is overwhelming, and all of the evidence is sufficient to convince a reasonable man to a moral certainty that Bassett was murdered.
The confession strengthens the case immeasurably; the confession itself is eyewitness testimony to the fact of death, as a result of criminal means. If believed, it establishes the corpus delicti beyond a reasonable doubt. But an extra-judicial confession must be corroborated to be legally credible. The questions arise, what kind of corroboration is required and how much? Must the corroborative facts themselves directly evidence the corpus delicti, or is any corroboration sufficient which convinces one that the confession is trustworthy? Since a confession in open court needs no corroboration, and the only reason for requiring corroboration of an extra-judicial confession is the fear of a false confession, it would seem on principle that any corroboration which induces a confidence in the truth of the same would be sufficient. Mr. Wigmore supports this view, and it does find some support in the cases. The weight of authority is to the contrary, however, and requires the corroborative facts to evidence the corpus delicti itself. But the corroborative facts tending independently to prove the corpus delicti need not be great. Since the fear of a false confession is the reason for requiring corroboration, it is generally held that some is sufficient.

In the recent case of Commonwealth v. Lettrich, the defendant was convicted of the murder of her sister's eight-day-old illegitimate child. She confessed that she had suffocated the baby and burned the body in the furnace. No trace could be found. The defendant had undertaken the care of the child, was last seen with it, and on the day of the alleged murder, was seen carrying a bundle about twenty-four inches long.

WIGMORE, EVIDENCE (3d ed. 1940) § 2071 n. 6, "As to the application of the rule, requiring corroboration it remains only to note that it has of course no bearing upon an infra-judicial confession, which is in effect a plea of guilty."

WIGMORE, EVIDENCE (3d ed. 1940) § 2071. "In a few jurisdictions, the rule is properly not limited to evidence concerning the 'corpus delicti', i.e., the corroborating facts may be of any sort whatsoever, provided only that they tend to produce a confidence in the truth of the confession." And in § 2070, "The policy of any rule of the sort is questionable. Moreover, the danger which it is supposed to guard against is greatly exaggerated in common thought. That danger lies wholly in a false confession of guilt. Such confessions, however, so far as handed down to us in the annals of our courts, have been exceedingly rare. But this rule and all such rules, are today constantly resorted to by unscrupulous counsel as mere verbal formulas with which to entrap the trial judge into an error of words in his charge to the jury. These capabilities of abuse make it often a positive obstruction to the course of justice."


346 Pa. 497, 31 A. (2d) 155 (1943)
and ten inches in diameter which she explained at the time was a bundle of soiled clothes. When she took the bundle into the house, she told her companion that she did not want her father to see her bringing in the soiled clothes. She made inconsistent statements as to what had become of the child, all of which proved to be false. The court held that there was sufficient evidence of the corpus delicti independent of the confession to render the confession admissible, and that all of the evidence, together with confession, established the corpus delicti sufficiently to take the case to the jury. The court said that the purpose of the rule (requiring corroboration) is to prevent conviction on extrajudicial confessions where in fact no crime was committed, and reasoned that, as the child could not of its own volition go anywhere, a very strong inference arose from the fact that it was missing. This, together with the fact the defendant had undertaken the care of the child and was last seen with it, together with the other circumstances of the case, were deemed sufficient corroboration. It will be noted that, although the court required some evidence of the corpus delicti itself in corroboration, the only evidence of it which did not depend for relevancy upon an inference to the guilt of the accused was the fact that the child was missing. As pointed out above, the fact the alleged victim is missing is generally deemed insufficient, either to establish the corpus delicti circumstantially, or in corroboration. But in the case of an infant under the care of the defendant, the rule was properly relaxed.

In the case of United States v. Williams, the defendants, along with a number of other sailors and officers, sailed on a ship which did not reach the port of destination, and was never heard of again. The three defendants were picked up in a small boat on the open sea. The boat had been tarred on the inside, as though in preparation for a long trip. The defendants had the captain's watch and his clothes, the clothes of the mate, the ship's register and the ship's compass. The bodies of the captain and other crew members were never recovered. The court held this evidence sufficient corroboration.

Under the majority rule, requiring the confession to be corroborated by evidence of the corpus delicti itself, it would seem that in the Mayer case the evidence would have been insufficient without the testimony of Schmidt and his son. There was absolutely no other evidence tending

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28 Fed. Cas. 636, No. 16707.
to establish the *corpus delicti* (aside from the fact that Bassett was missing) which did not depend for its relevancy upon an inference to the guilt of the accused. But the Schmidts' testimony would seem to be sufficient corroboration. Under the growing and better view, however, the confession was adequately corroborated without particular reference to the *corpus delicti* by all of the circumstances of the case which lent credence to the confession.

III.

CONCLUSION

The rule of *corpus delicti* is historically a strict rule, which requires that the fact a crime has been committed be established as a fact independent of the guilt of the accused, and beyond a reasonable doubt. It is designed to protect innocent persons from conviction of crimes never committed, and in homicide cases, it serves to guard innocent persons against punishment for the alleged killing of missing persons. But in order that the rule not be turned into a shield for the guilty, it has long been relaxed in cases of necessity, where, by the very nature of the circumstances, a strict application of it would render the law helpless in all cases of the same category, e.g., the maritime cases. This is not to say that it has been generally relaxed in individual cases where a body simply could not be found and where there was not enough independent evidence of the *corpus delicti* to establish it beyond a reasonable doubt. Such relaxation of the rule, at least as to the first element, fact of death, is of relatively late origin, and is not yet general. The *Clark* case, *supra*, is the most extreme illustration of relaxation. The *Anderson* case indicates that the Washington court will follow the *Clark* case, for it there approved establishment of the *corpus delicti* at least in part by evidence which depended for relevancy upon an inference to the guilt of the accused. The increasing facility of disposing of a victim's body makes necessary a relaxation of the rule, so that the *corpus delicti*, like the defendant's connection with the crime, can be established by any relevant evidence. Innocent persons would be adequately protected by the suggested requirements that there be some substantial independent evidence of the *corpus delicti*, and that all of the evidence in the case establish it beyond a reasonable doubt. If the courts adopt this view, and only then, can such persons as Mayer and Mrs. Smith be convicted, barring some fortuitous circumstances such as the interception of Mrs. Smith's letter to Wheeler.
IV
SUPPLEMENT

On appeal from the grand larceny conviction in 1929, a point was raised which is of peculiar interest and ought to be included in any account of the Mayer litigation. It will be remembered that in the summary of evidence, mention was made of a telegram which Bassett's sister received on the afternoon of the day Bassett disappeared, and that in Mrs. Smith's confession, she related how Mayer compelled Bassett to write that same telegram. The original, in longhand, was introduced by the State at the grand larceny trial in an effort to prove that it had been written by Mayer, or if not, then by Bassett 'under duress. While Mayer was not sworn at the trial, he did, at the instance of his defense counsel, make several samples of his handwriting. When the defense requested an instruction that no inference of guilt should arise from the defendant's failure to testify, the instruction was refused. The trial court was under a misapprehension as to the effect of Rule of Supreme Court IX, adopted January 14, 1927, upon the Washington statute, which provides: "It shall be the duty of the court to instruct the jury that no inference of guilt shall arise against the accused if the accused shall fail or refuse to testify as a witness in his or her own behalf." Rule IX would seem to abrogate the statute, but in the case of State v. Pavelich, which had not been decided at the time of Mayer's trial, the court held that the instruction must still be given if requested. By the time of the appeal, the Pavelich case had been decided, and was the basis of reversal of Mrs. Smith's conviction. The Supreme Court affirmed Mayer's conviction, however, on the ground that he had testified when he made samples of his handwriting before the jury.

If the holding that Mayer testified was sound, the ruling was sound, for whenever the accused testifies at all, or if he is sworn and merely offers to testify to incompetent matter which is rejected, the prosecutor may comment on his failure to testify concerning all phases of the case, and he is not entitled to the instruction. But the holding that Mayer testified is very questionable, although there are some supporting cases. The court relied upon two passages from the second edition of Wig-

88 150 Wash. 411, 273 Pac. 182 (1928)
89 State v. Ulsemer, 24 Wash. 657, 64 Pac. 800 (1901).
more and two prior Washington cases which are not in point. The
passage from Wigmore was: "Man does not communicate by words
alone; and it may occur that words become inferior to action as a mode
of communicating a correct impression of a scene observed. Certainly,
in an appropriate case, it is proper and customary for the trial court
in its discretion to sanction a departure from the ordinary or verbal
medium and permit the witness to make clearer his own observed data
by representing them in gesture \textsuperscript{39}, and the following: "It would
be folly to deny ourselves on the witness stand those effective media
of communication commonly employed at other times as a superior
substitute for words.\textsuperscript{40}

The first quotation was from the section on "Dramatic communica-
tion, Gesture, Dumb Show, etc.," and the second was from the opening
paragraph of the section on "Models, Maps, Diagrams, Photographs,
General Principles." These paragraphs of Wigmore have to do with
the efforts of the witness to communicate his knowledge by more than
mere words, \textit{i.e.}, by gestures, etc., where words are inadequate to con-
vey his impressions. This is a very different situation from a mere
"bodily exhibition," or more exactly, the making of handwriting speci-
mens in the presence of the jury, not to prove the truth of what is writ-
ten, but to enable the jury to measure, as it were, the bodily style of
the defendant. The sections of Wigmore quoted by the court are
applicable to a witness who is testifying, not by mere words, but who
is aiding his verbal recitation by the use of gestures, models, maps or
diagrams. They are applicable to a deaf mute, whose only means of
communicating to the jury is to write his testimony, or to communicate
in sign language to an interpreter who conveys his meaning to the jury
Such a person would have testified, had he taken the witness stand
for that purpose. But when a person writes before the jury, he cannot
be said to have testified unless what he wrote was used to prove the
truth of the matters written. Mayer's writing was used for no such
purpose, but was handed to a handwriting expert, who himself gave
the only testimony that was introduced concerning it.

The misinterpretation which the court placed upon Wigmore's state-
ments can be clearly demonstrated by quoting a passage from his sec-
tion on self-incrimination.\textsuperscript{41}

\textsuperscript{39} 2 Wigmore, Evidence (2d ed. 1923) § 789.
\textsuperscript{40} 2 Wigmore, Evidence (2d ed. 1923) § 790.
\textsuperscript{41} 8 Wigmore, Evidence (3d ed. 1940) § 2265. See Inbau, Self-incrimination—
"The limit of the privilege is a plain one. From the general principle it results that an inspection of the bodily features by the tribunal or by witnesses cannot violate the privilege, because it does not call upon the accused as a witness, i.e., upon his testimonial responsibility. That he may in such cases be required sometimes to exercise muscular action—as when he is required to take off his shoes or roll up his sleeve—is immaterial,—unless all bodily action were synonymous with testimonial utterance; for, as already observed (ante, Sec. 2263) not compulsion alone is the component idea of the privilege, but testimonial compulsion. What is obtained from the accused by such action is not testimony about his body, but his body itself (ante, Sec. 1150) Unless some attempt is made to secure a communication, written or oral, upon which reliance is to be placed as involving his consciousness of the facts and the operations of his mind in expressing it, the demand made upon him is not a testimonial one." (Italics mine.)

And in the same section, Mr. Wigmore specifically points out that an accused person may, among other things, be required to make specimens of his handwriting.

The State in its argument made much of the idea that it could not have compelled Mayer to give a sample of his handwriting before the jury, and reasoned from there to the idea that his act was testimony. The quotation from Wigmore would seem to dispose of the idea that the State could not have compelled Mayer to exhibit his bodily style. Further than this, Mayer could have made a sample of his handwriting out of court, in the presence of a witness, who could have testified in court that the writing was Mayer's. The writing would not be testimony; it would be an item of demonstrative evidence, identified by the witness on the stand. It was none the less demonstrative evidence when made in court before the jury; the only difference was that no witness for identification was needed.

The court said that it was as though Mayer had testified, "See, this is my writing." But it is submitted that that is just what it is not. The jury could see for themselves. Mayer in no way vouched for the genuineness of his hand; he in no way asserted that he was in good faith writing in his usual style. Any such assertion would have been valueless, not made under oath. Had he made such an assertion on the witness stand, he might have been liable to prosecution for perjury had he intentionally falsified his writing style. But could he not, with impunity, write in any manner he desired when not on the stand? It is


42 Mr. Wigmore is making reference to the general principle outlined in § 2263 of his work, that nothing turns on the precise phraseology of the constitutional provision, and that it was designed to be merely declaratory of the common law.
submitted that Mayer did not testify any more than if he had exhibited a mark upon his body for identification, or spoken for voice identification. The doctrine that this demonstration was testimony would, if carried to its logical extreme, mean that the accused testifies when he enters the court room, and exhibits his features, height, size, etc. to the jury. Wells v. State, in following this doctrine, went so far as to hold that the privilege against self-crimination was violated when the accused was required to stand in order that a witness might better identify him. Under such a holding, the accused ought to be allowed to screen himself from the view of the witnesses and jury, reclining out of sight where he could hear the proceedings. The Washington court later repudiated any such doctrine in State v. Clark, where it was held proper to require the accused to stand and walk over in front of the witness so that she could identify him. In Holt v. United States, the accused was required to put on a blouse, to determine whether it fit; held. Not privileged. In O'Brien v. State, testimony that the accused had a scar of identification was held admissible, where he had been required against his will to exhibit the scar to the witness. In State v. Ah Chuey, the defendant was compelled to exhibit his arm so as to show certain tattoo marks. The court held that no evidence of physical facts can be encompassed within the privilege. How much less is style of handwriting a physical fact? In Henrietta Robinson's Trial, (for murder of another woman) the accused sat heavily veiled. A witness was unable to identify her because of the veil, and the Court threatened to have it removed by force if she did not remove it. Any other ruling would have resulted in as unsupportable an outcome as in Wells v. State, supra. The judicial view is increasingly crystallizing in the idea that the privilege embraces only testimonial evidence, not bodily exhibition.

The court also relied upon two Washington cases, State v. Nordstrom, and State v. Dooley, which do not appear to be apt. In State v. Nordstrom, the defendant testified on direct examination that he

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18 20 Ala. App. 240, 101 So. 624 (1924)
19 156 Wash. 543, 287 Pac. 18 (1930)
20 218 U. S. 245 (1910)
21 125 Ind. 38, 25 N. E. 137 (1890)
22 14 Nev. 79 (1879)
23 11 Am. St. Tr. 528, 543, 545, 547, 549 (N. Y. 1854)
24 7 Wash. 506, 35 Pac. 382 (1893)
25 82 Wash. 483, 144 Pac. 654 (1914)
could not get certain boots on his feet, and "at the request of counsel, made apparently extraordinary efforts to put them on in the presence of the jury, but without effect." In rebuttal, the State called a shoemaker, and over objection the shoemaker was permitted to measure the boots and the defendant's feet, and then to testify that the defendant could wear the boots. The defendant assigned error, but the conviction was affirmed; the court held that the measurement, and the testimony of the shoemaker, were legitimate cross examination. This holding was on solid ground, for the defendant had testified that he could not wear the boots. Had the defendant not taken the stand, but merely demonstrated in the presence of the jury that he could not get the boots on, it is submitted that the State could have measured his feet, not by way of cross-examination, for the defendant would not have testified, but as a matter of demonstrative evidence. Even though the defendant did not first try to get the boots on, to measure his feet is not any more to require him to testify than where he is required to present himself before the court in order that the jury may estimate his size, or the size of his feet, hands or ears.

And so it can hardly be said that the Nordstrom case is authority for the holding in the Mayer case. State v. Dooley was a criminal prosecution for violating the provisions of a statute which made it a crime for a witness to ask or receive pay in exchange for falsifying his testimony. The accused had offered to make a false affidavit for pay, to be used upon motion for a new trial, in a case where the accused had served as a witness. The court held that where by statute an affidavit is made a distinct means whereby the trial court can receive testimony in support of a motion for a new trial, a person making such an affidavit is a witness within the purview of the criminal statute. Obviously this does not support the holding in the Mayer case.