MINUTES

ASSEMBLY JUDICIARY COMMITTEE
March 30, 1977

Members Present: Chairman Barengo
Assemblyman Hayes
Assemblyman Banner
Assemblyman Coulter
Assemblyman Polish
Assemblyman Price
Assemblyman Sena
Assemblyman Ross
Assemblyman Wagner

The meeting was called to order at 8:30 a.m. for committee action by Chairman Barengo.

AB 365:
Chairman Barengo opened with a report on the sub-committee meeting which was held on March 26, in Winnemucca. He said he felt the bill was well received and there were no objections from any of the people in Winnemucca to this bill. Mr. Moody was asked to give his views on this bill. Mr. Moody stated that he would look at this bill and contact those in his district who would be affected by the bill and report back to the committee.

It was noted that a similar bill to this was introduced and passed by the assembly last session and was killed in the Senate. However, this bill is somewhat differently written and avoids some of the objections which came up last session.

SB 132: Mr. Moody also addressed himself to this bill stating that his amendment was not related to the content of this particular bill. However, it was related to the same section of the NRS and what they wanted to do with the amendment was to change the voting procedure for changing the bylaws. The amendment would make a simple majority, rather than a two-thirds majority, necessary to change the bylaws. He said this was requested due to the extreme difficulty of getting the 2,000 members of the cooperative to respond in a large enough number to make a vote valid under the current law. See Exhibits B & C attached.

AB 35: Mr. Ross moved for No Further Consideration. Mr. Sena seconded the motion and it carried unanimously. (Mr. Coulter was not present in the room at this time.) Mr. Barengo stated that he would draft a letter to the judges stating that the committee wished their imput on this measure and that it would be considered next session.

AB 78: Mr. Ross moved for No Futher Consideration. Mr. Sena seconded the motion and all members voted yes, except Mr. Barengo and Mrs. Wagner (Mr. Coulter was not present in the room at this time.) who wished to show a "no vote".

Chairman Barengo said that there would be a letter sent to the governor and department heads that this committee had been apprised of the situation which exists and that appropriate action should be taken across the board to prevent it in each department or office.

AB 210: Discussion on this bill was lengthy and Chairman Barengo and Mrs. Wagner are going to contact Mr. Woodburn and the prime sponsors and try to work out some amendments to the bill which will make it more acceptable. The areas to be amended are the lenth of time being extended to two years, rather than the 60 days as now proposed and better notification provisions concerning the creditors. Mr. Coulter entered the meeting at this time.

AB 227: Mr. Ross moved for a Do Pass. Mrs. Wagner seconded the motion and it carried unanimously. (Mr. Banner was not in the room at this time.)

AB 251: This bill was discussed with Mr. Daykin and he is going to prepare amendments to the bill and it will be reconsidered at that time. A fiscal note which had been prepared by the Fiscal Analyst was submitted to the committee and is attached and marked Exhibit A.

AB 256: Mr. Ross moved for an Indefinite Postponement. Mrs. Wagner seconded the motion and it carried unanimously. (Mr. Banner was not in the room at this time.)

AB 309: Mrs. Wagner stated that she was going to talk to Larry Petty and then report back to the committee. Until then, this bill will be held in committee.

AB 349: After discussion on this bill it was decided that it should be amended to leave out the word "possesses" on line 3 and to delete the word "original" on line 14 and delete line 15 entirely. Mrs. Hayes moved for a Do Pass as Amended. Mr. Sena seconded the motion and it carried unanimously. (Mr. Banner was not in the room at this time.)

AB 377: Mrs. Wagner moved for an Indefinite Postponement. Chairman Barengo seconded the motion and all present voted in favor of the motion with the exception of Mrs. Hayes, who voted no. (Mr. Banner and Mr. Ross were not in the room at this time.)

AB 451: This bill was discussed and Chairman Barengo divided the bill into groups of seven sections each and assigned those groups to the committee members for study and this will be heard next week at which time Stan Peck will be present to answer the questions of the committee members.

AB 467: Mr. Price moved for an Indefinite Postponement. Mr. Ross seconded the motion and it carried unanimously. (Mr. Banner was not present in the room at this time.)

AB 471: Chairman Barengo distributed to the committee copies of

cases which pertain to this bill. They are attached and marked Exhibits D, E & F. The committee is also awaiting language from other states on similar statutes.

AB 472: This is being held for receipt of a similar Senate bill.

AB 261: Mr. Daykin stated that the exclusion of the local police blotter could be written into this bill as the committee had inquired and he is working on amendments to this bill. The bill will be reconsidered when those amendments are received.

AB 479: Assemblyman Demers explained this bill to the committee and said that it was the result of a problem in Clark County. Mr. Demers was the first sworn witness before the Judiciary Committee. He stated that it was the result of a meeting that he had had with Commissioner Rottman and two representatives of the bail bond business. He stated that the Insurance Commissioner's office has some amendments to this bill as it is written and he asked that further discussion be delayed until Mr. Merrill can come in to testify on this and their changes. Therefore, there was no action taken on this bill.

There being no further business before the committee, the meeting was adjourned at 10:45 a.m.

Respectfully submitted,

Linda Chandler

Linda Chandler

EXHIBIT A

FISCAL NOTE

BDR 18-473
A.B. 251
S.B. _____

Date Transmitted _____

• STATE AGENCY ESTIMATES Date Prepared January 24, 1977

Agency Submitting Department of Administration

Revenue and/or Expense Items	Fiscal Note 1976-77	Fiscal Note 1977-78	Fiscal Note 1978-79	Continuing
Hearings Division		$276,965	$268,185	
Total		$276,965	$268,185	

Explanation (Use Continuation Sheets If Required)

Local Government Impact YES ☐ NO ☐
(Attach Explanation)

Signature _____
Howard E. Barrett
Title Director of Administration

• DEPARTMENT OF ADMINISTRATION COMMENTS Date January 24, 1977

This fiscal note reflects the estimated cost for establishing a new division in the department of administration. It does not consider the possible cost reduction to individual agencies currently staffed with hearing officer positions or assigned with hearing responsibilities. In order to accomplish the functions, as outlined in BDR 18-473, it would be necessary to employ a chief of the division, four hearing officers, two legal researchers and clerical help, plus operating monies. Source of funding should be noted in the bill.
This bill provides for charges to be made for services, however, states that monies collected are to be deposited to the state general fund. We recommend, for the first biennium because of the lack of experience in operating a central hearings division and because of fluctuating case load, that the monies received from charges for services be available to the division to partially offset expenses.

Signature _____
Howard E. Barrett
Title Director of Administration

• LOCAL GOVERNMENT FISCAL IMPACT Date _____
(Legislative Counsel Bureau Use Only)

Signature _____

Title _____

FN-3 (Revised 8-9-76) PRINTER

EXHIBIT B

Nevada Rural Electric Association

President:
D. VERNON DALTON
Clover Route
Wells, Nevada 89835
Phone 752-3498

Vice President:
LaVERN MACHACEK
Diamond Valley
Eureka, Nevada 89316
Phone Diamond Valley 3

Secretary-Treasurer:
M. KENT (TIM) HAFEN
P. O. Box 236
Pahrump, Nevada 89041
Phone 727-5216

March 4, 1977

Mr. Peter T. Kelley
P. O. Box 722
Carson City, Nevada 89701

Dear Pete,

As we discussed the other day by phone, I am sending more detailed information on possible changes to NRS 81.230 thru 81.540 concerning Non-Profit Corporations.

As you know, Valley Electric Association, which serves electricity to Mountain Springs and Sandy Valley in Clark County, Pahrump, Amargosa Valley and Beatty in Nye County, Fish Lake Valley in Esmeralda County and Montgomery Pass in Mineral County is a non-profit REA financed Cooperative Corporation. As such, we come under the above mentioned chapter as do many other Cooperative Electric and Telephone Corporations in the State of Nevada.

There is a provision in 81.470-1 that upon incorporation a majority can adopt the Bylaws. Further, 81.470-2 provides that if our original Articles of Incorporation had so provided, the Board of Directors could amend the Bylaws. Our articles did not confer this power.

Then 81.470-2 goes on to say that if Bylaws are to be amended or repealed it takes a 2/3 written consent of its members. This is the section that Valley Electric and Nevada Rural Electric Association would like to see changed to a simple majority.

The reason behind this request is that Valley Electric has many outdated sections of our Bylaws that need changing. We attempted this last summer. There are parts of our Bylaws that we are operating under and by necessity, operating contrary to our Bylaws, such as areas served.

Mr. Peter T. Kelley March 4, 1977

We made a vigorous effort at four public district meetings, plus two special mail-out requests and although the proposed changes were not controversial, we could not get a 2/3 written response to changing our By-laws. Mostly because without personal contact and detailed personal explanation of the proposed changes, people felt better about not responding. It is physically and economically impossible to make personal contact with each of our 2,000 members scattered over four counties.

Nevada Rural Electric Association, which endorses this proposed amendment, is a statewide association of Rural Electric Non-Profit Cooperative Corporations.

If there is concern in the Legislature that it could affect more than the types of Companies we represent, then there could be provisions for limiting these changes to just non-profit Cooperative Corporations dealing in electricity and telephones. I see no reason that this request should be controversial, nor that it would be unreasonable. It is just unrealistic to require that it be a 2/3 majority rather than a simple majority.

I know this request is late in the current Legislative session, because of reasons I explained to you. However, we would appreciate your best effort in our behalf.

I am taking the liberty of sending a copy of this letter to Senator Mel Close, Chairman of Senate Judiciary, Assemblyman Robert R. Barengo, Chairman of Assembly Judiciary, along with Senator Blakemore and Assemblyman Moody, representing our district.

Very truly yours,

M. Kent (Tim) Hafen
Secretary-Treasurer
and
Chairman of the Board
Valley Electric Association

MKH:j

EXHIBIT C

ASSEMBLY ACTION	SENATE ACTION	ASSEMBLY / ~~SENATE~~ AMENDMENT BLANK
Adopted ☐ Lost ☐ Date: Initial: Concurred in ☐ Not concurred in ☐ Date: Initial:	Adopted ☐ Lost ☐ Date: Initial: Concurred in ☐ Not concurred in ☐ Date: Initial:	Amendments to ~~xxxxxxx~~ / Senate Bill / ~~Joint Resolution~~ No. 132 (BDR 7-681) Proposed by Committee on Judiciary

1977 Amendment Nº 367 A

Replaces Amendment No. 293A.

Amend the bill as a whole by adding a new section designated section 5, following section 4, to read:

"Sec. 5. NRS 81.470 is hereby amended to read as follows:

81.470 1. Each corporation incorporated under NRS 81.410 to 81.540, inclusive, must, within 1 month after filing articles of incorporation, adopt a code of bylaws for its government and management not inconsistent with the provisions of NRS 81.410 to 81.540, inclusive. A majority vote of the members, or the written assent of members representing a majority of the votes, is necessary to adopt such bylaws.

2. The power to make additional bylaws and to alter the bylaws adopted under the provisions of subsection 1 shall be in the members, but any corporation may, in its articles of incorporation, original or amended, or by resolution adopted by a [two-thirds] majority vote, or by written consent of [two-thirds] a majority of the members, confer that power upon the directors. Bylaws made by the directors under power so conferred, may be altered by the directors or by the members. The written consent of [two-thirds] a majority of the members [shall suffice] suffices to adopt bylaws in addition to those adopted under the provisions of subsection 1, and to amend or repeal any bylaw.

3. All bylaws in force must be copied legibly in a book called the Book of Bylaws, kept at all times for inspection in the principal office. Until so copied, they shall not be effective or in force."

Amend the title of the bill, 2nd line, insert:

"reducing the vote required to amend the bylaws of a cooperative corporation;" after "purposes;".

CURTIS AUSTIN, APPELLANT, v. STATE OF NEVADA, RESPONDENT.

No. 6300

December 7, 1971 491 P.2d 724

Appeal from judgment of conviction and sentence of the Fifth Judicial District Court, Nye County; Kenneth L. Mann, Judge.

Defendant was convicted in the district court of possessing heroin, and he appealed. The Supreme Court, GUNDERSON, J., held that where alleged accomplice's acts in connection with heroin allegedly given to him by defendant for purposes of sale were such as to render him subject to prosecution in Nevada on charge of possession and alleged accomplice was only person who incontestably possessed heroin and used it criminally, alleged accomplice was in fact an "accomplice," and permitting jury to determine alleged accomplice was feigned accomplice only and to convict on uncorroborated testimony of alleged accomplice was error.

Reversed; information dismissed and appellant discharged, without prejudice to institution of new proceedings.

THOMPSON and MOWBRAY, JJ., dissented.

[Rehearing denied January 10, 1972]

Harry E. Claiborne and *Annette R. Quintana*, of Las Vegas, for Appellant.

Robert List, Attorney General, Carson City; *William P. Beko*, District Attorney, Nye County, for Respondent.

1. CRIMINAL LAW.
Defendant's proximity at time of arrest to individual whose luggage was subsequently found to contain heroin was insufficient "corroboration" of alleged accomplice's testimony that defendant knew other individual possessed narcotics, that defendant owned the narcotics, and that defendant therefore constructively possessed them through other individual. NRS 175.291, subd. 1, 453.030.

2. CRIMINAL LAW.
Where alleged accomplice's acts in connection with heroin allegedly given to him by defendant for purposes of sale were such as to render him subject to prosecution in Nevada on charge of possession and alleged accomplice was only person who incontestably possessed heroin and used it criminally, alleged accomplice was in fact an "accomplice," and permitting jury to determine alleged accomplice was feigned accomplice only and to convict on his uncorroborated testimony was error. NRS 175.291, subds. 1, 2, 194.020, subds. 1, 3, 5, 195.020, 453.030.

OPINION

By the Court, GUNDERSON, J.:

Convicted of possessing heroin in violation of NRS 453.030, appellant Curtis Austin contends that because the State adduced no evidence to corroborate its principal witness, Jesse Martin, and because Martin's testimony unequivocally established Martin was himself an active, corrupt participant in the criminal endeavor he ascribed to appellant Austin, the evidence against appellant was therefore insufficient to sustain his conviction in view of our legislature's pronouncement that "[a] conviction shall not be had on the testimony of an accomplice unless he is corroborated." NRS 175.291(1). We are constrained to agree.

As counsel for appellant contends, the trial transcript contains nothing inculpatory of Austin except the testimony of Jesse Martin, a heroin dealer with a lengthy and varied criminal history who, when apprehended with "a whole bunch of narcotics" several months before the incident concerned herein, had undertaken to incriminate others in exchange for cash and to avoid prosecution for his own criminal activities. Without Martin's testimony the record shows only that on October 3, 1969, Austin drove from Las Vegas to Beatty, Nevada. There, at the Exchange Club, a casino-restaurant serving also as a bus station, Austin met Tanya Edwards, who had arrived by bus from Portland, Oregon, some eight hours earlier. Austin bought a glass of milk. Then, both left the casino and entered Austin's car; Miss Edwards placed her luggage on the rear seat; police officers appeared, showed a search warrant, and found heroin concealed in a slipper in Edwards' luggage.[1]

Austin thus stands convicted of possessing narcotics which

[1]We can find nothing suspicious or unusual about Austin's meeting with Edwards, evidencing Austin knew Edwards possessed a quantity of narcotics. True, Beatty is approximately 115 miles from Las Vegas; however, the highway is good, for much of the way there is no posted speed limit, and Edwards apparently is an attractive woman, commonly employed as a cocktail waitress and singer. Men often embark on more arduous journeys for less reason than this. They met in a public place; Austin showed no interest in her luggage; his actions were not hurried or furtive. Indeed, the place and time of their meeting tend

EXHIBIT D

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arrived in Nevada with Edwards, which never thereafter came into Austin's actual possession, and over which he exercised no dominion whatever on the date of the alleged offense. Therefore, it is vital to appreciate that the conviction must be justified, if at all, on the theory that, through Martin, the State proved Austin, as owner of the narcotics, constructively possessed them through Edwards, and before her through Martin himself.[2] It is vital, we say, because without recognition of this, Martin's status as an accomplice to the crime charged cannot properly be evaluated. The rationale that one participant in a criminal scheme is culpable for the others' acts is a sword that cuts both ways. And from Martin's testimony a chronology of events emerged, principally on cross-examination, that would constitute him an active criminal participant with Austin in possession of the heroin concerned.

According to Martin, about September 23, Austin proposed that Martin leave Las Vegas "to sell narcotics for him"; Martin agreed, without learning how, where or when he was supposed to go. On September 26, Martin testified, he asked Austin about the trip; then he learned Austin wanted him to leave Las Vegas to market heroin in Portland, Oregon, a city with which Martin had no familiarity. Pursuant to instructions from Austin, he "checked the bus station and got the amount of the fares from Las Vegas to Portland and the time that the

more to suggest Austin did not know Edwards carried contraband than to prove that he did. It seems strange Austin, a black man, would select a small town like Beatty for a criminal rendezvous, since there blacks are a relative rarity. There are at least three answers to any suggestion that this may be explained by inferring Austin thus sought to avoid detection. First, Austin could have met Edwards any number of places in Las Vegas without the slightest prospect of apprehension. Second, if she carried contraband belonging to him and he therefore desired not to attract attention to their meeting, it is hard to understand why he did not meet her when she first arrived in Beatty. Third, if he desired to meet her outside Las Vegas, to avoid being seen with her, he could have arranged their rendezvous more conveniently at points outside but closer to Las Vegas. Thus, the circumstances of their meeting seem to us to have no incriminating significance.

It may also be noted that even if there were independent evidence to show Austin knew Edwards was likely to possess narcotics (and there is not), it would remain most doubtful that his knowing association with a probable narcotics violater would justify any reasonable inference that Austin himself was guilty of criminal misconduct. Cf. Sibron v. New York, 392 U.S. 40, 62 (1967).

[2]Our brother Thompson seems to recognize this, for his opinion is grounded on the concept that Austin was deemed to have the same possession as any person possessing the narcotics pursuant to his direction.

bus would leave." At 6:00 p.m. that evening, Martin met Austin and Edwards; "she said yes she was ready to go"; "then Austin told me be ready at 9 o'clock." At this point, according to Martin, he "went home and called the police department." However, what he told the police at this juncture is not clear.

As Martin's story proceeded, Austin and Edwards picked him up in Austin's car; Austin stopped, went into the desert, came back and gave Martin ten balloons containing 20 heroin capsules each, a total of 200 "caps," retail value $5 each, a total of $1,000. Then Austin drove them to Beatty, where Martin last saw him "approximately 11 o'clock that night on the 26th" when Austin gave Edwards money to purchase their tickets to Portland. Upon arrival there about 10:00 p.m. September 27, they rode around in a taxi an hour or so, then took separate motel rooms. Thereupon, Martin went out to find where the "fast action" was. (As Martin said Edwards did nothing after their arrival, except to hold some of the heroin Martin transported there, Martin's story does not account for why Austin sent her along, as supposedly he did.)

Martin first said he had no money when they arrived, then said he had less than $30; he stayed eight days; still, he claimed he sold no narcotics. Instead, he said, he proceeded to search out addicts and give the narcotics away, leaving with Edwards all that he did not take with him "down on the street." (Considering expenses necessarily inherent in the venture, it is hard to see how Austin could profit from it, even had Martin sold everything supposedly entrusted to him.)

Martin explained he gave away the narcotics because Austin told him to generate business by distributing samples. He kept giving them away, he said, because no "contact" appeared to show him the ropes, as Austin supposedly had promised. Yet it was apparent Martin needed no one to show him the ropes; he is justifiably proud of his own expertise in the narcotics trade.[3] Probably because he could not explain his survival in any other way, he admitted that he accepted meals and favors from addicts he "raised," but denied accepting money. He was communicating with the Las Vegas police, he claimed,

[3]Consider the following excerpt from cross-examination of Martin: "Q. So, you just looked over the crowd and if you saw a fellow you thought was an addict you just— A. If I saw one that I knew was an addict. Q. You are deft enough that you can look at a man and tell he is an addict? A. Well, I would say I have a fair knowledge of it. Q. You have that much knowledge of the traffic you can look at a man and tell whether he is an addict or not, right? A. Well, I did that time."

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but did not tell them of his own criminal activities because he "figured it was none of their concern." His own activities, he said, were not a crime if he "didn't get caught." (Inasmuch as Martin did not tell the police what he was actually doing in Portland, and Edwards concededly did not actively participate in Martin's criminal pursuits, what truthful information he could have reported to the police is something of a mystery.)[4]

According to Martin, only four days after Edwards and Martin arrived in Portland, Austin became disgruntled because Martin was not making any money there, and directed that Edwards should return with such narcotics as were undistributed. (Martin testified that the night before Edwards left—which would have been October 1, as she had to leave Portland October 2, to arrive in Beatty October 3—he was with her when she called Austin. This testimony was at odds with that given at the preliminary hearing, when Martin testified he was present only at the time Edwards called Austin from the bus depot on arrival.) When Austin asked that Edwards return, Martin allowed her to leave with seven balloons of

[4]Martin's testimony would establish that his actions, including his own knowingly criminal endeavors, were within the scope of the plan he claims to have entered into with Austin: "Q. What were your directions by Mr. Austin to do when you went up there if you were taking that heroin up there for him, what were your directions by him to do with it? A. Just what I did with it except he told me to give out some samples and let the guys on the street know what I had, and then they would start to buy. But I never did sell any. Q. That's all the instructions you had? A. Well, except someone was suppose [sic] to contact me and show me the ropes, the ins and outs, and all, which never did happen. Q. He told you someone would contact you and show you all the ropes? A. Yes. Q. And nobody showed up? A. No. . . . Q. So, then, you went on your own to give it away? A. No, I wasn't giving it away on my own; I was giving it away because he told me to. Q. Because he told you to? A. To give out some samples, and that is what I was doing. Q. Does that seem reasonable, Mr. Martin, that he would tell you somebody would contact you up there and show you the ropes and then he would tell you to go out on your own and give it away? A. Well, I guess it seemed reasonable enough to me, I guess, because nobody contacted me. . . . Q. But you did go out and stay with addicts during the night and they bought meals and everything for you. And you, instead of charging them for the heroin, you would give it to them? A. Yes, I gave it to them. Q. Did you know at the time that you were furnishing heroin to those addicts you were violating the Oregon state law? A. Well, they didn't catch me at it. . . . Q. Well, that was my question. You didn't know it was a violation or a felony in Oregon to give it away to anybody? A. (No response.) Q. Right? A. Are you still waiting for an answer? I thought I answered you. No, I wasn't really too concerned about whether it was a violation or not. I didn't think it was a violation if I didn't get caught at it, at least."

heroin (140 "caps"). Of the balance that he retained, he says he supplied one balloon (20 "caps") to the police; he "gave away" the contents of the other balloons (40 "caps") over the course of his stay. Martin testified he was in Edwards' motel room on October 2 as she finished packing, and saw her pack the balance of the narcotics that Martin had given her. When she departed, he called the bus station, ascertained when her bus would depart Portland and arrive in Beatty, and called the police in Las Vegas to tell them where Edwards had packed the narcotics he had given her, and where to be to arrest her and Austin.[5]

The police apparently did not know that, in fact, Martin had been purveying heroin in Portland; for they obtained a search warrant upon an affidavit that assumed Martin was merely keeping Miss Edwards and the narcotics under surveillance. Martin's testimony does establish, however, that he was a heroin dealer, and had been well over a year before his alleged transaction with Austin. Some three months before events involved in Austin's conviction, Martin admitted, he was apprehended with 56 "caps" of heroin; then, to avoid prosecution, he undertook to incriminate others, and supplied or fabricated evidence on at least one other associate besides Austin and Edwards. From testimony of police officers as well as Martin it is clear that in exchange for Martin's co-operation and testimony, the police gave Martin money when he requested it, and refrained from prosecuting him.[6]

[5]Martin's testimony did not explain why Austin should become disgruntled over Martin's failure to make money, which is strange when one recalls Martin was supposedly giving away the narcotics because Austin told him to, and Austin never arranged the promised "contact" to help Martin begin to make sales. It is also interesting that while any police plan to capture Austin with narcotics in Nevada was necessarily dependent from its inception upon the narcotics being returned here, Martin's story attributed their return to Austin's spontaneous decision, and attributed that decision to Austin's self-inflicted disgruntlement with the venture. It is also curious that, although Martin said he saw where the narcotics were packed and told the police, they did not find them immediately when they conducted their search in Beatty. Only after failing to find them on the first search of Edwards' effects did they ultimately find contraband in the toe of her slipper.

[6]On this point, cross-examination of Martin proceeded:

"Q. How much did you have on you when they caught you? A. Oh, I think it was something like 56 caps, I think. Q. Of heroin? A. Yes. Q. Where did they catch you? A. F Street and Jackson. Q. Did they throw you in jail? A. Yes. Q. And then they made a deal with you, didn't they? A. Well, what do you mean when you say they made a deal? Q. Well, they made a deal with you that you would go free if you catch other people, testify against them and throw

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The courts have long recognized not only that the uncorroborated testimony of an accomplice has doubtful worth, but that his incrimination of another is not corroborated simply because he accurately describes the crime or the circumstances thereof.[7] Our legislature, as legislatures in a multitude of other states, has codified this historic view. NRS 175.291 provides:

"1. A conviction shall not be had on the testimony of an accomplice unless he is corroborated by other evidence which in itself, and without the aid of the testimony of the accomplice, tends to connect the defendant with the commission of the offense; and the corroboration shall not be sufficient if it merely shows the commission of the offense or the circumstances thereof.

"2. An accomplice is hereby defined as one who is liable to prosecution, for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given."

It is therefore apparent: first, NRS 175.291(1) requires us to consider whether Martin has been adequately corroborated, assuming he is an "accomplice"; and, second, if no "corroboration" is found, NRS 175.291(2) requires us to decide whether Martin's participation in the criminal endeavor he attributed to Austin constituted Martin an "accomplice." We will consider these issues in the order stated.

everybody else in jail to save yourself? A. They didn't say that. Q. Well, what did they do with you? Do you have a case pending? A. No, I don't have no case pending so far as I know. Q. They dropped it all on you, didn't they? A. Well, let me answer that this way: They said that they would make recommendations to the District Judge for me. Q. Well, you have never been in front of a District Judge, have you? A. Pardon? Q. You have never been in front of a District Judge, have you, on your own case? A. No, so far I haven't. Q. And they haven't go[t] a case pending against you now, have they? A. No, they don't have. Q. You got it all dropped, didn't you? A. Yes."

Martin also testified:

"Q. Now, you have sold quite a bit of heroin in your time, haven't you? A. Not too much. Q. But you have sold quite a bit, haven't you? A. Not too much. Q. Well, what do you call too much? A. What do you call quite a bit? Q. Well, how much have you sold? A. Well, I don't remember."

[7]1837, Lord Abinger, C.B., in R. v. Farler, 8 C.&P. 106: "A man who has been guilty of a crime himself will always be able to relate the facts of the case, and if the confirmation be only on the truth of that history, without identifying the person, that is really no corroboration at all."

1826, Bushe, C. J., and others, in R. v. Sheehan, Jebb 54, 57, thought "that 'ex concesso' an accomplice was concerned in the crime and knew all the facts . . ."

[Headnote 1]

1. *Could Austin's proximity to Edwards constitute "corroboration" of testimony by Martin showing that Austin knew she possessed narcotics, that Austin owned the narcotics, and that Austin therefore constructively possessed them through Edwards?*

Under statutes such as NRS 175.291 it is commonly held that "corroborative evidence is insufficient when it merely casts a grave suspicion upon the accused." People v. Shaw, 112 P.2d 241, 255 (Cal. 1941), and cases there cited; Cooper v. Territory, 91 P. 1032 (Okla. 1907). As the California Supreme Court said in People v. Shaw, supra, citing numerous authorities:

"The difficulty comes in determining what corroboration is sufficient. First, we must eliminate from the case the evidence of the accomplice, and then examine the evidence of the remaining witness or witnesses with the view to ascertain if there be inculpatory evidence, —evidence tending to connect the defendant with the offense. If there is, the accomplice is corroborated; if there is no *inculpatory* evidence, there is no corroboration, though the accomplice may be corroborated in regard to any number of facts sworn to by him." Id., at 255; emphasis in original.

This seems the approach the courts have uniformly taken to application of statutes like NRS 175.291; indeed, it seems the only approach available. How else may we implement the legislative edict that there must be corroborative evidence "which *in itself*" tends to connect the defendant with the commission of the offense *"without* the aid of the testimony of the accomplice"? How else may we honor the legislative mandate that "corroboration shall not be sufficient if it merely shows the commission of the offense or the circumstances thereof"?

Implicitly recognizing the propriety of the aforedescribed approach to application of NRS 175.291, this court held in Ex parte Hutchinson, 76 Nev. 478, 357 P.2d 589 (1960), that an accomplice was not sufficiently corroborated, even to show probable cause to hold for trial, merely by showing the defendant was with the accomplice near the scene of the crime on the night it was committed, at the time the accomplice testified they committed it in concert.[8] Similarly, as Austin's

[8]A recent case similar to *Hutchinson* and to the one before us is State v. Jones, 465 P.2d 719 (Ore.App. 1970). There, the court held testimony showing only that a burglary was committed, that the defendant had been in the store in question earlier on the same evening as the burglary, and that later that evening the defendant was still in

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proximity to Edwards is not independent *inculpatory* evidence connecting him to her possession of heroin, therefore if Martin's testimony establishes himself as an accomplice of Austin, then, as appellant's counsel contends, the evidence adduced against him was insufficient. This is the mandate of our legislature. As this court said in another case involving the same statute, "if re-examination is now to be had it should . . . be by legislative rather than judicial act." Ex parte Sullivan, 71 Nev. 90, 93, 280 P.2d 965, 966 (1955).

The State's only response to this is summarized in, and almost limited to, one sentence in its answering brief: "The law does not require corroboration of an informant." Thus, it seems fair to say that lack of "corroboration" is conceded, so that Austin's conviction may not stand if Martin was an "accomplice" within the meaning of our legislature's mandate. We pass to consideration of this second issue.

[Headnote 2]

2. *As Martin described the criminal endeavor in which he incriminated Austin, was Martin within the statutory definition of an "accomplice"; and, if so, may application of NRS 175.291 properly be avoided, as the minority opinion suggests, by saying that Martin was at the most a "feigned accomplice"?*

NRS 175.291(2) defines an "accomplice" as "one who is liable to prosecution, for the identical offense," but inasmuch as the statute does not specify that an "accomplice" must be liable to prosecution for the same offense *in Nevada*, a strong argument could be framed that Martin would be an "accomplice" if his testimony merely established that in concert with acts justifying prosecution of Austin in Nevada, Martin rendered himself liable to prosecution for possession of the same heroin in Oregon, or elsewhere. It is, however, unnecessary to decide this question, because it is clear Martin's acts were such as to render him subject to prosecution, together with Austin, on the same charge in Nevada. NRS 194.020(1)(3)(5); NRS 195.020; State v. Chapman, 6 Nev. 320 (1871); State v. Cushing, 61 Nev. 132, 120 P.2d 208 (1941).

town with accomplices and others, was not sufficient corroboration of accomplices' testimony to support defendant's conviction for the burglary. In so holding, the court quoted (id., at 720) from State v. Carroll, 444 P.2d 1006, 1007 (Ore. 1968): ". . . Before independent evidence of defendant's association with an admitted accomplice will furnish the corroboration necessary, it must appear that the defendant and the accomplice were together at a place and under circumstances not likely to have occurred unless there was a criminal concert between them."

It is equally clear that Martin was not merely a "feigned accomplice" because, unlike situations concerned in the cases cited in the minority opinion, Martin's testimony shows unequivocally that he participated criminally in the activities he described to incriminate Austin. Indeed, Martin is the only person who incontestably possessed the heroin and used it criminally. As this court said in State v. Verganadis, 50 Nev. 1, 248 P. 900 (1926), one of the cases to which our brother Thompson has referred us:

" 'Where the voluntary cooperation in the commission of a crime is admitted,' says Mr. Wharton in his work on Criminal Evidence, vol. 1 (10th ed.) sec. 440, 'the court may charge the jury that the witness is an accomplice; but where the evidence is conflicting as to the manner of cooperation, the question as to whether or not the witness is an accomplice should be submitted to the jury, under instructions as to voluntary or real cooperation in the commission of the offense charged.' " 50 Nev., at 7–8. Thus, neither the *Verganadis* case, nor others in which this court has considered the subject of feigned accomplices, are in point on the matter before us. Unlike the informant in *Verganadis*, whom this court said was not an accomplice "for the reason that there was no criminal intent on his part," Martin was not merely feigning participation. He was a criminal with criminal intent, playing both sides, for his own purposes, and not to further the ends of justice. The police obviously could not, and apparently did not, sanction Martin's criminal acts. Martin purveyed narcotics, not to aid the police, and not because compelled by the exigencies of the situation in which he found himself. About this, we believe, reasonable men cannot differ.

It is Martin's criminal intent, not his intent to betray Austin, that is decisive of his status. "An accomplice is 'one culpably implicated in, or who unlawfully co-operates, aids, abets, or insists in, the commission of the crime charged.' " 2 Wharton's Crim. Ev. § 448 (12th ed. 1955). "The test as to whether one is an accomplice is whether his participation in the offense has been criminally corrupt." Blake v. State, 24 P.2d 362 (Okla. Crim.App. 1933). In Savage v. State, 170 S.W. 730 (Tex. Crim.App. 1914), where a witness testified the defendant had offered to bribe him to leave the country, and that the witness actually left as agreed, but with intent of betraying the defendant to the police, the court said:

"It is useless for the court to assume, under the circumstances and statements as made by this witness, that there was any question or issue as to his being an accomplice. . . .

Under this witness' evidence, he went into a scheme to work up a case against these parties at the beginning in order to get them into trouble, and that, having done so, he accepted the money and railroad ticket and agreed to leave the country, and did start to El Paso, and later on did in another instance leave the country, and he testifies that appellant Savage sent him money to different points in Texas, California, and Arizona to keep him out of the country in the latter instance. There could be no question that Barkley was an accomplice, made so by his own testimony. The court should have instructed the jury positively that he was an accomplice." 170 S.W., at 733. Accord: Carr v. State, 82 S.W.2d 667 (Tex. Crim.App. 1935).

We view the instant matter in much the same light. As Martin's testimony left no doubt his participation was criminally corrupt, the court erred in permitting the jury to determine he was a feigned accomplice only, and to ignore our legislature's requirement of corroboration. Whether the jury reached their verdict on this basis, or some other, Martin's testimony alone was insufficient to support it.

We perceive no other way to view the matter. If the distinction between an actual accomplice and a "feigned accomplice" does not depend on whether the informer participates with criminal intent, or merely feigns it, then on what does the distinction depend? What are we talking about "feigning," if not the criminal intent? The distinction surely cannot depend upon whether the informer harbored, at the time of his own criminal acts, intent to betray supposed confederates to the police if it should seem expedient to do so. Nor can it turn on whether, before performing his own criminal acts, the informer took the precaution to tell the authorities of his intent to betray his confederates. We believe we are concerned with whether Martin's criminality was feigned, not with whether his loyalty was.

By NRS 175.291, our legislature has declared that one who has participated criminally in a given criminal venture shall be deemed to have such character, and such motives, that his testimony alone shall not rise to the dignity of proof beyond a reasonable doubt. To this legislative policy we must give meaningful effect.[9]

Accordingly, appellant's conviction must be and hereby is

[9]The minority opinion suggests "the fault" in our reasoning is that we deny the jury's right to find an informer is a "feigned accomplice" although his own testimony unequivocally establishes him as a real accomplice. This "fault" is in accord with our precedents. Cf. State v.

reversed. It is clear that, upon the present record, by virtue of NRS 175.291, there is insufficient evidence to hold appellant to answer for the crime with which he stands charged. Ex parte Hutchinson, 76 Nev. 478, 357 P.2d 589 (1960). Thus, the charge against appellant is hereby dismissed, and he is hereby discharged from custody.[10] However, as we wish to afford the State an opportunity to prosecute appellant, in the event evidence to corroborate Martin is available, dismissal of the charge against appellant shall be without prejudice to institution of other criminal proceedings against him.

While other assignments of error have been raised, it is unnecessary to decide them.

ZENOFF, C. J., and BATJER, J., concur.

THOMPSON, J., with whom MOWBRAY, J., agrees, dissenting:

1. Our Constitution limits the appellate jurisdiction of this court in criminal cases to questions of law alone. Nev. Const. art 6, § 4; State v. Millain, 3 Nev. 409 (1867); State v. Fitch, 65 Nev. 668, 680, 200 P.2d 991 (1948); State v. Butner, 66 Nev. 127, 131, 206 P.2d 253 (1949). This command is to be obeyed, and denies our right to intrude upon the function of the jury to weigh, evaluate and credit the testimony of a witness or witnesses. The fault of the majority opinion lies in its acceptance of the whole of the testimony of the witness Martin as being true, and upon that premise concluding that he was a real as distinguished from a feigned accomplice. The jury was not compelled to credit all of the testimony given by Martin. It was entirely free to accept a portion of

Pray, 64 Nev. 179, 179 P.2d 449 (1947), deciding that a witness's testimony showed her to be an accomplice as a matter of law and, since her testimony was not sufficiently corroborated, reversing a verdict against the defendant without allowing the State an opportunity to re-try him. Cf. In re Oxley and Mulvaney, 38 Nev. 379, 149 P. 992 (1915), as well as Ex parte Hutchinson and Ex parte Sullivan, supra, in which this court would not even allow a trial upon the uncorroborated evidence of witnesses whose testimony established them as accomplices.

[10]Tanya Edwards, who arrived in Beatty with the heroin, was convicted of the offense concerned and has not appealed. She did not take the witness stand, either to defend herself or to accuse Austin. Austin testified at length, denying complicity with her and Martin. While the minority opinion suggests that lack of the corroboration required by NRS 175.291 is somehow rendered less important by the fact that Austin denied complicity with Martin, we cannot see how uncorroborated testimony becomes more trustworthy because it is contradicted, nor where there is any latitude in the statute for a distinction of such character.

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his story and disbelieve the rest. People v. Davis, 309 P.2d 1 (Cal. 1957); People v. Matlock, 336 P.2d 505 (Cal. 1959); People v. Bodkin, 16 Cal.Rptr. 506 (Cal.App. 1961). And, although the State may have been bound by the evidence given by Martin, the jury, as the trier of the facts, was not. State v. Fuchs, 78 Nev. 63, 368 P.2d 869 (1962). Accordingly, it was permissible for the jury to reject that portion of Martin's testimony inculpating him with Austin, and to accept, as true, other testimony offered by him. Martin's implication of Austin was, by Austin, denied. The evidence was in direct conflict as to Austin's involvement. It was the jury's task to resolve that conflict under proper instructions from the court.

2. Of course it is true that the testimony of a real accomplice must be corroborated in order to justify a conviction. NRS 175.291. It is equally true, however, that the testimony of one who is a feigned accomplice need not be corroborated, and if believed in relevant part, will support a conviction. State v. Verganadis, 50 Nev. 1, 7, 248 P. 900 (1926); State v. Smith, 33 Nev. 438, 447, 117 P. 19 (1910); see also Ex parte Colton, 72 Nev. 83, 87, 295 P.2d 383 (1956); Tellis v. State, 84 Nev. 587, 445 P.2d 938 (1968). Whether the witness is a real or a feigned accomplice is a jury question to be resolved under appropriate instructions, State v. Verganadis, supra, and the finding of the jury is conclusive, Smith v. State, supra. This is particularly true when the evidence is in conflict. Appropriate instructions were given in this case.

3. Martin testified that he had alerted the police that Austin and Tanya Edwards were to meet in Beatty, Nevada, on a certain day and that Tanya would have the narcotics in her possession. Moreover, his testimony, if believed, established that the narcotics originally belonged to Austin and were being redelivered to him by Tanya. Austin did meet Tanya in Beatty on that day and she did have the narcotics in her possession. In short, the events which transpired gave credit to that aspect of Martin's testimony and, as to that aspect, it was permissible for the jury to believe that Martin was a feigned accomplice who voluntarily cooperated with law enforcement to aid justice by detecting a crime.

4. Austin contends that the State failed to prove his possession of the narcotics. He had driven to Beatty to meet Tanya who had the narcotics in her handbag. As they started to drive away in Austin's automobile the police intervened, exhibited a search warrant, searched the car and the handbag, found the narcotics, and placed Austin and Tanya under arrest. Austin was never observed physically to have taken the handbag into personal custody. However, if the narcotics were Austin's, as Martin testified, Austin would be deemed to have the same possession as any person possessing the narcotics pursuant to his direction, since he retained the right to exercise dominion and control. People v. White, 325 P.2d 985 (Cal. 1958).

5. The jury's verdict in this case should be sustained. We have no business setting aside factual determinations. The majority opinion paints the witness Martin as a rascal and then accepts his testimony as entirely true in order to rule as a matter of law, that he was a real accomplice as to all phases of the transaction whether in Oregon or Nevada. The jury was not obliged to so treat his testimony. It could sift, evaluate, accept some of it and reject the balance. The jury apparently accepted Martin's advice to the police that a crime would occur in Beatty because it did happen precisely as he said it would. I find no legal error in that decision.

ANTHONY FOX, Appellant, *v.* THE STATE OF NEVADA, Respondent.

No. 6434

December 8, 1971 491 P.2d 721

Appeal from judgment of Eighth Judicial District Court, Clark County; Clarence Sundean, Judge.

Defendant was convicted in the district court of selling narcotics, and he appealed. The Supreme Court, Batjer, J., held that where witness' affirmative answer to prosecution question as to whether witness had ever made a purchase of heroin before from defendant was admitted for limited purpose of showing defendant's knowledge of narcotic nature of substance sold, such testimony was properly received by trial court which instructed jury as to limited purpose of testimony.

Affirmed.

Robert G. Legakes, Public Defender, and *Jerrold J. Courtney,* Deputy Public Defender, Clark County, for Appellant.

Robert List, Attorney General, and *Roy A. Woofter,* District Attorney, Clark County, for Respondent.

STATE v. SEYMOUR

No. 3133

May 7, 1936. 57 P.(2d) 390.

1. INCEST.
Testimony of prosecutrix, an accomplice, *held* sufficiently corroborated to sustain conviction for incest (Comp. Laws, sec. 10978).

2. CRIMINAL LAW.
Evidence that accused committed act of incest in county of prosecution *held* sufficient to sustain conviction therefor.

3. INCEST.
Accomplice is sufficiently corroborated to sustain conviction for incest, where circumstances in evidence from sources other than accomplice's testimony tend on the whole to connect accused with crime charged (Comp. Laws, sec. 10978).

4. CRIMINAL LAW.
Weight of evidence was for jury.

5. CRIMINAL LAW.
In incest prosecution, prosecutrix' testimony as to acts of sexual intercourse with accused before and after date of act charged *held* admissible as tending to show relation and incestuous disposition of accused and prosecutrix.

APPEAL from Second Judicial District Court, Washoe County; *Thomas F. Moran*, Judge.

Arthur B. Seymour was convicted of incest, and he appeals. Affirmed.

John W. Burrows, for Appellant:

The verdict of the jury in the above-entitled case was contrary to the law as defined in the instructions given the jury by the court; and the verdict of the jury so rendered was contrary to the evidence presented in the case, and said evidence was insufficient to sustain such verdict. There was nothing to prove that the adultry was not committed in California, and if so, the courts of Nevada had no jurisdiction in the case. Ruth Seymour was a self-confessed accomplice, and it is the law of this state that no person can be convicted on the uncorroborated testimony of such an accomplice. There

was no one else who says that there was an act of intercourse committed in Nevada. Gertrude Seymour testified that she knew of the trip to Sacramento, California; Ruth Seymour testified that they went to Sacramento; Arthur Seymour, who did not deny the paternity, said: "We committed adultery in Sacramento"; Frank Seymour, who was in the car at the time, was not put on the stand; 266 days from September 9, 1934, the time they were at Sacramento, to June 1, 1935, is a normal time for the birth of a full-term baby; Gertrude Seymour said that the baby was a strong, normal baby. There was no corroboration of Ruth Seymour's testimony that the conception of the baby was not the happening of the events at Sacramento, California.

It is not sufficient corroboration merely to show generally that the defendant was an associate of the accomplice. Peo. v. Koening, 99 Cal. 574, 34 P. 238; Peo. v Larsen, 4 Cal. Unrep. Cas. 286, 34 P. 514; Peo. v. Butler, 71 N. Y. S. 129; Smith v. State (Tex. App.), 38 S. W. 200; State v. Lay, 38 Utah 143, 110 P. 286; Peo. v. Morton, 139 Cal. 139, 73 P. 609.

Gray Mashburn, Attorney-General; *W. T. Mathews* and *W. Howard Gray*, Deputy Attorneys-General; and *Ernest S. Brown*, District Attorney, for the State:

Where one act of incestuous intercourse is elected for prosecution, testimony of either prior or subsequent acts is admissible as evidence of an incestuous disposition, and as corroboration of the testimony as to the one act. People v. Koller (Cal.), 76 P. 500.

The corroboration necessary and required by section 10978 N. C. L. is simply sufficient corroboration which tends to connect the defendant with the crime. State v. Streeter, 20 Nev. 403, 22 P. 758; 31 C. J. 388. Ruth Seymour, the prosecutrix, testified definitely to the place and time and to the crime charged in the information. Her mother testified that the defendant himself had confessed that the girl's pregnancy was due to his fault. The mother further testified that she had noticed

the affectionate attitude on the part of the defendant toward her daughter from the period commencing with June 1934 until February 1935. Furthermore, the defendant himself admitted on examination that he had had sexual intercourse at least on one occasion with Ruth Seymour, and that he constantly kept company with her from June 1934 until February 1935, and that he had seen her nearly every day; that he had spent a night in a hotel in Reno, Washoe County, Nevada, with her; that he had engaged in "petting parties" frequently with her; had addressed her affectionately. He testified positively that he loved the girl, that he wanted to marry her, that he intended to marry her when he had secured his divorce from his wife. We believe, from the opinion in the case of State v. Streeter, supra, that under this evidence it was entirely for the jury to decide as to its weight.

OPINION

By the Court, DUCKER, C. J.:

The defendant, Arthur B. Seymour, was convicted of the crime of incest. He has appealed from the judgment and the order denying his motion for a new trial.

It is alleged in the information that the offense was committed in the county of Washoe, State of Nevada, on or about October 1, 1934. The mother of the female with whom the defendant is alleged to have committed the crime instituted the prosecution, but for convenience we will refer to the daughter as the prosecutrix.

1-3. Defendant insists that the evidence in insufficient to justify the verdict, and that the verdict is contrary to the evidence, in this, that the evidence fails to show that he committed an offense of incest in Washoe County, Nevada. He contends also that there is not sufficient corroboration of the testimony of the prosecutrix, an accomplice. The following facts were

presented in evidence: Defendant and prosecutrix are related as first cousins. The latter was eighteen years of age on the former's trial in July 1935. She had lived with her parents in said city of Sparks all of her life and was never married. Defendant has also lived in that city for a number of years. His parents separated when he was quite young and thereafter he lived at different times with his mother, father, and grandmother. He lived for a while at the home of the prosecutrix. Defendant was married in April 1928. He and his wife separated in April 1934, and she left Sparks and went to Oakland, Calif., taking their young daughter with her. The separation was caused by defendant's attentions to the prosecutrix. The latter testified that between June 1, 1934, and February 15, 1935, she saw defendant quite often in the city of Sparks, county of Washoe, State of Nevada. He came to her home frequently and they were much together within that period. She testified that she had sexual intercourse with him during that time about twice a week, all of which occurred in said city of Sparks. They had such intercourse on one occasion on or about October 1, 1934, in that city at a place where defendant was living, known as the Deer Park Grocery Store. She continued having these relations with him in Sparks until about February 15, 1935, when her mother, who became aware of her pregnancy, took her to a hospital in Oakland, Calif., where she gave birth to a child on June 1, 1935. Defendant is the father of that child.

The testimony of the prosecutrix summarized above, together with other evidence, reveals enough of the legal evidence adduced to support the verdict and judgment.

The mother of the prosecutrix was a witness for the state. She testified that she had been residing with her husband in the city of Sparks for a number of years. She testified that prosecutrix was their daughter, and defendant's father was a brother of her husband. The witness had known defendant for a long time and knew

that he was a married man during the year 1934. He became unduly attentive to her daughter and this was more apparent after witness returned from Lake Tahoe to her home in Sparks on September 14, 1934. She testified that he was in her company frequently; "addressed her as sweetie, and all those affectionate words that lovers use." This unusual conduct between cousins caused the witness to admonish defendant to cease visiting her daughter. He resented her interference and did not discontinue his attentions. She saw defendant in company with her daughter quite often after that. Whenever the daughter went to school, he would accompany her. In February 1935, witness went to the school and found them near there is an automobile. At this time they admitted to her that prosecutrix was pregnant, and defendant confessed to her that he was the cause of it. He said he would marry prosecutrix after he got a divorce. The witness then took her daughter to a hospital in Oakland, Calif., where she gave birth to a child on June 1, 1935, as also testified to by the daughter.

But evidence of defendant's intimacy with the prosecutrix on or about the date alleged in the information is also supplied by the defendant himself. He was a witness in his own behalf. In his testimony he admitted that he was the father of the child, and his knowledge of his relation with prosecutrix as her cousin. After he took his wife to San Francisco on April 27, 1934, he commenced keeping company with prosecutrix. He commenced to love her in 1931 and loved her ever afterwards.

He admitted having sexual intercourse with her in Sacramento, Calif., in September 1934. Later in that year he took her to a hotel in Reno where he engaged a room and signed the hotel register as husband and wife. They remained in that room all night and he sought to relieve her of pregnancy by having her drink a quantity of gin.

The testimony of the mother and defendant does not

disclose any one circumstance tending directly to corroborate the testimony of the prosecutrix, it is true, but this is unnecessary. If circumstances in evidence from sources other than the testimony of the accomplice tend on the whole to connect the accused with the crime charged, it is enough. State v. Streeter, 20 Nev. 403, 22 P. 758; 31 C. J. 388, and cases cited in note 55 supporting the text. The testimony of the mother and the defendant shows a conjunction of opportunity and intimacy extending over a period of time, both before and after the act charged. This led, as appears by his admission, to an act of sexual intercourse shortly prior to the time specified in the information. Not long after that time, as likewise appears from his admission, followed the clandestine association as husband and wife in the room of the hotel in Reno. These circumstances are of sufficient probative force to satisfy the statute as to the corroboration of an accomplice. Collectively, they tend to connect the defendant with the commission of the offense. Section 10978 N. C. L.

4. The weight of the evidence was for the jury. The prosecutrix was also corroborated by the testimony of the mother and defendant as to the other sexual acts.

5. It was objected by the defendant that the testimony of prosecutrix as to such other acts with defendant was inadmissible. We are not of that opinion. Those acts occurring, as she testified, about twice a week, commencing around the 1st of June 1934, and continuing until February of the following year, tended to show the relation and incestuous disposition of the parties, which had a probative bearing upon the probability of the crime having been committed as charged. Prior acts of sexual intercourse are admissible in this class of cases, according to the great weight of authority. People v. Stratton, 141 Cal. 604, 75 P. 166; Lipham v. State, 125 Ga. 52, 53 S. E. 817, 114 Am. St. Rep. 181, 5 Ann. Cas. 66; State v. Pruitt, 202 Mo. 49, 100 S. W. 431, 10 Ann. Cas. 654; Thayer v. Thayer, 101 Mass. 111, 100 Am. Dec. 110; State v. Wallen, 123

Points decided

Minn. 128, 143 N. W. 119; People v. Skutt, 96 Mich. 449, 56 N. W. 11; 16 C. J. p. 602; 14 R. C. L. p. 38; Wigmore on Evidence (2d ed.) sec. 398. Subsequent acts are within the rule. Thayer v. Thayer, supra; Lawson v. State, 20 Ala. 65, 56 Am. Dec. 182; State v. Witham, 72 Me. 531; Burnett v. State, 32 Tex. Cr. R. 86, 22 S. W. 47; State v. Bridgman, 49 Vt. 202, 24 Am. Rep. 124; State v. Reineke, 89 Ohio St. 390, 106 N. E. 52, L. R. A. 1915A, 138; People v. Koller, 142 Cal. 621, 76 P. 500; Wigmore on Evidence, sec. 398; Bishop on Statutory Crimes, sec. 682. Especially are such acts admissible when, as here, they are connected with anterior acts, thus showing a continuousness of illicit relations.

We have considered all other claims of error made by defendant and find them to be without merit.

The judgment and order denying the motion for a new trial should be affirmed.

It is so ordered.

LYON COUNTY BANK ET AL. *v.* LYON COUNTY BANK ET AL.

No. 3135

June 16, 1936. 58 P. (2d) 803.

1. PARTIES.

Statutory ground of demurrer that plaintiff has not legal capacity to sue *held* to refer to persons who cannot sue except by guardians, next friends, committees, or, in case of married women, by joining their husbands in certain cases (Comp. Laws, sec. 8596).

2. ACTION.

In action by bank as trustee of railroad to recover trust fund in bank at time bank was taken over by bank examiner, complaint *held* not demurrable on ground that plaintiff was without legal capacity to sue, in that same person could not control both prosecution and defense of action (Comp. Laws, secs. 747 et seq., 8596).

Complaint alleged that suit was brought for benefit of bondholders of railroad of which bank was

Points decided.

The general design of the statute is, as counsel claims, to confer the right of selecting their own school officers upon the people of each school-district. But even if no good reason could be assigned why this design is not more fully carried out, so that each district would have an election entirely separate from any portion of any other district, it would not be the duty of the court to assume legislative power, and extend the clearly expressed provisions of the statute to embrace such cases. A consideration of the statute however leads to the conclusion that the legislature intended what the statute expresses. It must be supposed that the legislature understood that the boundary lines of election precincts and school-districts do not necessarily coincide. And in order to meet this condition the law provides that, where two or more school-districts are within the same election precinct, separate elections may be held. From this we assume that the legislature, having in view the general purpose of the statute, considered it inexpedient to inflexibly enforce it, and that the purpose of the statute would be sufficiently accomplished by holding separate elections in the class of cases provided for, when the necessity is more apparent than in cases where there is simply an overlapping of election precinct and school-district lines.

It is ordered that the application for the writ of *quo warranto* be denied.

[No. 1308.]

THE STATE OF NEVADA, RESPONDENT, v. S. M. STREETER, APPELLANT.

CRIMINAL LAW—CORROBORATION OF ACCOMPLICE—EVIDENCE.—The evidence to corroborate the testimony of an accomplice, as required by section 365 of the criminal practice act (Gen. Stat. 4245) is sufficient if it tends to connect the defendant with the commission of the offense.

IDEM—INCEST.—The testimony in this case reviewed: *Held*, sufficient to corroborate the testimony of the prosecuting witness in a case of incest. (See opinion.)

IDEM—REASONABLE DOUBT.—The instructions in this case upon the subject of reasonable doubt were identical with those given in *State* v. *Potts*, *ante*, and same ruling applied.

Argument for Appellant.

IDEM—WEIGHT TO BE GIVEN TO DEFENDANT'S TESTIMONY—INSTRUCTIONS.—The court did not err in instructing the jury that in considering the weight and effect to be given to the defendant's evidence the jury should, in addition to noticing his manner and the probability of his statements taken in connection with the evidence in the case, "consider his relation and situation under which he gives his testimony, the consequences to him relating from the result of this trial, and all the inducements and temptations which would ordinarily influence a person in his situation; you should carefully determine the amount of credibility to which the evidence is entitled; if convincing and carrying with it a belief in its truth, act upon it, if not you have a right to reject it."

OBJECTIONS TO QUESTIONS—WHEN IMMATERIAL.—Objections to questions asked a witness, and ruled out by the court, become immaterial, and will not be considered in the appellate court, where it affirmatively appears that the witness was afterwards allowed to answer questions of the same import.

APPEAL from the District Court of the State of Nevada, Elko County.

R. R. BIGELOW, District Judge.

The facts sufficiently appear in the opinion and head notes.

J. W. Dorsey, and *J. A. Plummer*, for Appellant.

I. The testimony in this case introduced as corroborative of the testimony of the prosecuting witness, is wholly insufficient to connect the defendant with the commission of the offense. (Testimony reviewed,)

The necessity of corroboration, and the character and extent of such corroboratory evidence, is the subject of statutory law in this state. (Gen. Stat. 4245.) The law goes to the full extent of requiring the corroboratory evidence of itself, and without reference to the testimony of the accomplice, to connect the defendant with the commission of the offense—the very thing for doing which the prisoner stands indicted. Corroboration as to time, place, and circumstances of the transaction is insufficient. (*Childers* v. *State*, 52 Ga. 106; *Hammack* v. *State*, 52 Ga. 397; *Middleton* v. *State*, 52 Ga. 527.)

II. The statute applies not only to accomplices, in a technical sense, but to all witnesses who were *particeps criminis*, whether as principals or accessories. The term accomplice is not used in the restricted or technical sense. (*Ervin* v. *State*, 1 Tex. App. 301; *Kelly* v. *State*, 1 Tex. App. 629; *Roach* v. *State*,

4 Tex. App. 46; *Hamilton* v. *State*, 9 S. W. Rep. 688; *Davis* v. *State*, 2 Tex. App. 588; *Boyd* v. *State*, 24 Tex. App. 570.)

III. The court erred in giving the instruction in relation to the weight and effect to be given the evidence of the defendant. (*Hartford* v. *State*, 96 Ind. 461; *Pratt* v. *State*, 56 Ind. 179; *Greer* v. *State*, 53 Ind. 420; *Unruh* v. *State*, 105 Ind. 123; *Bird* v. *State*, 107 Ind. 154.) The imperative instruction of the court was a direct invasion of the province of the jury.

IV. The court erred in sustaining objections to the following questions, asked upon the cross examination of Ida Gardner: (1) "Did your husband write to you and tell you that he wanted you to stand in and help to cinch the old man—referring to Mr. Streeter, your father?" (2) "You are now testifying on this stand, and you have appeared as a witness, haven't you, because, and only because, you have been told to do it by your husband?" (*State* v. *Cooper*, 83 Mo. 698; 1 Whar. Ev. Sec's 408, 544, 547, 549, 561; 1 Green Ev. 450; *State* v. *Reeves*, 10 S. W. R. 846.)

John F. Alexander, Attorney-General, for Respondent.

I. The cases cited by appellant have no application to this case.

II. The preponderance of authority in this country is that a jury may convict a prisoner on the testimony of an accomplice alone, though the court may, at its discretion, advise them to acquit, unless such testimony is corroborated on material points. (1 Whar. Crim. Law, 783; *People* v. *Gibson*, 53 Cal. 601; *Johnson* v. *State*, 65 Ind. 269; *Ulmer* v. *State*, 14 Ind. 52; *State* v. *Ward*, 51 Iowa, 587; *People* v. *Rolfe*, 61 Cal. 541; *People* v. *Cochran*, 61 Cal. 549; *State* v. *Chapman*, 6 Nev. 320; *State* v. *Lambert*, 9 Nev. 321; *Hamilton* v. *People*, 29 Mich. 178; *Lindsay* v. *People*, 63 N. Y. 143.)

By the Court, MURPHY, J.:

The appellant was convicted of incest. It is claimed that the evidence is insufficient to support the verdict of the jury, in this: that the testimony of the prosecuting witness is uncorroborated, and that, therefore, a conviction was improperly had, relying upon the statutory provision. Section 4245, Gen. Stat. Nev. reads: "A conviction cannot be had upon the testimony of an accomplice, unless he be corroborated by such other evidence

as shall tend to connect the defendant with the commission of the offense; and the corroboration shall not be sufficient if it merely shows the commission of the offense, or the circumstances thereof."

Upon an examination of the transcript, it appears therefrom that there was some evidence tending to corroborate the accomplice. Defendant was in the habit of taking the prosecuting witness with him to the River ranch, and there remaining over night, and on one occasion they occupied the same bed, in the presence of the witnesses, Neely and Dakin. He admits these facts. He also admits the fact that his attention was called to the condition of his daughter, and that he took her to San Francisco and placed her in St. Mary's hospital, where she gave birth to a child, after which he sent her to Iowa by the southern route. She was brought from Iowa by the sheriff of Elko county. While she was at the hospital awaiting confinement, she wrote to her sister, in this state, charging that their father was the one who had committed the crime. Publicity appears to have been given to the accusation, and, several months before the finding of the indictment, persons acting in behalf of the defendant persuaded her to make an affidavit, fully denying the charge, and also to copy and sign a letter to the same effect, drawn in the interest of defendant, and addressed to this same sister who was present at the time of writing and signing the letter. It may be said of this circumstance, as well as each of the others, that it does not of itself necessarily tend to establish guilt, and it is true that an innocent father might have done any of these things; but taken as a whole, these circumstances form a combination tending to connect defendant with the commission of the offense. The court instructed the jury that a conviction could not be had upon the testimony of an accomplice alone, without corroboration. All that the statute requires is that the circumstances should be such as to convince the jury; such as to induce them to believe that the accomplice had sworn truly and that the charge was true. If the jury are satisfied with the weight of the corroborating circumstances, it is enough. The jury may disregard the testimony of an accomplice, or of any other witness who admits that he has previously made other and different statements, or has sworn to a different state of facts from that which he testifies to on the witness stand, yet they are not

bound to do so. They may give to the testimony of the witnesses such credit as, in view of all the circumstances, including any corroborating testimony that may have been introduced, they may deem it entitled to.

Mr. Justice Whitman, in the case of *State* v. *Chapman*, 6 Nev. 325, said: "How much the weight of this evidence may be is not for this court to decide. It is evidence tending to a statutory corroboration, considered by the jury sufficient." In the case of *People* v. *Cloonan*, 50 Cal. 450, the court said: "It is sufficient, if it tends to connect the defendant with the commission of the offense." To the same effect are the cases of *People* v. *Townsley*, 39 Cal. 405; *People* v. *Clough*, 73 Cal. 351; 15 Pac. Rep. 5. In the case of *State* v. *Miller*, 65 Iowa, 63, 21 N. W. Rep. the court said: "But it is for the jury to weigh and determine the effect of such evidence and its sufficiency; and each cause must be determined upon its own facts, because, in the nature of things, the corroboration cannot be the same in any two cases." In New York, where they have a statute similar to ours, all that is required is some other evidence fairly tending to connect the defendant with the commission of the crime charged, so that the conviction will not rest entirely upon the evidence of the accomplice. The question as to whether the evidence is sufficient corroboration is for the determination of the jury. (*People* v. *Ogle*, 104 N. Y. 513; 11 N. E. Rep. 53; *People* v. *Everhardt*, 104 N. Y. 594; 11 N. E. Rep. 62; *People* v. *Elliott*, 106 N. Y. 292; 12 N. E. Rep. 602.) In the case of *Roberts* v. *State*, 55 Ga. 221, the court said: "If they, (meaning the jury), found he was an accomplice, still there is, in our judgment, sufficient evidence to corroborate the witness. He (the defendant) had access to the store of Jack, delivered coke. * * * At all events, the two questions, whether he was an accomplice, and, if so, whether he was supported by other evidence, were fairly submitted to the jury; and if they found, either that he was not an accomplice, or that he was supported, if an accomplice, the verdict is sustained. * * * They might have found the latter, for there are circumstances, though slight, tending to corroborate Fain's evidence." The case of *Hammack* v. *State*, 52 Ga. 402, cited by appellant, sustains the views herein expressed. In *Childers* v. *State*, Id. 106, and the case of *Middleton* v. *State*, Id. 527, there was neither testimony nor circumstances

to connect the parties with the commission of the offenses but the contrary. In the Childers case the mother testified that he was at home and in bed at the very time that the robbery was said to have been committed. None of the other defendants attempted to implicate Childers, except Lee. In the Middleton case there was not a circumstance to connect him with the murder, except the statement of Thurman, uncorroborated. In the case of *Bell* v. *State*, 73 Ga. 572, the court said: "While a conviction cannot be had upon the uncorroborated evidence of an accomplice, * * * yet it is impracticable to lay down any rule as to the precise amount of evidence which is requisite to sustain the accomplice's account, * * * further than that there must be other evidence sufficient to satisfy the jury of the fact."

The statements of an accomplice should be received with great caution, and the court, as the court did in this case, should always so advise; yet if the testimony of the accomplice obtains full credit with the jury, and they are fully convinced of its truth, any fact or circumstance which tends to corroborate is admissible, and complies with the statute. The case under consideration is much stronger than several of the above-mentioned cases in which convictions were had. The uncontradicted testimony shows that there was but one bed at the River ranch during the time that this cohabitation is alleged to have taken place; that one night, at least, father and daughter occupied the same bed. The night in question Neely and Dukin came to the ranch. Asked permission to remain over night. The defendant spoke to the daughter and said, "Well, Maud, I guess we can spare them the buffalo robes;" and Maud answered, "Yes." The bed for the travelers was made on the floor of the cabin, and consisted of a horse blanket, buffalo robe, and an overcoat. There was no other bedding in the house except that on the bed occupied by the defendant and his daughter, and it is fair to presume, from the above facts, (and the jury must have come to that conclusion,) that the defendant and his daughter intended to occupy the same bed at the river ranch that night; therefore they were not provided with any extra bedclothes. Ida Gardner testified that during the months of December, 1887, and January, 1888, her father kept stock at the River ranch. He would go there two or three times a week to feed them. That either Maud or her-

self would accompany him. That there was but one bed in the cabin at the River ranch, and he never used to take any extra bedclothes.

Appellant assigns as error the giving of the instructions defining "reasonable doubt," claiming that they are conflicting. We had occasion to pass upon the same question in the case of *State* v. *Potts*, *ante*, 389, decided at this term. We there held that the instruction complained of, when read in connection with the statutory definition of "reasonable doubt," was not a reversible error. The same rule will apply in this case.

The court did not err in giving the instruction as to the weight and effect to be given to the defendant's evidence. This instruction was given and approved of in the case of *People* v. *Cronin*, 34 Cal. 195, and has been approved of in the following cases: *State* v. *Hymer*, 15 Nev. 54; *People* v. *Morrow*, 60 Cal. 147; *People* v. *Wheeler*, 65 Cal. 78; 2 Pac. Rep. 892; *People* v. *O'Neal*, 67 Cal, 379; 7 Pac. Rep. 790; *People* v. *Knapp*, 71 Cal. 10; 11 Pac. Rep. 793; *State* v. *Sterrett*, 71 Iowa, 388; 32 N. W. Rep. 387; *Bressler* v. *People*, 117 Ill. 439; 8 N. E. Rep. 62; and in a number of other states. The instruction does not invade the province of the jury. It leaves it to them to determine what credit should be given to the defendant's testimony, after considering all the facts in the case. The rulings of the court sustaining objections to certain questions propounded to the witness Ida Gardner for the purpose of showing her *animus* towards the defendant are also assigned as error. The rulings, however, are immaterial and unnecessary to be considered, for the reason that the witness was afterwards allowed to answer questions of the same import, and by her answers fully established her sympathy with the prosecution. The evidence in this case justifies the verdict. The corroborating circumstances are sufficient to convince the minds of a jury of the guilt of the defendant. Judgment affirmed.