The Emergence of a Criminal Defendant's Right to Testify at Trial in Minnesota

BY

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A. THE COMMON LAW PROHIBITION

Under the common law, a party to a suit was disqualified from testifying at trial. The rule was based on the belief that the testimony of an "interested" witness would be self-serving and false. Over time, the rule was abandoned in civil matters.[1] In Minnesota, parties in civil litigation were never barred from testifying, although the legislature has restricted testimony in certain cases. [2] Congress lifted the ban in civil cases in federal courts in 1864.[3]

Because a criminal defendant was interested in the outcome of his trial, he was not competent under the common law to testify in his own behalf —that is, he could not call himself to testify as a witness. When two or more

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[1] For brief histories of the relaxation of the common law rule barring testimony by parties, see *Ferguson v. Georgia*, 365 U. S. 570, 573-86 (1961), and George Fisher, "The Jury's Rise as Lie Detector," 107 *Yale L. J.* 575, 659-662 (1998). See also Kenneth S. Abraham's provocative article, "The Common Law Prohibition on Party Testimony and the Development of Tort Liability," 95 *Va. L. Rev.* 489 (2009).

[2] E.g., Stat., Ch. 36, §1, at 147-8 (1861):

> [W]here one of the original parties to the contract or cause of action in issue and on trial, is dead, or is shown to the court to be insane, the other party shall not be admitted to testify in his own favor, and where an executor or administrator is a party, the other party shall not be admitted to testify in his own favor, except as to such acts and contracts as have been done or made since the probate of the will or the appointment of the administrator.

[3] This law, which was buried in an appropriations bill, provided:

> Sec. 3. *And be it further enacted*, That the sum of one hundred thousand dollars is hereby appropriated, out of any moneys in the treasury not otherwise appropriated, for the purpose of meeting any expenses in detecting and bringing to trial and punishment persons engaged in counterfeiting treasury notes, bonds, or other securities of the United States, as well as the coin of the United States: *Provided*, That in the courts of the United States there shall be no exclusion of any witness on account of color, nor in civil actions because he is a party to, or interested in, the issue tried.

Act of July 2, 1864, Ch. 210, §3, at 351; 13 Stat. 344, at 351 (emphasis added). The following year, it was amended to exclude testimony by parties in actions by or against executors, administrators or guardians, "unless called to testify ... by the opposite party, or required to testify by the court." Act of March 3, 1865, Ch 113, at 533; 13 Stat. 533. The political background of this law is described in footnote 16 below.

defendants were tried for the same crime, each was disqualified from testifying for the other, but if a person was an accomplice or ceased to be a party, he could testify for or against the defendants.[4] Thus, during the Dakota War trials, several Indians, who already had been convicted and sentenced, were deemed competent to testify under oath against other Dakota in subsequent trials.

In 1864, Maine became the first state to permit the accused to testify in a criminal trial.[5] Other states soon followed, including Minnesota. Congress passed legislation in 1878 permitting criminal defendants to testify in federal courts and courts martial,[6] and England finally acted in 1898.[7]

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[4] Simon Greenleaf, I *A Treatise on the Law of Evidence* §363, at 511 (10th ed.1860) ("In regard to *defendants* in *criminal* cases, if the State would call one of them, as a witness against others in the same indictment, this can be done only by discharging him from the record; as, by the entry of a *nolle prosequi*; an order for his dismissal and discharge, where he has pleaded in abatement as to his own person, and the plea is not answered; or, by a verdict of acquittal, where no evidence, or not sufficient evidence, has been adduced against him.")(emphasis in original; citations omitted).

Under Minnesota law in the 1860s, testimony by an accomplice was not prohibited but to secure a conviction, corroborating evidence was required. The 1866 statute provided:

> A conviction can not be had upon the testimony of an accomplice unless he is corroborated by such other evidence as tends to convict the defendant of the commission of the offense, or the circumstances thereof.

Stat., Ch. 73, §94, at 531 (1866). This wording is a modification of the law passed by the territorial legislature in 1851, which ended with the clause, "and the corroboration is not sufficient, if it merely show the commission of the offense, or the circumstances thereof." Terr. Rev. Stat. Ch. 132, §242, at 568 (1851).

[5] James Bradley Thayer, "A Chapter in Legal History of Massachusetts," in *Legal Essays*, 310, 323-4 (1908) (published first in the *Harvard Law Review* in 1895).

[6] 20 Stat. at Large at 30 (March 16, 1878).

[7] L. Crispin Warmington & W. H. D. Winder eds., IV *Stephen's Commentaries on the Laws of England* §3, at 192 (21st ed. 1950)("At Common Law, the parties to a civil action were forbidden to give evidence on the ground that their testimony might be tainted by their interest in the proceedings. In a criminal trial, the private prosecutor might give evidence, since the indictment was brought at the suit of the Crown, but the person accused could never appear as a witness. This harsh rule was mitigated by a series of statutes and was finally abrogated by the Criminal Evidence Act, 1898. By this Act the prisoner is made a competent witness for the defence at every stage of the proceedings. He may give evidence either on his own behalf or on behalf of a prisoner jointly charged with him. But, though a competent, he is not a compellable witness. He can only be called upon his own application. If he refuses to give evidence the judge may, but the prosecution cannot, comment upon this refusal.").

B. THE TERRITORIAL ERA

The common law prohibition against defendant testimony in criminal cases was codified during most of Minnesota's territorial era. The Organic Act provided that Wisconsin law applied in the new territory until changed by the legislature.[8] Wisconsin followed the common law,[9] which became the law of the new territory. In 1851, the Second Territorial Legislative Assembly passed a statute on the "competency of certain persons as witnesses" that annulled the common law rule in all litigation: "neither parties nor other persons who have an interest in the event of an action or proceeding are excluded."[10] By oversight and carelessness, it omitted the bar against testimony by criminal defendants. The Third Legislature, meeting the next year, quickly corrected the error by adding one sentence to the end of the statute:

> Sec. 51. All persons without exception, otherwise than as specified in the next two sections, who having the power and faculty to perceive and making known their perceptions to others, may be witnesses. Therefore neither parties nor other persons who have an interest in the event of an action or

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[8] Section 12, Organic Act, which is posted separately on the MLHP.

[9] In *State v. Felner*, 19 WI. 590 (1865), where the defendant was tried for assault with intent to commit murder, the Wisconsin Supreme Court confirmed that it followed the common law: "[T]he defendant had no right to be sworn as a witness in his own behalf." (citing an 1861 law). In a footnote, the editor of this volume of the Wisconsin Reports noted that the prohibition was repealed in 1869.

[10] The 1851 statute provided:

> Sec. 51. All persons without exception, otherwise than as specified in the next two sections, who having the power and faculty to perceive and making known their perceptions to others, may be witnesses. Therefore neither parties nor other persons who have an interest in the event of an action or proceeding are excluded, nor those who have been convicted of a crime, nor persons on account of their opinions on matters of religious belief; although in every case the credibility of the witness may be drawn in question.

Minn. Terr. Rev. Stat., Ch. 95, §51, at 478 (1851). Section 52 prohibited "those who are of unsound mind" and "children under ten years of age" from testifying, and section 53 protected spousal communications and those with an attorney, clergy and physician.

In 1848, Connecticut became the first state to let civil parties testify. Fisher, supra note 1, at 662. Minnesota Territory followed three years later.

> proceeding are excluded, nor those who have been convicted of a crime, nor persons on account of their opinions on matters of religious belief; although in every case the credibility of the witness may be drawn in question. But no defendant in a criminal action or proceeding, shall be a competent witness therein for himself. [11]

Two years later, the common law prohibition was challenged in an appeal to the Territorial Supreme Court. The case arose in Justice Court in St. Paul where Wyman Baker and Thomas Baker were prosecuted for assault and battery. Wyman Baker was tried first and called Thomas Baker, his co-defendant, as a witness. An objection by Henry L. Moss, the U. S. Attorney, was sustained by Justice of the Peace Orlando Simons. Both defendants were convicted, and Wyman Baker appealed, alleging as one ground for reversal the exclusion of his witness. Affirming, Justice Moses Sherburne gave a lengthy justification of the common law rule, including these observations about the nature of the accused:

> The statements of persons charged with crime, upon the subject of the charge, are entitled to very little confidence. This has been demonstrated by the uniform experience of ages. So uncertain have such statements proved to be, as shown by the history of criminal proceedings, that courts have admitted them as evidence with great caution, and with many checks and limitations, even when made against the party making them. . . .
>
> It is perhaps just, to infer, as a general rule, that the class of persons who do not hesitate to be guilty of crime, will be equally ready to screen themselves from the disgrace and punishment of conviction by false swearing. [12]

Although the statute barred only the defendant from testifying, Sherburne held that the common law exclusion of the testimony of a codefendant remained in effect. That rule, he explained, was necessary because, if given the opportunity, each defendant would call the other as a witness, each

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[11] Minn. Terr. Rev. Stat., §93, at 20 (1852) (emphasis added).

[12] *Wyman Baker v. The United States*, 1 Minn. (Gil. 181, 183-4) 207 (1854). Excerpts from the court's opinion appear in Appendix One below, at 23-25.

would lie to support the other, and both would go free. [13] This was a powerful argument for abiding by the common law rule, which was founded on "the uniform experience of ages."

C. AFTER STATEHOOD

Soon after statehood, the issue arose again. In 1860, Charles Dumphey and Sanford Tripp were convicted of murder in separate trials in Anoka County District Court. At his trial, Dumphey called Tripp to testify, but an objection by the prosecution was sustained by the court. Dumphey appealed and argued that it was reversible error to exclude this witness. In affirming, Justice Flandrau cited *Baker* as authority for holding that a codefendant in a criminal case cannot be a witness for another defendant:

> The offer to swear Tripp, a co-defendant, as a witness for Dumphey, was very properly overruled. We might rest this point upon the rule that it has once been decided by this court, or rather its predecessor of the territory. *Baker v. United States*, 1 Minn. [207]. But we think the decision in that case was based upon sound principles which we approve. It has stood the test of five or six sessions of the legislature, without any alteration of the law having been made in consequence of the construction which that case placed upon it. See in this connection sections 3, 4, 5, p. 782, Comp. Stat., which give great strength to the view taken by the court in the case of *Baker v. The United States*. [14]

Over the next few years, minor grammatical changes were made to the law, and by 1863 a sentence specifically barring a "codefendant" from being a witness was added.[15]

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[13] Id. at 207.

[14] *State of Minnesota v. Charles Dumphey*, 4 Minn. (Gil. 340, 351) 438 (1860).

[15] It now provided:

> SEC. 7. All persons, except as hereinafter provided, having the power and faculty to perceive, and make known their perceptions to others, may be witnesses. Neither parties nor other persons, who have an interest in the event of an action, are excluded, nor those who have been convicted of a crime, nor persons on account of their religious opinions or belief; although in every case the credibility of the witness may be drawn in question. But no defendant in a criminal action or proceeding, shall be a

Although, the exclusionary rule remained intact in Minnesota, it was under siege elsewhere. John Appleton, a justice on the Supreme Court of Maine from 1862 to 1883, is widely credited with inspiring the attack in America.[16]

> competent witness therein for himself, nor, until acquitted or convicted, for a codefendant.

Stat., Ch. 73, §7, at 634 (1865)(emphasis added). This law was re-codified the following year, with one minor change—the word "codefendant" in the last sentence was now spelled "co-defendant." See Stat., Ch. 73, §7, at 520 (1866).

[16] The U. S. Supreme Court credited Appleton in *Ferguson v. Georgia*:

> The first statute [permitting the accused to testify] was apparently that enacted by Maine in 1859 making defendants competent witnesses in prosecutions for a few crimes. Maine Acts 1859, c. 104. This was followed in Maine in 1864 by the enactment of a general competency statute for criminal defendants, the first such statute in the English-speaking world. The reform was largely the work of John Appleton of the Supreme Court of Maine, an American disciple of Bentham. Within 20 years, most of the States now comprising the Union had followed Maine's lead.

365 U. S., at 577; see also James Bradley Thayer, supra note 5, at 324, who also noted, "It was mainly Bentham's influence working through younger men, such as Denman, Brougham. . . and Taylor, the writer on Evidence, that overthrew so rapidly in England the system of witness exclusion. It was the English example that moved us."

Professor George Fisher, however, disputes the view that Appleton's writings caused the demise of the common law rule. Instead, he credits a campaign begun in 1862 by Massachusetts Senator Charles Sumner against Southern laws barring black testimony in court. That year Sumner sponsored legislation permitting blacks to testify in courts in the District of Columbia. Supporters shrewdly emphasized the general problem of witness incompetence, avoiding the divisive matter of race. During the Senate debate, for example, Minnesota's Senator Morton S. Wilkinson urged passage because the exclusion of witnesses, regardless of their race, subverted the truth-seeking goal of a trial:

> I do not see, and I never have been able to understand, why a court should exclude any person from testifying. The object of testimony in a court is to arrive at the truth. Now, in the State of Minnesota the plaintiff in a suit, and the defendant, and everybody, may testify, and there is no reason why all intelligent persons should not be permitted to testify in court. The object of testimony is to arrive at the truth, to arrive at the facts, and there is no earthly reason why a negro, if he knows the facts, should not be permitted in a court of justice to testify to them. I base my support of this proposition of the Senator from Massachusetts upon the simple question of justice, of arriving at the facts. The question of slavery has nothing to do with it, as I understand....
>
> Now, sir, the true rule is not to exclude men, but to allow the jury to determine upon the credibility of the witness

To reformers such as Appleton, the rule's rationale of preventing perjury by the accused was "absurd" and underestimated the intelligence and experience of the jury; jurors would not always be swayed by the testimony of a defendant or a codefendant, and they would have contrary evidence to weigh from other witnesses, including the victim of the crime.[17]

The reform movement caught fire and soon made converts in the Tenth Minnesota Legislature. On March 6, 1868, it amended the witness competency law to permit a criminal defendant to testify, becoming the ninth state to do so.[18] The law now provided:

> All persons except as hereinafter provided having the power and faculty to perceive and make known their perceptions to others, may be witnesses; neither parties nor other persons who have an interest in the event of an action are excluded, nor those who have been convicted of crime, nor persons on account of their religious opinions or belief; although in every case the credibility of the witnesses may be drawn in question. ~~But no~~

Quoted in Fisher, supra note 1, at 677 (citing Cong. Globe, 37th Cong., 2d Sess. 3355 (1862)). It did not pass. Fisher, supra note 1, at 678. But two years later it did. On July 2, 1864, one sentence was added to an appropriations bill permitting parties and interested witnesses, regardless of their race, to testify in civil cases in federal court. It is quoted in note 2, supra. "[C]ivil parties," Fisher writes, "won the right to testify in federal court as a direct consequence of Charles Sumner's struggle to end the exclusion of black witnesses in federal courts sitting in Southern states." Id., at 681.

While civil litigants could now testify, criminal defendants were still disqualified. In examining the fall of the defendant testimony bar, Fisher saw the "striking split between North and South in the pattern of states that acted to let criminal defendants testify." The first states, all Northern, abolished the rule during and right after the Civil War; the South followed in the 1880s. By permitting defendant testimony under oath in their state courts, Fisher contends, Northerners could attack Southern laws excluding black witnesses on general competency principles, long advocated by Bentham, Appleton and others, and avoid countercharges of hypocrisy. He concluded, "Northern states first passed defendant testimony laws as part of their campaign to force Southern states to abandon their racial exclusion laws." Id., at 667-8.

[17] David M. Gold, *The Shaping of Nineteenth-Century Law: John Appleton and Responsible Individualism* 63-4 (1990) ("[H]e thought the position of those who wanted to protect the guilty from adding perjury to their crimes absurd. If the guilty defendant pleads not guilty, asked Appleton, is that not already tantamount to perjury? ... Furthermore, Appleton doubted that even the most imperturbable perjurer could deceive the jury completely and permanently.").

[18] Fisher, supra note 1, at 668 (chronological table of states abolishing rule based on data in *Ferguson v. Georgia*, supra note 1, at 577 n. 6).

~~defendant in a criminal action or proceeding, shall be a competent witness therein for himself, nor, until acquitted or convicted, for a codefendant.~~ And in the trial of all indictments, complaints and other proceedings against persons charged with the commission of crimes or offenses, the persons so charged shall, at his request, but not otherwise, be deemed a competent witness; nor shall the neglect or refusal to testify create any presumption against the defendant, nor shall such neglect be alluded to or commented upon by the prosecuting attorney or by the courts. [19]

The first case requiring the state supreme court to interpret this amendment rose on the night of October 29, 1867, when, during the course of a robbery, three men murdered Frederick Ableitner at his home near the town of St. Charles.[20] One escaped, another, John Whitman, was apprehended, and the third, George Staley, was arrested by a Chicago detective, D. J. Page, and brought to trial in Olmsted County district court in June 1868.

Midway through the nine day trial, [21] the state offered two confessions Staley gave Page, the first verbal, the second written. Staley claimed his confessions were involuntary and not admissible.[22] It was agreed that the question of whether they were admissible was for the court, and that the state had the burden of proof. Taking advantage of the new statute, passed

[19] 1868 Laws, Ch. 70, §1, at 110 (deletions and emphasis added)(amending Stat., Ch. 73, §7 (1866). It was effective March 6, 1868. The Senate passed it by a vote of 14 to 7. Journal of the Senate, 10th Leg. Sess., February 29, 1868, at 194. The House passed it 24-14. Journal of the House of Representatives, 10th Leg. Sess., March 5, 1868, at 305-6. The reports of the select committees to which these bills were referred are not available. Only committee reports from the late 1870s are kept by the Historical Society.

[20] *State of Minnesota v. George W. Staley*, 14 Minn. (Gil. 75) 105 (1869). Excerpts from *Staley* are posted in Appendix Two below, at 26-31, and the complete decision is appended to Samuel W. Eaton, "Murder of Warren Youmans and Others," 29-46 (MLHP, 2011).

[21] This was unusually long. In Massachusetts, the average length of a murder trial in the 1860s was only 3 days. George Fisher, *Plea Bargaining's Triumph: A History of Plea Bargaining in America* 119 (Table 5.3) (2003).

[22] The statute on confessions, Stat., Ch. 73, §93, at 531 (1866), provided:

> A confession of a defendant, whether made in the course of judicial proceedings, or to a private person, can not be given in evidence against him, when made under the influence of fear produced by threats, nor is it sufficient to warrant his conviction, without evidence that the offense charged has been committed.

only three months earlier, Staley testified under oath about statements and misrepresentations made to him by Page.[23] But the prosecutor took advantage of this opening by cross-examining him not only about the circumstances of his confessions but also about his participation in the crime itself. Staley's lawyers objected to the latter questions, and he did not respond (the jury was present during all testimony on whether the confessions were to be excluded). [24] Judge Lloyd Barber admitted the confessions, a ruling the supreme court found was not erroneous. Attorney General Francis R. E. Cornell alluded to Staley's silence in his summation:

> He called attention to the fact that the defendant had availed himself of his privilege to be a witness in his own behalf, and had testified upon one branch of the case, and when questioned by the prosecution in regard to his connection with the murder of Ableitner, he had refused to answer the question, and also called attention to the fact and commented upon it, that the defendant was a competent witness for himself upon the merits, and had refused to be a witness upon the main issue in this trial...[25]

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[23] Staley's appellate brief asserts that his attorneys limited their direct examination of him to the voluntariness issue:

> The case shows that the defendant was called as a witness by defense on the preliminary issue as to inducements offered for a confession and his testimony was taken upon that subject and no other, and he was not inquired of as to any other.

Brief of Defendant, at 14, in *State v. Staley*, supra note 20.

[24] *State v. Staley*, supra note 20, at 112 ("The written confession of this witness was exhibited to him on his cross-examination, and his signature thereto admitted, but he did not deny its truthfulness.").

If the jurors were present, it would not have been unusual. As late as the end of the eighteenth century, there was confusion about whether and how to exclude evidence in a jury trial. Professor Langbein writes:

> Because the jury was routinely present in court when the judge purported to rule on admissibility, and because the jury was not operating on clear directions to exclude what it should not have heard, there was as yet little practical difference between excluding hearsay (or other forbidden evidence) and admitting it with diminished credit.

John H. Langbein, *The Origins of Adversary Criminal Trial* 250 (2003).

[25] *State v. Staley*, supra note 20, at 117. At that time, the Attorney General was required to assist in the prosecution of criminal cases when asked by the governor or the county

Staley's counsel objected that these comments violated the last clause of the statute, which provided that a defendant's "neglect [or refusal to testify may not] be alluded to or commented upon by the prosecuting attorney or by the courts." The supreme court rejected this argument but split over the reasons. Chief Justice Thomas Wilson disregarded the recent amendment and rested on the statute's declaration that "in every case the credibility of the witnesses may be drawn in question":

> The defendant, it will be borne in mind, was examined as a witness on his own behalf on the preliminary question as to whether his confession was or was not voluntary, and on that question his testimony was directly opposed to that given by Page. It was therefore an important consideration for the jury whether the witness was deserving of credence.
>
> We think the law of 1868 does not forbid the resort to any argument or evidence to impeach the *witness*. The *party* is not to be prejudiced by his silence, but if he becomes a *witness*, his veracity or credibility may be attacked by any legitimate argument, whether it refers to what he has said, or refused, or neglected to say. [26]

In a concurrence, which Justice Samuel J. R. McMillan joined, Justice John Berry took a different approach to reach the same result:

> In this case the defendant *testified*, and his testimony was addressed both to the court and jury: to the Court upon the question of the admissibility of his confessions, and to the jury upon the question of weight to be given to the same. To such a state of facts, I think the prohibition (*found in Section 1*, *Ch. 70*, p. 110, *Laws* 1868) in regard to allusions to, and comments upon a defendant's neglect to testify does not apply. Upon this ground, rather than upon that taken by the Chief Justice, I prefer to rest my assent to the conclusion arrived at in the foregoing opinion in regard to the Attorney General's allusion to, and comments upon the defendant's neglect and refusal to testify in the case. [27]

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attorney. Stat. Title 5, §36, at 89 (1866).

[26] *State v. Staley*, supra note 20, at 118.

[27] Id., at 125 (emphasis in original).

Judge Barber had sentenced Staley to be executed on March 5, 1869, which was also upheld on appeal. But in response to a popular petition for leniency, Governor Marshall reduced Staley's sentence to life in prison, and six years later, he received a full pardon from Governor Davis. [28]

D. THE LINGERING QUESTION OF CODEFENDANT TESTIMONY

The sentence in the legislation disqualifying a defendant from being a witness for a codefendant was removed by the 1868 amendment, but doubt still lingered in some quarters that a defendant could call a codefendant to testify in his trial.

On March 11, 1868, two brothers, David and William Dee, were indicted in Olmsted County District Court for assaulting Bernard Clark on February 17, in Rochester. On October 5, 1868, David Dee was tried first, and called William Dee as a witness. The prosecution objected on the ground that a co-defendant could not testify. Lloyd Barber, the trial judge who had presided over the murder trial of George Staley three months earlier, sustained the objection. David Dee was found guilty and fined $400. His lawyer, E. A. McMahon, filed an appeal.

Sections of McMahon's appellate brief might have been drafted by John Appleton himself. After parsing the statute, he alluded to the rationale of the common law rule while describing the reform movement that was causing its demise.

> The whole tendency of the law, at the present time, is to make the entrance to the witness stand broader, and not narrower. The theory that persons interested in the event of an action are so unlikely to tell the truth, and so apt to tell falsehood, that their testimony is worthless, and hence ought to be rejected in all cases, was the only foundation on which the exclusion of parties, in either civil or criminal causes, ever rested. So far as

[28] "Murder of Warren Youman and Others," supra note 20. Staley and Whitman were indicted in June 1868. Staley was tried first; Whitman, awaiting trial, was eligible to be called as a witness for Staley, but was not. After seeing Staley's fate, Whitman pled guilty to manslaughter in October, and was sentenced to eight years in prison. Governor Austin granted him a full pardon three years later.

> the former are concerned, that theory was set aside by the legislature years ago. Why that body should desire to still hold it good in regard to the latter, no just reason can be given.
>
> Whether it be a just policy or not, to allow party in interest in either civil or criminal trials, to be witnesses, is not now important to inquire; but, from the course of legislation on the subject it scarcely admits of question that it is now recognized policy of the State, to enlarge the rights of defendants in criminal trials, to the same extent as in civil trials.[29]

In response, Attorney General Cornell argued that the amendment permitted the accused to be a witness only if he asked to testify, and it followed that a codefendant could not be called unless he requested. [30]

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[29] Brief of Appellant, *State of Minnesota v. David Dee*, 14 Minn. 35 (1869), at 4. Excerpts from the court's opinion appear in Appendix Three below, at 32-4.

[30] Brief of Respondent, *State v. Dee*, supra note 29, at 2-3. Apparently recognizing the futility of his position, General Cornell's brief was just that— only 3 pages. He argued:

> The language of [the statute], under which this right is claimed . . . is that "in the trial of all indictments...against persons charged with the commission of crimes or offences, the person so charged shall, *at his own request*, *but not otherwise*, be deemed a competent witness."
>
> This necessarily excludes the idea that he can be made a witness in any other way than by *his own request*. The manifest object of the act is to give a person charged with the commission of a crime the privilege of supplying, by his own testimony, proof of facts which he might not otherwise be able to establish, and at the same time guard him against being compelled, in case he does not exercise his privilege, to disclose on the witness stand facts tending to incriminate himself. Any other construction than that put upon the statute by the Court below would defeat the object of the law.

This was an attempt to counter McMahon's contention that "all disabilities heretofore cast upon co-defendants, are removed" by the amendment. McMahon had asked:

> As the law now stands, no one would contend, that had the defendants been tried jointly, both would not have been permitted to testify, and each have received all the benefit of the other's testimony. Can a sound reason be given why a trial should deprive either defendant of testimony which a joint trial would have entitled him to?

Brief of Appellant, *State v. Dee*, supra note 29, at 4.

Reversing, Justice John Berry noted that the 1868 amendment struck the prohibition against codefendant testimony from the statute, thus making that individual a competent witness. He proceeded to construe the statute as a whole, using rhetorical questions as he went along:

> We are of opinion that the effect of this amendment was to make the person charged and on trial a competent witness, at his own request, but not otherwise; that the amendment has no reference to co-defendants not on trial, and that a co-defendant, not on trial, is made a competent witness by the general provision in the first clause of section 7 [providing that "All persons except as hereinafter provided having the power and faculty to perceive and make known their perceptions to others, may be witnesses."].
>
> The repeal of that portion of section seven. . .which specifically excluded co-defendants, furnishes strong support to this construction. The language "shall at *his* request, but not otherwise, be a competent witness," can hardly apply to a co-defendant not on trial. A co-defendant not on trial, having no interest in the separate trial of his co-defendant, is not to be presumed to be in court. He may, and in many case[s] must, be in jail. What object could *he* have in requesting permission to testify even if opportunity were given him? How does he acquire a standing place in court from which to make the request? He is neither a party to the trial nor the attorney of a party. This view is, we think, further supported by the subsequent language of the amendment, which goes on to provide as follows: "nor shall the neglect or refusal to testify create any presumption against the defendant." [31]

A slight degree of reformist thinking appears in Berry's opinion. His comment that "A co-defendant not on trial, having no interest in the separate trial of his co-defendant..." would not have been written by Moses Sherburne, who believed that the interests of all defendants were aligned. And, in another departure from the writings of common law proponents, he does not recite the maxim that a statute in derogation of the common law should be strictly construed.[32]

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[31] *State v. Dee*, supra note 29, at 33-4.

[32] Compare *Baker v. U. S.*, supra note 12, at 182, 183.

E. THE U. S. - DAKOTA WAR TRIALS

On March 16, 1878, ten years after Minnesota abolished the common law prohibition, Congress passed legislation providing that in all criminal trials in federal courts and in courts martial, "the person so charged shall, at his own request, but not otherwise, be a competent witness."[33] Sixteen years before this, however, the Dakota War trials were held, and in them the defendants spoke in their own defense.

The Dakota were not tried in state or federal district court, nor in courts martial; instead they were tried by a five-member military commission.[34] Fighting ended in late September 1862. The commissioners, each of whom had fought in the war, were picked by Henry Sibley on September 28; between that date and November 3, 392 Dakota were tried; all but 69 were convicted; 303 were sentenced to die, and 38 were hung on December 26, 1862, in Mankato. [35]

Military commissions supposedly followed the procedures of courts martial.[36] Before 1878, military tribunals used common law rules on

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[33] 20 Stat. at Large 30 (March 16, 1878), provided:

> [I]n the trial of all indictments, informations, complaints, and other proceedings against persons charged with the commission of crimes, offenses, and misdemeanors in the United States courts, Territorial courts, and courts martial, and courts of inquiry, in any State or Territory, including the District of Columbia, the person so charged shall, at his own request, but not otherwise, be a competent witness. And his failure to make such request shall not create any presumption against him.

[34] For the composition of the commission, see Carol Chomsky, "The United States-Dakota War Trials: A Study in Military Justice," 43 *Stanford L. Rev*. 13, 24 (1990).

[35] Id at 13, 19, 21, 24, 27-8.

[36] On September 28, 1862, General Henry Sibley issued Order No 55: "The Commission will be governed in their proceedings by military law and usage." It was rewritten at the beginning of each trial transcript.

Professor Chomsky writes:

> Although the Articles of War in 1862 nowhere mentioned military commissions or the procedures to be followed in establishing them, the Army had determined, at least by January 1 1862, that military commissions were to be "ordered by the same authority, be constituted in similar manner, and their proceedings be conducted according to the same general

evidence, which prohibited the accused from testifying because he was "interested" in the outcome.[37] Yet, in the Dakota War trials, the defendants gave extended explanations of their conduct, including alibis, and refuted witnesses who testified against them. This raises the question of whether the military commission discarded the exclusionary rule or had another basis in the common law for letting the Dakota give exculpatory statements.

The unsworn statement was devised to alleviate the harshness of the rule against defendant testimony.[38] Beginning in the mid-fifteenth century,

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> rules as court martial, in order to prevent abuses which might otherwise arise."

Chomsky, supra note 34, at 56 n. 269 (citing sources).

Keeping in mind the danger in relying upon books written long after the events under examination, Lt. Col. Winthrop's acclaimed treatise on military law, published in 1886, confirms that military commissions were required to follow the procedures of courts martial but were allowed to be less formal:

> Procedure. In the absence of any statute or regulation governing the proceedings of military commissions, the same are commonly conducted according to the rules and forms governing courts-martial. These war-courts are indeed more summary in their action than are the courts held under the Articles of war, and, as their powers are not defined by law, their proceedings—as heretofore indicated—will not be rendered illegal by the omission of details required upon trials by courts-martial, such, for example, as the administering of a specific oath to the members, or the affording the accused an opportunity of challenge. So, the record of a military commission will be legally sufficient though much more succinct than the form adopted by courts-martial, as—for example—where it omits to set forth the testimony, or states it only in substance. But, as a general rule, and as the only quite safe and satisfactory course for the rendering of justice to both parties, a military commission will—like a court-martial—. . . will ordinarily and properly be governed, upon all important questions, by the established rules and principles of law and evidence. Where essential, indeed, to a full investigation or to the doing of justice, these rules and principles will be liberally construed and applied.

William Winthrop, II *Military Law* 74-5 (W. H. Morrison, 1886) (citing sources).

[37] The 1878 law abolishing the common law bar applied to courts-martial. See note 33 supra, and Simon Greenleaf, III *A Treatise on the Law of Evidence* §487, at 465 (Edward A. Harrison ed., 16th ed., 1899)("The rules in regard to the *competency of witnesses* are the same in courts-martial as in the courts of the common law.") (emphasis in original).

[38] *Ferguson v. Georgia*, 365 U. S. at 582-3 (citing sources). Professor Fisher saw that it had the additional benefit of avoiding the vexing problem of conflicting oaths at trial. Fisher, supra note 1, at 641.

English trials came to rely heavily on testimony under oath. From the sixteenth century through the nineteenth centuries, there was a "presumption that sworn testimony was true."[39] The defendant, of course, was not competent to testify and only after the late sixteenth century could he even call his own witnesses, who were not sworn. The unfairness of these proceedings led to the development of the unsworn statement, which enabled the accused to give his side of the story without being cross-examined. Under the common law, however, the accused was not a "witness" and his unsworn statement was not "evidence."[40] As a result, juries, in the words of Professor George Fisher, had a "distain for unsworn evidence," which had a "devalued status" when compared to "the power of the oath." [41] The practice was permitted in military trials,[42] including the Dakota War trials.

The trials commenced with the commissioners being sworn, and charges translated to the accused. Charges fell into two categories: (a) a crime committed at a specific date and place or (b) being a war participant. Most defendants were charged with both crimes.[43] All defendants denied the

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[39] Fisher, supra note 1, at 627, 636 (citing courts and commentators).

[40] Wigmore described the logic of the common law: "In effect, [the accused] furnished evidence, *i.e.*, material which affected the jury's belief; but he was not sworn, he had no standing as a witness, and in theory of the law he therefore gave no evidence." John Henry Wigmore, II *Treatise on the System of Evidence in Trials at Common Law* §575, at 697 (1904).

[41] Fisher, supra note 1, at 641, 643.

[42] There are two authorities for this assertion. First, military tribunals followed the rules of common law evidence, which permitted defendants to deliver unsworn statements. Second, in his 1898 treatise, Lt. Col. Davis warned that under the 1878 Act, "The submission by the accused of a sworn statement is not a legitimate exercise of the authority to testify conferred by the statute, and such a statement should not be admitted *in evidence* by the court." But in a footnote, he added, "It may be admitted, however, as an unsworn statement to which the court will attach such weight as it believes it to deserve." George B. Davis, *A Treatise on the Military Law of the United States* 132 n. 4 (1898).

[43] Chomsky, supra note 34, at 27 (citing sources). For example, in the first trial on September 28, 1862, Defendant Godfrey faced both charges:

> *Charge*: Murder
>
> *Specification 1*: on or about the 19th day of August 1862, did join in a war party of the Sioux tribe of Indians against Citizens of the United States and did with his own hand murder seven white men and women and children more of less peaceable Citizens of the United States;
>
> *Specification 2*: [general] and particularly did at various times and places

charges and then spoke to the commissioners.

According to the transcripts, the "prisoner" was not sworn before speaking; in contrast, every prosecution witness, including Dakota such as Godfrey and David Faribault, who had already been tried, took the oath before testifying. The transcripts are obviously incomplete,[44] and it is probable that the recorder condensed into coherent English the statements of all witnesses, sworn and unsworn. While the transcripts do not display the question-and-answer format of a typical cross-examination, the way the defendants addressed one specific topic and then moved to another strongly suggests that their statements, which often appear as soliloquies, were actually replies to specific questions from the commissioners.[45]

As the common law developed, the point in the trial when the accused could give an unsworn statement changed. In the sixteenth century, the accused responded, if he chose, to each prosecution witness as the case progressed.[46] Later, it seems he found it advantageous to give it toward the end of the trial.

> between the 19th of August 1862 and the 28th day of September 1862 join and participate in the Murder and Massacre committed by the Sioux Indians in the Minnesota Frontier.

United States v. Godfrey (Case #1, September 28, 1862) (Isch transcription).

[44] In some cases, a witness is listed but her testimony is not recorded. E.g., in *U. S. v. Wy-a-tah-towah* (Case #5, September 28, 1862), Miss Swan a/k/a "Schwandt" is listed as a witness, but only the testimony of Mattie Williams is recorded. Conversely, in *U. S. v. Charles Crawford* (Case #8, October 5, 1862), one witness is listed but the testimonies of three others are recorded. See below at 42-3, 47-49.

[45] John P. Williamson, a first-hand observer of the trials, wrote in a letter in the *Missionary Herald*, November 5, 1862: "Again, in very many of the instances, a man's own testimony is the only evidence against him...If he denies, he is cross-examined with all the ingenuity of a modern lawyer..." Quoted in William Watts Folwell, II *A History of Minnesota* 198 n.15 (Minn. Hist. Soc., 1961)(first edition, 1924).

In 1861, one year before the Dakota Trials, Michigan became the first state to codify the availability of the unsworn statement; although, in a break with the common law, it provided that the accused could be cross-examined about his statement. *Ferguson v. Georgia*, 365 U. S. at 584 n.15.

[46] Wigmore, note 40, at 697 ("During the period of recorded trials down to the second half of the 1500s ... the accused made an address at the proper stage, and, as witnesses came on, he spoke and was questioned freely as if his statements counted for something, though he was not sworn.").

When codified in the nineteenth century, the accused was given latitude as to when to deliver his unsworn statement. E. g., the Georgia statute declared unconstitutional in *Ferguson v. Georgia* did not specify when the accused could speak.

In a few of the Dakota War trials, a defendant gave several statements, some disputing a prosecution witness who had just testified.[47]

It is noteworthy that each Dakota delivered a statement immediately after pleading not guilty. The transcripts record the accused's attempt to explain his actions before a government witness was called.[48] In other words, in these trials, the defense preceded the prosecution, a reversal of the Anglo-American system of criminal procedure.[49]

That the commission permitted the defendants to speak at all gives the trials an appearance of fairness.[50] But that appearance is deceptive because the commission surely knew that many Dakota would supply proof of their own

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[47] E.g., *U. S. v. Muz-za-bom-a-du* (Case #10, October 6, 1862) (defendant spoke first, followed by the sworn testimony of Godfrey, a prosecution witness, and the defendant's rebuttal); and *U. S. v. Wa-pay-doo-ta* (Case #11, October 7, 1862)(same scenario). See below at 50-54.

[48] As time passed the transcripts get shorter. During November 1 and 2, 83 trials were held. The transcripts of most of these trials record the defendants' statements in several sentences but no testimony of witnesses, though they are named.

It may be thought that if the transcript was a condensed version of what transpired, perhaps the trial really began with testimony from prosecution witnesses, followed by the defendant's unsworn statements which the recorder packed into one or several paragraphs and later moved to the top of the transcript. It can be said with complete certainty that this did not happen. The war trials were conducted with lightning speed. The recorder did not have time or any reason to prepare a second transcript which rearranged the actual chronology of the evidence he had recorded earlier. The conclusion is inescapable that the transcripts correctly show the accused delivering his explanation of why he is innocent of the charges before the government put on its case.

[49] Summarizing the experience of centuries, Professor Langbein writes:

> Anglo-American courts use the concept of the burden of production, also known as the burden of going forward with the evidence, to organize the parties' responsibilities to inform the court. In criminal procedure, setting aside some arcane matters involving affirmative defenses, the critical production burden is that of the prosecution. The court will dismiss a prosecution case without trial if the prosecution does present sufficient evidence to allow the judge to conclude that a reasonable jury could decide the case in accordance with the charges in the indictment.

Langbein, supra note 23, at 258. This was the procedure followed by military tribunals. William Winthrop, I *Military Law* 424-5 (W. H. Morrison, 1886) (citing sources).

[50] If fairness was the commissioners' ambition, they did not succeed. Professor Chomsky is particularly insightful about the deficiencies in the proceedings, even by the standards of the day. Chomsky, supra note 34, at 46-61.

guilt.[51] From her study of the trials, Professor Carol Chomsky concluded that most of the prisoners were unfamiliar with "American customs [and] trial procedures." [52] It is not likely that even one prisoner grasped what an aberration it was for the commission to order or encourage him to delivery an unsworn account of his actions, which in many cases became a confession, at the start of his trial.

The unsworn statement was created to alleviate the unfairness of the common law bar—to enable the accused to give his version of the events to the jury if he chose—but in the war trials, it become another weapon the military wielded against the Dakota.

F. CONCLUSION

Of the numerous movements to reform court procedures in mid-nineteenth century America, one aimed to unshackle witness competency laws from restrictions embedded in the common law. Its proponents argued that if these statutes were liberalized, courts and juries would receive more evidence, making their rulings and verdicts fairer and more accurate. In Minnesota, a civil litigant always had the right to testify at trial but, except for a brief period in 1851-1852, a criminal defendant was disqualified by a statute reflecting the common law's bleak conviction that, if given the chance, the accused would lie and dupe the jury. Eventually, the merits of the reformers' arguments were recognized, and on March 6, 1868, the legislature amended the witness competency law to grant a criminal defendant the right to take the stand and testify at his own trial. This early history helps us understand why the current statute begins with a simple declaration:

> Every person of sufficient understanding, including a party, may testify in any action or proceeding, civil or criminal, in court or before any person who has authority to receive evidence, except as provided in this subdivision . . . [53]

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[51] Folwell, supra note 45, at 198-9 n. 16 (describing Rev. Stephen R. Riggs, who had gathered evidence against the defendants, recollecting that "the trials were conducted in too much haste, that the records were generally too meager, and that the pressure brought on prisoners to convict themselves was not in accordance with military regulations or with the spirit of Christianity.").

[52] Chomsky, supra note 34, at.52-3.

[53] Minn. Stat. §595.02, subd. 1.

G. ACKNOWLEDGMENTS

Researching this article led me to the writings of some of our finest legal historians. These include John H. Langbein's *The Origins of Adversary Criminal Trial* (2003), and George Fisher's "The Jury's Rise as Lie Detector," 107 Yale L. J. 575 (1998). Both assisted me in understanding the background of the common law prohibition against defendant testimony that was enforced by Minnesota courts until March 6, 1868.

After finishing the section on the *David Dee* case, I thought I was at the end of this article until one afternoon at the Historical Society, I chanced upon a hefty, spiral-bound book by John Isch. Because he had contributed a book review to the Minnesota Legal History Project, I was curious to see what he had written. It was a compilation of the transcripts of the Dakota War trials.[54] As I skimmed the transcripts, I was surprised to see the defendants ―or "prisoners" as they were designated―giving detailed explanations of their actions to the military commission. In the following months, I endeavored to understand why the Dakota were permitted to speak during their trials, in apparent disregard of the common law bar.

Carol Chomsky's "The United States-Dakota War Trials: A Study in Military Justice," 43 *Stanford L. Rev.* 13 (1990), is the most thorough analysis of the trials, and is indispensable reading for those interested in the legal history of this state. For the development of the unsworn statement practice, I turned once more to Professor Fisher and to early editions of the treatises of Simon Greenleaf and John Henry Wigmore. It is hard to read Wigmore and not be impressed by the depth of his research. In later editions, he even weaves into footnotes, already laden with case citations, quotations from barristers' autobiographies to illustrate how Parliament's abolition of the common law prohibition in 1898 affected their trial tactics. Although they were written decades after the Dakota trials, I benefited as well from treatises on military law and practice by Lt. Cols. Winthrop and Davis.

These early treatises were made available to me at the Riesenfeld Rare Book Room at the Library of the University of Minnesota Law School. I also took advantage of the resources of the State Law Library and the Minnesota

[54] John Isch, *Guilty as Charged: The 1862-1864 Military Commission Trials of the Dakota* (np, 2010). The title refers to the sentence the commission intoned in case after case, not the author's belief as to the propriety of trial procedures.

Historical Society. I am indebted to the librarians and staff of each of these institutions for their assistance.

I have not found any reports of trials in which criminal defendants made unsworn statements in Minnesota before March 1868, but my hunch is that the practice was allowed. In an unusual case in 1921 the Minnesota Supreme Court held that the 1868 amendment granting the accused the right to testify abrogated the common law rule permitting him to make an unsworn statement. In 1919 A. C. Townley and Joseph Gilbert were prosecuted for conspiring to discourage enlistments in the war effort against Germany. They were represented by counsel until the conclusion of the case when they resigned as representatives of Townley, who asked to address the jury. The trial court denied his request, and no summation was delivered by the defense. After the guilty verdicts, Townley's lawyers reappeared, moved for a new trial and, when that was denied, appealed to the state Supreme Court. It held that because the accused may now testify in his own behalf, if he chooses, courts should no longer follow the common law practice of permitting him to make an unsworn statement to the jury at the close of the case. The trial court, therefore, properly denied Townley's request to make his own closing argument to the jury. It also held that the state constitution does not confer upon the accused the right to make a closing argument to the jury on his own behalf. Excerpts from *State v. Townley and Another*, 149 Minn. 5, 182 N.W. 773 (1921) are in Appendix Five.

As other states enacted legislation permitting the accused to testify under oath, the unsworn statement practice was abandoned until, by 1961, only one state retained it. That year the U. S. Supreme Court declared a Georgia law that only allowed a defendant to give an unsworn statement but not be cross-examined was unconstitutional because it denied him effective assistance of counsel and violated the Fourteenth Amend-ment's Due Process Clause. [55]

My experience with this practice occurred a few years later, and because my memory of it was refreshed while researching this article, I will recount it in closing. In the summer of 1965, after my first year in law school, I was a field researcher for a study conducted by the NAACP Legal Defense Fund of rape cases in Southern states from 1945 to 1965.[56] Rape was a capital

[55] *Ferguson v. Georgia*, 365 U. S. 570 (1961).

[56] Discussed at greater length in "That Summer in the South (A Memoir in the Form of a Book Review)," an essay posted on the website of the Veterans of the Civil Rights

crime in those states during this period. The study aimed to gather specific facts about each case so that a statistical analysis could be made showing whether there was racial discrimination in the application of the death penalty. One morning in early August, I was in the library of the Georgia Supreme Court in Atlanta scouring the transcript of the trial, probably held in the 1950s, of a man found guilty of rape and sentenced to be executed. Near the end of the transcript, the defendant's unsworn statement was recorded. I recall, he began:

> Members of the jury:
> I want to tell you the truth. I will tell you what really happened.
> I did it.
> I mean I didn't do it.
> . . . .

Movement, www.crmvet.org. The study is the subject of a recent book by one of the participants. Barrett J. Foerster, *Race, Rape, and Injustice: Documenting and Challenging Death Penalty Cases in the Civil Rights Era* (University of Tennessee Press, 2012).

APPENDIX ONE

Wyman Baker
vs.
The United States

1 Minn. (Gil. 181) 207 (1854)

. . . .

Error to district court, Ramsey county.

Assignment of errors:

1. The district court erred in affirming the judgment of Orlando Simons, the justice below, for the reason that said justice erred in excluding the witness, Thomas Baker.
2. The district court erred in rendering judgment against Joseph M. Marshall, the surety on the recognizance for writ of *certiorari*.
3. The district court erred in rendering judgment for, or affirming judgment below with ten dollars costs to, the United States.

H. L. Moss, for plaintiff in error.
Rice, Hollinshead & Baker, for the defendants in error.

SHERBURNE, J. Wyman Baker, the plaintiff in error, and one Thomas Baker, were defendants in a criminal prosecution for assault and battery. Wyman Baker was first tried, and upon his trial offered the said Thomas Baker, his co-defendant, as a witness in his behalf. This witness was objected to by the counsel for the government, and the objection was sustained by the magistrate before whom the cause was tried, and the witness excluded.

The exclusion of this witness is alleged to be error, and the counsel for the plaintiff in error, in order to sustain his position, relies upon §93, on p. 20, of the amendments to the Revised Statutes, allowing parties and others to be witnesses, in derogation of the common law. But that section of the statute contains the following clause:

"But no defendant in a criminal action or proceeding shall be a witness

therein for himself." It is a well settled rule of evidence at common law, that parties to the record are inadmissible as witnesses, either in civil actions or criminal prosecutions; they are neither permitted to testify for, nor obliged to testify against, each other. And the rule is the same, whether the defendants are tried together or separately. *Commonwealth v. Marsh*, 10 Pick. R. 57; *The People of New York v. Bill*, 10 Johns. R. [95]. It should not be persumed (sic) that the legislature intended to change this salutary rule, unless such intention clearly appears from the language used. In other words, a law authorizing such a departure from well established rules, and especially those commending themselves to general favor, should be strictly construed. I Kent's Com. 464; *Commonwealth v. Knapp*, 9 Pick. R. 514. As the common law rule now stands, we do not find, as before stated, that any distinction is made as to the admissibility of parties to the record as witnesses between the case of a trial of all the defendants at the same time, and that of separate trials; nor, indeed, does there seem to be any reason for such distinction. If Wyman and Thomas Baker had been tried together, Wyman might have offered Thomas as a witness, with the same reason that he offered him upon a separate trial. They were both defendants in the same case, and as to the effect of their testimony for each other, it was immaterial whether they were tried separately or at the same time. The rule for admitting parties defendant as witnesses, after discharge, or judgment against them, is based entirely on different grounds, and even this is sometimes denied by high authority. *Rex v. Lafone et. a*l., 5 Esp. R. 155. The later authorities, however, are otherwise. We are of the opinion that the statute was intended to mean nothing more than that a defendant in a criminal action should not be permitted to testify in defense of his own cause; and such a provision is in affirmance, and not in derogation, of the common law rule which is founded, not merely on the consideration of interest, but—partly, at least—in a principle of policy for the prevention of perjury. 3 Stark. Ev. 1062. It is said in the case of *Commonwealth v. Marsh*, above cited, that "if parties charged with an offense are permitted to testify for each other, they might escape punishment by perjury. If, in the present case, Barton, whose trial was postponed, had been admitted as a witness for the defendant, he might have been acquitted, and then on the trial of Barton, the defendant in his turn might be admitted to testify; and thus they would be allowed mutually to protect each other, and evade the ends of justice."

The statements of persons charged with crime, upon the subject of the charge, are entitled to very little confidence. This has been demonstrated by the uniform experience of ages. So uncertain have such statements proved to

be, as shown by the history of criminal proceedings, that courts have admitted them as evidence with great caution, and with many checks and limitations, even when made against the party making them. The fear of death, imprisonment, or loss of character—the hope of sympathy, or pardon, or modified punishment; and perhaps all of these feelings operating in some degree at the same time—madden the mind of even the entirely innocent, when placed under suspicious circumstances; and while writhing under the tortures of suspense, he commits the grossest errors, is guilty of the wildest falsehoods, and has often been known to confess himself guilty of the crime of which he knew nothing. If the statements of the accused, when against themselves, are liable to objections, how little weight should be allowed to those which are made in favor of the party making them!

It is perhaps just, to infer, as a general rule, that the class of persons who do not hesitate to be guilty of crime, will be equally ready to screen themselves from the disgrace and punishment of conviction by false swearing. A case of simple assault and battery, like the present, may be an exception, but the law makes no distinction; and if the testimony is admissible in this case, it would be also admissible if the charge were murder. For these reasons we are all of the opinion that the justice was right in excluding the witness.

. . . .

Section 120 on page 315 of the Revised Statutes regulating the action of the district court in cases of certiorari is silent as to costs, and, also, as to judgment against the sureties; and this is left to be governed by sec. 198 above recited. We do not, however, see any authority for taxing costs in this case in the supreme court.

* * * * *

APPENDIX TWO

The State of Minnesota
vs.
George W. Staley.

14 Minn. (Gil. 75) 105 (1869)

. . . .

A confession, made by a person charged with crime, is not admissible in evidence, if it appears to have been induced by the promise of any advantage, or threat of any harm, of a temporal or worldly nature, made by a person in authority. The officer making the arrest is, within the rule, a person in authority.

If proof of a confession is objected to on the allegation that it was improperly obtained, the judge is to determine, as a preliminary question, whether the allegation is true, and his decision thereon, though subject to review, will not be reversed unless it is manifestly against the weight of evidence. The admission of the confession in such case is, to some extent, in the discretion of the Court.

. . . .

The act of March 6, 1868, which allows a person charged with crime to testify in his own behalf, and provides that his neglect or refusal to testify, shall not create any presumption against him, and forbids the prosecuting attorney from alluding to or commenting upon such neglect, does not forbid the resort to any argument or evidence to impeach such witness. The party is not to be prejudiced by his silence, but if [107] he become a witness, his veracity may he attacked by any legitimate argument, whether it refers to what he has said, or refused or neglected to say.

. . . .

It is proper for a jury to consider the circumstances under which a confession is made, with a view of determining what weight should be given to it; but it is not their province to reject a confession ; nor is it the law, that if a party making a confession is not entirely free from fear, or wholly uninfluenced by present fear, or hope of favor, that the Court should reject his confession; if

voluntary, it is receivable, whatever may be the motives of the party by whom it is made.

. . . .

The defendant was indicted with John Whitman and Charles Edwards, for the murder of Frederick Ableitner. The defendant was tried separately in the District Court for Olmsted county, found guilty, and sentenced. After verdict, and before judgment, defendant moved for a new trial, which was denied; he appeals to this Court.

The case is sufficiently stated in the opinion of the Court.

R. A. Jones for Appellant.

F. R. E. Cornell, Attorney-General, for Respondent.

By the Court.—Wilson, Ch. J.—The defendant having been convicted in the District Court of Olmsted County of the murder of Frederick Ableitner, made a motion for a new trial, which was denied, and from the order of denial he appealed to this Court. We shall examine the several grounds on which he claims to be entitled to a new trial, in the order in which they were stated by his counsel.

. . . .

The defendant made a confession, oral and written, to the admission of which in evidence he objected on the ground that it was not voluntary. The rule seems well settled, that if any advantage is held out, or harm threatened, of a temporal or worldly nature, by a person in authority, the confession induced thereby must be excluded. Reg. vs. Baldey, 12 E. L. & Eq. 590; State vs. Grant, 22 Maine, 171; Com. vs. Moony, 1 Gray, 461-3. Page, the officer who made the arrest, and by whom the inducements are alleged to have been held out, is within the rule, a person in authority. If proof of the confession is objected to on the allegation that it was improperly obtained, the Judge is to determine as a preliminary question whether the allegation is true in point of fact, and his decision of the question is, we think, subject to be reviewed by this Court. But the rule is well settled, that this Court will in no case reverse the decision of a lower court on a question of fact, unless it is manifestly against the weight of evidence. . . .

We are not called upon to determine whether the burden is on the State to

show affirmatively that the confession was voluntary, or to negative any inducement to make it, for the Attorney General seems to have conceded that; and the evidence on the affirmative and negative of this preliminary question was all offered before its determination by the Court. The Court having received the confession, must have determined, as a matter of fact, that it was voluntary, and the question presented to us is, did it clearly err in this determination? Page was called as a witness and testified: "I told him if he was going to say any thing he must say the truth. * * I think we all told him everything depended on Edwards being caught, as we believed him the most guilty;" and denied that beyond what is expressed or implied by these words, there was any inducement offered. Several witnesses were called to contradict him, who testified that he had admitted that he had held out other inducements, and the defendant, called and examined on his own behalf as a witness on this preliminary question, testified: "I saw Page during the day (of the arrest). He spoke to me about confessing during the day; first time was between one and two o'clock, right after dinner. He at this time asked me where Edwards was. I told him I did not know. Webb was present. Page said to me that Whitman had made a confession, and stated some things that he said Whitman had stated to him. He then told me he had seen my father and mother and sister, and it was their request that I should tell him all about it. He then said Charley has got you in many a scrape, meaning Edwards. I told him he had not. He then went on to state more conversation ho said he had with Whitman; said Whitman had laid the blame entirely on me; and now sir, said he to me, 'the one of you that tells the straightest story shall have the privilege of turning State's evidence.' I was twenty-two years old last March." The written confession of this witness was exhibited to him on his cross-examination, and his signature thereto admitted, but he did not deny its truthfulness. Where his statements and those made by Page are at variance, it was for the Court below to say which of them was entitled to credence, and its determination of the question on a conflict of evidence, unless manifestly against the weight of evidence, is final. Nor is it very clear on which side was the preponderance of evidence. If the latter witness was contradicted by others, the former was discredited by the statements of his own confession. But in any view that may be taken of it, there was some evidence reasonably tending to sustain the finding and decision of the Court, which is sufficient. The admission of the confession is in such case to some extent in the discretion of the Judge. Green. Ev., Sec. 219. No recent case, I think, goes so far as to hold that such statements as it is admitted were made by Page, render subsequent confessions inadmissible as evidence. The earlier English cases that perhaps go to that length, have been modified or

overruled. Reg. vs. Baldey, 12 E. L. Eq., 596; Wharton's Am. Cr. Law, (6 Ed.) Sec. 685, and cases there cited; Roscoe's Cr. Ev., 39 et seq. The fact that the confession was made in answer to a question assuming the guilt of the person, or was obtained by artifice, falsehood or deception, or preceded by a caution to the accused, to tell the truth if he said anything, does not render the confession inadmissible in evidence. People vs. Wertz, 37 N. Y., 303; Wharton's Cr. Law, 690, 691; 1 Phillips Ev. (4th Ed.) 558-9; State vs. Kirby, 1 Strobhart, 378; Roscoe Ev., 47; State vs. Grant, 9 Shepley, 174. Unless there is a positive promise of favor, made or sanctioned by a person in authority, or the inducement held out is calculated to make the confession an untrue one, I think it may be laid down as a rule based on reason, and deducible from the late authorities, that the confession will be admissible. See Wharton Cr. Law, Sec. 686 & 687, and cases cited in notes; Corn. vs. Tuckerman, 10 Gray 173; State vs. Grant, 9 Shepley, 171; Reg. vs. Thomas, 7 Car. & P., 345. If we are right in supposing this to be the law in such cases, there was no error in receiving the oral confession.

Afterward the Attorney for the State offered the written confession made a few days later, to the admission of which the defendant objected on the ground that it was not voluntary. If the oral confession was admissible, it follows that the one reduced to writing was also, there having been no intermediate threat of harm, or promise of favor, or act done calculated to induce the defendant to make an untrue confession, and it appears that Hill, the Justice of the Peace before whom the confession was made, and by whom it was reduced to writing, cautioned him "if he had any statement to make, it might and probably would be used against him on his trial; that he was under no obligation to make one, or to answer any question that might be put to him." We fail to discover anything in the circumstances under which the confession was made calculated to intimidate the accused, or influence him to make an untrue statement. Page seems to have resorted to falsehood and deception, in stating that Whitman had made statements which he had not, but we have seen this did not render the confession inadmissible. In the reception of the confessions, therefore, we think there was no error.

. . . .

In the argument of the Attorney General, it appears by the case, that "He called attention to the fact that the defendant had availed himself of his privilege to be a witness in his own behalf, and had testified upon one

branch of the case, and when questioned by the prosecution in regard to his connection with the murder of Ableitner, he had refused to answer the question, and also called attention to the fact and commented upon it, that the defendant was a competent witness for himself upon the merits, and had refused to be a witness upon the main issue in this trial, whereupon the defendant asked that it be entered upon record in the case, and an exception be entered thereto on the part of the defendant," and the Attorney-General consenting, it was so ordered. It is argued by the defendant that this was prohibited by statute, Chap. 70, Laws 1868, and therefore is a ground for a new trial.

The law referred to is as follows: "That Section seven (7), Chapter seventy-three (73), of the General Statutes, be amended so as to read as follows: All persons, except as hereinafter provided, having the power and faculty to perceive and make known their perceptions to others, may be witnesses; neither parties nor other persons who have an interest in the event of an action are excluded, nor those who have been convicted of crime, nor persons on account of their religious opinions, or belief; although in every case the credibility of the witnesses may be drawn in question. And in trial of all indictments, complaints and other proceedings against persons charged with the commission of crimes or offenses, the person so charged shall, at his request, but not otherwise, be deemed a competent witness; nor shall the neglect or refusal to testify create any presumption against the defendant, nor shall such neglect be alluded to or commented upon by the prosecuting attorney or by the courts." The defendant, it will be borne in mind, was examined as a witness on his own behalf on the preliminary question as to whether his confession was or was not voluntary, and on that question his testimony was directly opposed to that given by Page. It was therefore an important consideration for the jury whether the witness was deserving of credence.

We think the law of 1868 does not forbid the resort to any argument or evidence to impeach the witness. The party is not to be prejudiced by his silence, but if he becomes a witness, his veracity or credibility may be attacked by any legitimate argument, whether it refers to what he has said, or refused, or neglected to say. In other words, while the legislature recognized the fundamental law, that no person should be compelled, in any criminal case to be a witness against himself, it does not forbid or lessen the [119] and right of the State to impeach the credibility of any witness. The defendant, having been a witness, and having admitted the making of a

confession, which, if believed, must certainly have affected his credibility before the jury, it was competent for the Attorney General, for the purpose of discrediting him, to refer to and comment upon the fact that he did not deny the truth of his confession, though he was a competent witness for that purpose.

. . . .

We are of opinion that the order appealed from be affirmed.

Berry, J.—In this case the defendant testified, and his testimony was addressed both to the court and jury: to the Court upon the question of the admissibility of his confessions, and to the jury upon the question of weight to be given to the same. To such a state of facts, I think the prohibition (found in Section 1, Ch. 70, p. 110, Laws 1868) in regard to allusions to, and comments upon a defendant's neglect to testify does not apply. Upon this ground, rather than upon that taken by the Chief Justice, I prefer to rest my assent to the conclusion arrived at in the foregoing opinion in regard to the Attorney General's allusion to, and comments upon the defendant's neglect and refusal to testify in the case.

McMillan, J.—I concur in the views expressed by Justice Berry as to the construction of Section 1, Ch. 70 of the Laws of 1868, and its application to this case.

* * * * *

APPENDIX THREE

THE STATE OF MINNESOTA

vs.

DAVID DEE, Indicted with WILLIAM DEE.

14 Minn. 35 (1869).

. . . .

Held, that upon a trial in October, 1868, in this case, threats made in November preceding were not made at a time so remote from the time of trial, that testimony in regard to them should on account of such remoteness be excluded. The particulars of hostile feeling on the part of the witness may be inquired into, so far as is proper for the purpose ascertaining the extent and nature of such hostile feeling, in order the jury may be informed how much allowance to make for such feeling. Whether it is a sound rule that before the expression of hostile feeling on the part of a witness can be shown, for the purpose of affecting his credit, such witness must himself be inquired of as to such expression. But without any such preliminary inquiry, testimony as to threats and expression of hostile feelings on the part of a prosecuting witness, is admissible for the purpose of showing, that a defendant who is charged with assaulting such witness, had reason to believe that such witness intended to kill him, or do him some great bodily harm, and was therefore justified in doing whatever was necessary to prevent such injury to himself.

The statutory provision in *Ch*. 70, *Laws* 1868, enacting that "in the trial of all indictments, complaints and other proceedings against persons charged with the commission of crimes or offenses, the person so charged shall, at his request, but not otherwise, be deemed a competes witness," does not include a co-defendant, not on trial so as to exclude him from the operation of the general rule of competency.

The defendant David Dee, appeals to this Court from a judgment of the District Court of Olmsted county. A sufficient statement of the case appears in the opinion of the Court.

E. A. MCMAHON for Appellant.

F. R. E. CORNELL, Attorney General, for Respondent.

By the Court.—BERRY, J.—The first count of the indictment in this case charges the defendants with an assault upon Bernard Clark with intent to murder, and the second count with an assault upon the same person with intent to commit manslaughter.

A separate trial being allowed, the appellant David Dee was found guilty of an assault and battery, and sentenced to pay a fine of four hundred dollars. The testimony as to the facts and circumstances of the alleged assault was conflicting and contradictory. The account of the alleged assault given by Bernard Clark, who was called by the prosecution, and that given by David Dee, who took the stand for himself, were essentially variant as to material points.

. . . .

The defendant David Dee called as a witness his co-defendant, William Dee, who was sworn. The counsel for the State objected to the receiving of testimony from William Dee, on the ground that he was a co-defendant. The testimony was excluded, and in this the Court below erred. *Sec*. 7, *Ch*. 73, *Gen. Stat*., reads as follows: "All persons, except hereinafter provided, having the power and faculty and to perceive and make known their perceptions to others, may be witnesses; neither parties nor other persons who have an interest in the event of an action are excluded. . . But no defendant in a criminal action or proceeding shall be a competent witness therein for himself; nor until acquitted, for a co-defendant." The exceptions referred to in the section quoted, are not important in this. If this section had not been changed, there would be no question that the exclusion of the testimony of William Dee, a co-defendant, who had not been tried, would have been proper. But by *Ch*. 70, *p*. 110, *Laws* 1868, the section cited was amended by striking out the last sentence of the same, and inserting the following language "And on the trial of all indictments, complaints, and other proceedings against persons charged with the commission of crimes or offenses, the *person* so charged shall at his request, but not otherwise, be deemed a competent witness," &c. (The word *person*, which we italicize, is misprinted "persons" in the session laws.) We are of opinion that the effect of this amendment was to make the person charged and on trial a competent witness, at his own request, but not otherwise; that the amendment has no

reference to co-defendants not on trial, and that a co-defendant, not on trial, is made a competent witness by the general provision in the first clause of section 7.

The repeal of that portion of section seven as it originally enacted, which specifically excluded co-defendants, furnishes strong support to this construction. The language "shall at *his* request, but not otherwise, be a competent witness," can hardly apply to a co-defendant not on trial. A co-defendant not on trial, having no interest in the separate trial of his co-defendant, is not to be presumed to be in court. He may, and in many case must, be in jail. What object could *he* have in requesting permission to testify even if opportunity were given him? How does he acquire a standing place in court from which to make the request? He is neither a party to the trial nor the attorney of a party. This view is, we think, further supported by the subsequent language of the amendment, which goes on to provide as follows: "nor shall the neglect or refusal to testify create any presumption against the defendant."

How is it possible that the *neglect* or *refusal* of a co-defendant, not on trial, to testify could create any such presumption, if such co-defendant is competent *only* upon his own request?

And, finally, by its own terms this exception from the general rule of competency is provided for only "*on the trial* of all indictments," &c. "*against* persons charged," &c. The separate trial of an indictment against one co-defendant is not the trial of an indictment against another co-defendant, and therefore the exception does not cover a co-defendant not on trial. We are therefore of opinion that the Court below erred in excluding the testimony of William Dee.

Judgment reversed and a new trial directed.

MCMILLAN, J. —I concur in the conclusion arrived at in this case.

* * * * *

APPENDIX FOUR

DAKOTA WAR TRIAL TRANSCRIPTS

There are three rolls of microfilm of the trial records in the Ronald M. Hubbs Microfilm Room of the Minnesota Historical Society. The following eleven trial transcripts can be found on the first roll. They were transcribed by John Isch, who bought a microfilm copy of the original recorders' handwritten transcripts, and typed them into an accessible, readable form, adding fact-rich commentary.

The following transcripts are not complete. Omitted are boilerplate paragraphs that fill the first three or more pages of each original, handwritten transcript. Stock paragraphs listed the names and ranks of the members of the commission, noted that they were sworn before the trial began, and identified the interpreter. Order 55 followed:

> Headquarters, Camp Release
> Order No. 55
> September 28, 1862
>
> The Commission will be governed in their proceedings by military law and usage.
>
> Henry Sibley,
> General Commanding
> Military Expedition

The charges and "specifications" were spelled out and witnesses listed. For obvious reasons, boilerplate was omitted or condensed by Isch.

The captions of the original transcripts are rather odd. They are a variation of the following:

Charges, testimony, etc.	Charges, specifications
vs.	vs.
Name	Name

I have revised the caption of each of the following cases to reflect that it was the United States that brought the criminal charges against an individual Dakota. This accords with military protocol.[57] And it permits a more exact citation of each case, i. e., *U. S. v. Muz-za-bom-a-du* (Case #10, October 6, 1862).

The following transcripts, commentary and annotations are posted with the permission of John Isch.

* * * *

[57] Article 90 of the American Articles of War of 1874 provided:

> Art. 90.—The judge advocate, or some person deputed by him, or by the general or officer commanding the army, detachment, or garrison, shall prosecute in the name of the United States, but when the prisoner has made his plea, he shall so far consider himself counsel for the prisoner as to object to any leading question to any of the witnesses, and to any question to the prisoner, the answer to which might tend to criminate himself.

Winthrop, supra note 36, at 122.

U. S. vs. WE-CANK-WASH-TA-DONPE *
Case #3

[Order #55 Constituting Order]
[The Military Commission meets September 28, Camp Release]
[Charges and Specifications]

Charge: Murder.

Specifications: On or about the 18th day of August 1862 did kill George H Gleason, a white citizen of the United States, and has likewise committed sundry hostile acts against the whites between the said 18th day of August 1862 and the 28th day of Sept, 1862. This near the RedWood River, and at other places on the Minnesota frontier.

And thereupon the prisoner being asked whether he had to say in answer to said charge made the following statement, I plead not guilty of murder. The other Indian shot Gleason,** and as he was falling over I aimed my gun at him but did not fire I have had a white woman in charge, but I could not take as good care of her as a white man because I am an Indian I kept her with the intention of giving her up.

Don't know of any other bad act since Gleason was murdered. I moved up here with the Indians. If I had done any bad act I should have gone off. I was present when the white man was killed.

There were two in the war party who killed Gleason. The other Indian was not a relative of mine. The other Indian fired twice. The other Indian said, "Brother in law, let's shoot him." He had already shot at Kim. I aimed at him because I was told I must kill the whites to save myself. I have been in three battles. I have not fired at any other white man.

I wanted to prevent the other Indian from shooting. I prevented him from

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* Other names: Wicanpiwastedapi; Chaska; perhaps Satterlee's Chaska-Dan, on his execution list #19.
** George Gleason, clerk at the Upper Sioux Agency warehouse, was carrying Mrs. Wakefield and children when he was shot.

killing the women and children with Gleason. I snapped my gun at Gleason, but it failed to go off. The reason I attempted to shoot was that the other Indian asked me if I was afraid to shoot. I don't know why the gun wouldn't go off. I shot over Gleason when he fell. This was the third shot. I afterwards snapped at him when he has dead on the ground.

Sarah Wakefield, a witness on the part of the prosecution, being then in the court, was called and after being duly sworn testified as follows— I was with Mr. Gleason when he was killed. Myself and two children were riding with him. There were two in the party who attacked us.

The Indians were coming up from the direction of the Lower Agency. The other man shot Mr. Gleason. This man tended the horses. When the shots were fired the horses ran and he caught them. The Indian was near the wagon when he fired. He shot both barrels and loaded up while this Indian ran after the horses.

When Mr. Gleason was in his death agony this Indian snapped his gun at him. He afterwards told me it was to put him out of his misery. I saw this Indian endeavor to prevent the other Indian from firing at me. He raised his gun twice to do it. He said he did not go into this thing willingly. The pipe I spoke of yesterday I have since heard belonged to a white man who was killed and that he (the prisoner) felt so bad about it he didn't care whether he was killed or not in this war, and that was why he was in it. Jo. Reynolds knows him very well and considers him a fine man. He is a farmer Indian and spells a little. He had on leggings at the time Gleason was shot. When we got in, he took me from a tepee where it was cold, with my babes to one where there was a white woman. Since then he has saved my life three times.

When this Indian prevented the other Indian from killing me, the other wanted to kill my children, saying "they were no use" and this Indian prevented it. I have never known him to go away but twice. He went only when he was freed to go and expressed great feeling for the whites. His mother took me in the woods and kept me, when my life was threatened. He saved my life once when Shakopee the chief of his band tried to kill me. This Indian has no plunder in his tent.

They are very poor, he and his family. They have had to beg victuals for me and he has given his coffee and food to my children and gone without

himself. He is very generous man. I have seen him give away his own shirt to Indians.

Angus Robertson, another witness for the prosecution ,being then called and duly sworn, testified as follows:*** I heard the prisoner say before Mrs. Wakefield that he fired the second shot. He said his brother in law wanted to kill Mrs. Wakefield and her children, but he prevented it. He said his shot didn't kill Gleason. This Indian is a very good Indian. His conduct has been uniformly good towards Mrs. Wakefield and her children.

[Courtroom cleared and commission deliberates]

Found guilty and sentenced to be hung.

*** This may be Andrew Robertson, father of Thomas Robertson, Little Crow's interpreter, mixed blood also an interpreter, but see the mixed blood listing in Monjeau-Marz, C. L. (2005). The Dakota Indian internment at Fort Snelling, 1862-1864. St. Paul, MN: Prairie Smoke Press, p. 138, has an Angus M. Robertson

[Isch commentary: Hung at Mankato because he mistakenly responded when the name of Chaska-Ite was called. Derounian-Stodola, based on the Wakefield account, says this was the person who was executed wrongly (the rescuer of Wakefield) when he answered to the name "Chaska" in Mankato. Derounian-Stodola, K. Z. (2009). *The War in Words*. Lincoln, NE: University of Nebraska Press, p. 71. She spells his name as Chank-Wash-ta-don-pee and cites him as case #3. Riggs in his letter to Wakefield trying to explain the wrong execution, says they had forgotten that Chaska had been originally convicted under the name We-chan-hpe-wah-tay-do-pe; Riggs apparently means that when this man answered to the name Chaska, he and others did not realize that this was not the Chaska who was on the list of persons to be executed. Folwell also concludes this is the one who was mistakenly hung. Folwell, 1927.

There remains a difficulty, however. Nowhere in the transcript is any name used other than Wechank-wah-to-don-pe(e). The list of those to be executed sent by the President to Sibley on December 6, does not include case #3, We-cank-wash-ta-donpe. The list was read to the prisoners on Monday, December 22. There was a "Chaska" on this list, perhaps case #121, Chaskey (who had been selected for execution by Whiting and Ruggles) who did not stand when the name "Chaska" was read. We-chank-wah-to-donpe stood because he obviously knew himself as "Chaska," a common name for a first-born son, and the soldiers accepted him as the person to be hung even through the "cover" of the trial transcript, which always includes the name of the defendant, has We-cank-wash-ta-donpe, not Chaska, as does the charge and specification and the sentence. This would also have been the name used when the transcripts were reviewed and a decision was made as to who was to be executed. The archival material from the Adjutant General's Office, contains a list of the Indian Prisoners in Mankato in January 1863. This is the

listing of the remaimng Dakota after the execution They are listed by their names and the tnal number. In this listing Wa-chaspe-waste-tay-dopy is included as case #3. He is listed as being alive and Chas-key (#121) is not listed as being alive, so the army still did not know they had executed the wrong person,. The transcript is clear that We-chank-wah-to-done-pe is the Dakota for whom Mrs. Wakefield pleads and whom she believes was erroneously executed. And that is likely what happened.]

* * * * *

U. S. vs. TA-ZOO *
Case #4

[Order #55 Constituting Order]
[The Military Commission meets: September 28, Camp Release]
[Charges and Specifications]

Witnesses: Mary Swan [Schwandt], Martha Williams

Charge: Murder

Specification 1: did on or about the 18th day of August 1862, kill, or by his fresence or agency aid [and] abet in the killing of Francis Patoille and Mary Anderson, two white citizens of the United States. This between Fort Ridgely and New Ulm, Minnesota.

Specjfication 2: did on or about the 18th day of August 1862, and at various others times between the said 18 day of August 1862 and the 28th day of September 1862, ravish Mattie Williams a white woman and a prisoner in the hands of the Sioux Tribe of Indians.

And thereupon in answer thereto the prisoner made the following sdtatement— I have had sore eyes in two years and am not able to shoot at any thing. I was camped three miles below the Fort this side of the River. I am a professional juggler and a young girl came to me. I am not able to hunt any and on this account have been planting. All the settlers around New Ulm have kept me from starving.

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* Other names: Taju; Ptanduta, Scarlet Otter (Tazu — a nickname?), *LG*; Ptandoota or Red Otter, Ptari doo ta— Scarlet Otter, Taju xa, Red Otter.

Some young Indians came down there the morning after the outbreak and told me that the Indian traders at the Lower Agency had been killed and I followed them down towards New Ulm. On the way down I saw two bands of Indians going towards New Ulm and when I went as far as the Sweeny (Travellers Home). I met 3 wagon loads of Indians coming back.

When they met me they told me to get in and I got in. I came along with them and when they go opposite LaFramboise house, met these ladies (Miss Williams and Miss Swan [Schwandt]).

I heard the Indians say there was a load of white men and women coming down and I jumped off. I ran towards the others and I heard a shot and saw them running off. There were 3 ladies running off and others and I told them to stop firing, that if they killed white women I would kill one of them, that they should take them prisoners. Saw 2 Indians catch hold of Miss Williams and one hold of Miss Swan [Schwandt]. If it hadn't been for me these young ladies would have between killed. Ma-zee-be took Miss Swan [Schwandt] by the ann. He is here. One of the Indians who had hold of Miss Williams was killed at the last battle.

The name of the other is Hapan (the son of Ea-chan-woan-due). This is all I know. I was blind and I didn't go anywheres. I know this woman, (Miss Williams). If this woman is living now and is about to see her relatives, I am the cause of it. I ravished her. She was not willing and I desisted. I tried to sleep with her twice, but she was too young. The negro was in the middle wagon with my party.

And thereupon Mattie Williams, a witness on the part of the prosecution, being before the Commission was duly sworn and testified as follows— The prisoner committed the crime charged against him upon me. He repeated it. He was of the party who killed Patoille. He took me and tied my arms when we were taken. He was engaged with the party in their designs. He helped to plunder.

Mary Swan [Schwandt], another witness on the part of the prosecution, being in Court and duly sworn, says: I was one of the party when Patonelle was killed. This Indian was one of those who attacked us.

[Courtroom cleared and commission deliberates]

Guilty of both chares and specifications and sentenced to be hanged.

[Isch commentary: *After the Trial*: Reviewed by Whiting and Ruggles: "Convicted of participating in the murder of Mr. Patville, and of ravishing a young girl." Statement to Riggs: "Plan-doo-ta, alias Tajoo (Red Otter) says he had very sore eyes at the time of the outbreak, and was at that time down opposite Ft. Ridgely. He was with the party that killed Patwell [Patoile] and others. Maza bon doo killed Patwell [Patoile]. He himself took Miss Williams captive. Says he would have violated the women but they resisted. He thinks he did a good deed in saving the women alive." Ta-zoo wrote the following two days before his execution: "[T]ell our friends that we are being removed from this world over the same path they must shortly travel. We go first, but many of our friends may follow us in a very short time. I expect to go direct to the abode of the Great Spirit, and to be happy when I get there; but we are told that the road is long and the distance great; therefore, as I am slow in my movements, it will probably take me a long time to reach the end of the journey, and I should not be surprised if some of the young, active men we will leave behind us will pass me on the road before I reach the place of my destination." (Satterlee execution list #3) Executed in Mankato.]

* * * * *

U. S. vs. WY-A-TAH-TOWAH *

Case #5

[Order #55 Constituting Order]
[The Military Commission meets: September 28, Camp Sibley, Lower Agency]

Witnesses: Miss Williams, Miss Swan [Schwandt]

[Charges and Specifications]

Charge: Murder

Specifications: [general] and on or about the 18th day of August 1862 kill, or by his participation cause to be killed, a white man named Francis Patoille, a

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* Other names: His People; Oyatetawa; Wy-a-tah-ta-wa; W-a-the-to-wash; Ay-a-ta-to-wah; Wyata-tonwan (Satterlee); Folwell claims this Dakota is not found anywhere else.

citizen of the United States. This between Fort Ridgely and New Ulm, Minnesota.

And thereupon in answer thereto the prisoner made the following statement— It was never my intention to kill any one, but what I did was done under the influence of evil spirits. This outbreak was commenced by three Indians of different bands, and I was led into it by force by them. It was never my intention to do anything bad, but what I did, was done under the influence of evil spirits. My chief told me to stay here, and the government (?) done fairly by us.

Wabasha is my chief. Have seen Patioille often. Know when he was killed. I was present. There was a lot of Indians coming from below and I was with them. I saw the Indian fire at Patoille.

I shot at him, but don't know whether I hit him or not. I was near when I shot at him. A good many shots. I aimed at the crowd when Patoille was shot. I shot at the crowd when they were in the wagon. Three of the Indians are arrested and 3 were killed. The negro was of the party. I never saw the negro man kill any whites.

I have been in 3 fights—at New Ulm, Birch Coolie, and Wood Lake. I fired 2 shots at New Ulm, 4 at Birch Coolie, 2 shots at Wood Lake. I have a bad gun. I always kept a good ways off.

Don't know that the negro killed anybody. I was wounded at the battle of New Ulm in the breast. The past seems to me like a dream. The powers above made my eyes dark. 'Wa-pe-du-ta, Muz-ze-bom-da, Makahanduya, Pta-doo-ta and Godfrey were of the party.

Mattie Williams being present in Court was then called as a witness and duly sworn, testified as follows, I do not recognize the defendant as one of the Patoille murderers.

[Courtroom cleared and commission deliberates]

Guilty of all charges and sentenced to be hung.

[Isch commentary: *After the Trial*: Reviewed by Whiting and Ruggles: "Confesses to have participated in the murder of Mr. Francis Patville, and to have been engaged in three

battles." *Statement to Riggs*: Wy n fah taw a (His People) says he was at the attack on Captain Marsh's company, and also at New Ulm. He and another Indian shot at the same time. He does not know whether he or the other Indian killed the white man. He was wounded in following up another white man. He was at the battle of Birch Coolie, where he fired his gun four times. He fired twice at Wood Lake. (Satterlee execution list #2) Executed in Mankato.]

* * * * *

U. S. vs. HIN-HAN-SHOON-KO-YAGMA-NE *
Case #6

[Order #55 Constituting Order]
[The Military Commission meets: October 5, Camp Release]

Witnesses: Wak-kin-ah-wash-tay (Wakinyanwaste, Good Thunder), Mrs. Hunter**

[Charges and Specifications]

Charge: Murder

Specifications: [general] and did kill Alexander Hunter a white citizen of the United States on or about the 19th day of August 1862 and &d participate in the murders and massacre committed at various times and places in the Minnesota Frontier between the 19th day of August 1862 and the 28th day of September 1862.

The prisoner being asked whether he is guilty, or not guilty of the charge and specifications, answers — The charge is not true. I was in the battle at

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* Other names: Walks Clothed with an Owl's Tail; Hinhan shoon koyag mane, Walks clothed in an owl's tail (Satterlee); Hin-han-shoon-ko-yag-ma-ne (Koblas); Hinhansunkoyagmani. Transcript indicates he is the nephew of Passing Hail.

** Mrs. Hunter, a mixed blood, was the daughter of Andrew Robertson, a former Superintendent of Indian Schools; she was a sister [in law?] of Thomas A. Hunter. Alexander Hunter, her husband, was a cripple from frozen feet. The family was looking for some kind of cart so they could flee and they stopped over night at Wapa-xa village and resuming their way, he was murdered. (Folwell #6)

Fort Ridgely. Didn't kill anybody. I was in the battle of Birch Coolie. A great many shots were fired, but I don't know that I shot any. I was in the last battle at Wood Lake. The Indians said if I didn't go they would kill me. I don't remember of killing white man. That's all I have to say. I did not kill Mr. Hunter nor was I one of two who delivered Mrs. Hunter to Makewashtay.

Mrs. Marion Hunter, being duly sworn, says —I know this Indian (prisoner). I have seen him before. I saw him about 2 miles below the agency, where my husband was killed. My husband and myself were the only ones in our party. The Indian was alone. We were fleeing from the Indians towards the Fort walking. The Indian met us and shot my husband in the heart. He was within 3 feet of us. He took out his knife to cut my husband's throat, but I begged him to desist and he desisted. He took me prisoner and carried me towards Little Crow's village when this man (Wa-ke Washtay) took me from him and carried me to my mother. I am sure the prisoner is the man.

Wake Washtay being sworn says— I know the prisoner. I met the prisoner with Mrs. Hunter at the time she said she lost her husband going towards Little Crow's village.

[Courtroom cleared and commission deliberates]

Found guilty and sentenced to be hung.

[Isch commentary: *After the Trial*: Reviewed by Whiting and Ruggles: "Convicted of the murder of Alexander Hunter, and of having taken and had Mrs. Hunter a prisoner until she was rescued from him by another Indian." *Statement to Riggs*: Hin han shoon ko yay ma ne (One Who walks Clothed in an Owl's Tail) says he is charged with killing white people and so condemned. He does not know for certainly that he killed any one. He was in all the battles. That is all he has to say. (Satterlee execution list #4) Executed in Mankato.]

* * * * *

U. S. vs. TA-HAM-PU-HIDA *

Case #7

[Order #55 Constituting Order]

[The Military Commission meets: date not given, Camp Release]

[Charges and Specifications]

Charges: Murder

Specifications: [general] and did at various times between the 18th day of August 1862 and the 28th day of September 1862 participate in various Murders and Massacres committed at various times between the above dates by war parties of the Sioux Indians upon the persons of white citizens of the United States. This on the Minnesota Frontier and between New Ulm and the Yellow Medicine.

The prisoner being asked whether he was guilty or not guilty answers as follows: I have not been at New Ulm, Yellow Medicine or the Fort. Have been here all the time with Red Iron. At the last Battle Indians gave notice that all the Indians who did not go would be killed. I staid at a distance on a mound and had no arms.

[Courtroom cleared and commission deliberates]

Found not guilty.

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* Other names: Tahanpehda; Tacanhpehda (rattling tomahawk), *LG*.

* * * * *

U. S. vs. CHARLES CRAWFORD *
Case #8

[Order #55 Constituting Order]
[The Military Commission meets: October 5, Camp Release]
Witness: Antoine Frenier

[Charges and Specifications]

Charge: [general] **

Specification: [general]

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* Other names: Wakaninape; Charles Crawford was Joseph Brown's brother-in-law, the brother of Thomas Crawford, and the half-brother of Gabriel Renville. He was born near Lake Traverse in 1837. His father was Joseph Renville (Akipu) and his mother was Winona Crawford, a mixed blood. His Dakota name was Wakanhinape, Appearing Sacred. He was the manager of the government warehouse at Yellow Medicine. He was tried twice by the Military Commission (Trials #37 and 251, see biographical notes on trial #37).

** Charles Crawford was tried twice. This was his first trial. Anderson/Woolworth have his own narrative of this trial: "I was tried twice [by the military tribunal], and I will tell of both times. The day that General [Colonel] Sibley came to Camp Release an officer came to me and told me that I was wanted at headquarters. I went over there and went in. I found in there a number of officers, and among them one whom I knew afterwards to be Colonel Crooks, who wrote a paper about me, stating that I was accused of killing a white man. He asked me if that was so. I told him no; and then he said to me 'If you lie about this, there is a man who knows about it and will tell on you.' I then told them, as I have told you here, about going to hunt for my sister, and all that, up to the time that I went to the battle of New Ulm. Then the guard went and brought Lozenzo Lawrence. Lawrence was asked if he knew me, and he said yes; then he was asked if he knew of my killing a white man. He said no. 'Why do you then accuse this man of killing a white man?' — this question was put to Lawrence. He said he heard that. Then Lawrence was asked how he heard of it, and Lawrence said he didn't know. Then he was asked how it came that he heard of it, and he said again 'Oh, I heard of it.' Then Lawrence was asked who told him this, and he said that he had heard it, but didn't know exactly where he had heard it Then Lawrence came out and one Anton [Antoine] Frenier was brought in, who accused me of breaking open a barrel of whisky', getting the Indians drunk, and starting with them on a war party. That is what Frenier accused me of, but that is not true, because I was not them" Crawford was a half-brother of Major Brown's wife, Susan. Mrs. Lydia Blair and Ellen were daughters. Mazamani was his uncle and his father was Akipa. Crawford became an Indian minister in later years. (Folwell, #8).

Charles Crawford states: In the night they had the fight (?), the morning after I went to Brown's house, for the folks, and they were not there. I followed their trail down. I saw two Indians coming and thought they were going to kill me. I then took Browns' buggy and horse and went to Lower Agency. Little Crow said every half breed and Indian must get to the Fort or be killed. I went to the Fort but I didn't fire my gun off. I came home. I went to New Ulm, didn't fire my gun off. I sat behind a house and held my horse, was not at Birch Coolie. Was at last fight, had to go. I was a clerk for the agent at the time at Yellow Medicine. I never told an Indian I killed white people. I saved what property I could.

Antoine Frenier being duly swotn says—I know nothing about this defendant but what Major Brown's family told me. One of the family told me that Crawford got a barrel of alcohol out of the warehouse and all the half breeds and Indians got drunk.

Lorenzo [Lawrence] *** says Charles was in on the Battles since the outbreak and fired upon the whites.

*Lydia Blair **** being duly sworn says,* I didn't see any persons drink alcohol. I heard the Indians drank it. He has been with us all the time except in the fight at the fort.

Ellen Brown being duly sworn says, The statement made by the last witness is true.

Lorenzo being duly sworn says, I heard that prisoner killed one Dutchman. Didn't know anything about it; know his character is good.

[Courtroom cleared and commission deliberates]

Found not guilty.

*** The transcript is not clear but it appears that Antoine Frenier is repeating what he heard from Lorenzo, who testifies under oath a moment later. Lorenzo Lawrence or To-wan-e-ta-ton (Face of the Village) was a fill-blood Dakota who protected a number of white persons during the Conflict.

**** Lydia Blair (1836-1886) was the wife of Charles Blair who was killed by the group of Dakota who took the Brown family captive. She was the daughter of Joseph R. Brown (1805-1870) and the sister of Samuel Brown (1845-1925) and Ellen Brown (1841-1920). Charles Crawford, in turn, was the half-brother of Joseph Brown's wife, Susan (1819-

1904). Thus Ellen and Lydia were testifying in favor of their uncle. On the other hand, Anton Frenier was the uncle of Susan (Frenier) Brown and he testified against Charles Crawford.

[*Isch* commentary: *After the Trial*: After the Conflict he joined Sibley's expedition as a scout. Later he settled on the Sisseton Reservation. He joined the Good Will Presbyterian Church in 1877 and in 1879 he was ordained as a minister. He also served as an interpreter. He died in 1920. (See Anderson/ Woolworth 1988, p.112)]

* * * * *

U. S. vs. MA-KA-TA-NA-JIN *

Case #9

[Order #55 Constituting Order]

[The Military Commission meets: October 6, Camp Release]

Witness: Tazoo

[Charges and Specifications]

Charge 1: Murder

Specifications: did on or about the 18th day of August 1862 participate in the murder of Francis Patoille, between Fort Ridgely and New Ulm, Minnesota

Charge 2: [general]

Specification 2: [general]

And therefore on the first one was asked what he had to say in answer to said charge, to which he made the following statement— The Indians were passing my house when Patville [Patoille] was killed. I got into the team.

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* Other names: Makatonajin; Maka to najin—Stands on earth.

[sic]. I was not in any battle and never did any thing wrong. I had two sons who were killed in battle. The settlers near New Ulm fed me, and the Indians were jealous. I had a gun when Patville [Patoille] was killed. Did not aim a gun.

Mrs. Williams testimony: Defendant was one of the party who killed Patville [Patoille]. I did not see much of him in the matter and don't know whether he took an active part.

[Courtroom cleared and commission deliberates]

Acquitted.

* * * * *

U. S. vs. MUZ-ZA-BOM-A-DU *

Case #10

[Order #55 Constituting Order]

[The Military Commission meets: October 6, Camp Release]

Witness: Godfrey

[Charges and Specifications]

Charge: Murder

Specification 1: did on or about the 20th day of August 1862 kill an elderly woman and child in a garden near New Ulm, Minnesota. **

Specification 2: [general].

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* Other names: Iron Blower, Muz za boom a du; Maza bomida; Ma-za-boon-do; Mazabomdu.

** Victims were Mrs. Anton Messmer and Anton Henle's children Anton, Maw, and Martin. The bridge mentioned was at Henle's, the soldiers were a recruiting party with a flag. The date is August 18, not 20th (Folwell, #10).

The foregoing charge being read to the prisoner and he [was] asked what he had to say thereto answered— I am not guilty. Ever since I remember I have been a friend to the whites.

An old Indian had a medal (?) which he gave me with good advice which I have always followed.

Since the treaty of 1857 I have always lived with my family near Winona. I was coming up to get my annuities at the time of the outbreak.

I wanted to go to Winona again. But I was afraid the Indians would take me and kill me. I call God to witness that I have not killed or shot at a white man.

My father and all the family were all killed by the Chippeways. But I have heard my father say that he never killed or abused a white man. I am short sighted and never even hunted ducks. I was compelled to go to several battle fields. I was near New Ulm cutting Kinnickinic when I heard of the outbreak

I went to the lower agency after this outbreak but got nothing for any share. I was going along with a load of Kinnickinic. I saw the Indians with Mary Schwant, Miss Williams and I saved their lives. I have a niece a member of the church at the Lower Agency. I took Miss Schaji to her and she has kept her.

When Patville [Patoille] was killed I was not with the party. But heard the firing. Threw the Kinnickinic from my back and came up. I stopped them from killing the women. I left the women at Waconta house. The next morning I got her. I know where the Travellers House is.

Godfrey being duly sworn says— I know the prisoner. This Indian killed an old woman and two children. They were going into a garden when he fired on them. It was near the Travelers House near New Ulm. I saw the Indians fire on the old woman and saw her fall. He then jumped into the garden and kicked the children down. We didn't see him kill the children. I was in the wagon at the time. This took place on the first day they commenced killing the whites. I saw him again but he didn't say he had killed any whites. If a man enters the house of enemies the Indians gave him the name of killing many if men are killed there.

The prisoner states that what Godfrey states is not true. I met Godfrey at the Travellers Home. I heard Godfrey had not killed any. I met Godfrey and his party near the Travellers Home. I didn't stop with them but went up near where they killed Patville [Patoille]. I saw no whiskey. I have a bad gun when we met soldiers on the horse but it didn't go off. I was in the front wagon. I crossed the bridge when the soldiers were shot on foot. I was not there when the soldier was killed.

[Courtroom cleared and commission deliberates]

Found guilty and sentenced to be hung.

[Isch commentary: *After the Trial*: Reviewed by Whiting and Ruggles: "Convicted of the murder of an old man and two children." *Statement to Riggs*: Ma za born doo (Iron Blower) says he was down on the Big Cottonwood when the outbreak took place; that he came that day into New Ulrn and purchased various articles, and then started home. He met the Indians coming down. Saw some men in wagons shot, but does not know who killed them. He was present at the killing of Patwell [Patoile] and others, but denies having done it himself. He thinks he did well by Mattie Williams and Mary Swan [Schwandt] in keeping them from being killed. They now live and he has to die, which he thinks not quite fair. (Satterlee execution list #5). Executed at Mankato.]

* * * * *

U. S. vs. WA-PAY-DOO-TA *

Case #11

[Order #55 Constituting Order]

[The Military Commission meets: October 7, Camp Release]

[Charges and Specifications]

Specifications. [general]

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* Other names: Wahpeduta (Scarlet leaf), LG;Wapa duta, Scarlet leaf (Satterlee); Wan-pa-doota (Koblas); Wahpey-du-ta Wa-pa-doo-tah, Red Leaf; Wakarusa; Godfrey's father-in-law.

Charges: [general]

The prisoner being asked whether he was guilty or not guilty made the following statement: I am not guilty. All the time of the outbreak I was among the settlements and the Indians came down and that was the first news I had of it. I was living with the Germans near New Ulm. They built a house for me and I did not go to New Ulm. I was at the battle this side of the Cottonwood River at New Ulm. I had no gun and was a good ways off, but not even a knife. Have not been with any other war party. Have kept my self at home. I am telling the truth. I and my German neighbors were great friends. I was not at the Lower Agency when the murders were committed there.

I have killed no white men. I was going into a house and a white man presented his gun to my breast and I shot him. Some of the Indians said I had shot another white man but it was not true.

David Faribault being first duly sworn says— I was at prisoner's lodge the day after the troops came here and he told me he killed 2. Have seen him often at battles, at New Ulm, at the Fort, and at the last battle. He said the persons he killed were 2, cooks. I thought he meant (?) Myrick. He said he shot one in the head and one in the body. His wife was present. The place he mentioned was where Divol ** and Myrick were killed.

The prisoner states further— All the Dakota have killed whites. If the guilty are punished there will be none left. I saw Mankato in war parties, where I was—*The prisoner further states*—The man I shot was near New Ulm. I was in the battle at the Fort but had no arms. It was an old man that I shot with a white beard and hair. I shot him and he fell.

The negro was with the party at the time, but was not present. The negro is my son in law. I heard he was a brave man. The family was killed on the west side of New Ulm on the hill. I went there and found they were killed after I heard firing. Tazoo was of the party who killed them. He is a juggler. It was below the Fort near a stream where the nigger killed people with a hatchet. There is another stream near this one. The negro killed 4. I was always with him in the start but I was left behind. When I overtook them

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** Divol (see Dahlin, p. 26) was killed at the time and place of Myrick and so this likely refers to his death.

they told me the men killed 12. He has a gun and a hatchet with him. They had guns. Below where he killed this they set the house of fire. I heard them saw there were people in the house. I turned back from there. Shot at the man because he attempted to shoot me first. The colored man went of his free will with us. I was living with my son in law when the outbreak commenced. We started away together but he left me. I went on with the young men. Taope brought us word that the Indians were all going below to New Ulm. That they had killed all at the Agency. That they were going to kill all the whites. The negro was cutting hay at the time. I heard the black (?) men hollering that the Indians were coming. I then saw him take his gun and go towards the Indians. The negro went because he was willing to go.***

[Courtroom cleared and commission deliberates]

Found guilty and sentenced to be hung.

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*** He turns the tables on Godfrey. His story is nicely arranged by the court reporter. He used very good language for one unable to talk or understand English. Seems as if questions asked were not of importance, and so not recorded. From stories, he shot and killed Mrs. Joseph Stocker at Milford as she lay sick in bed. Taopi, the aged chief was against the outbreak from the beginning; he held back many. (Folwell, #11)

[Isch commentary: *After the Trial*: Reviewed by Whiting and Ruggles: "Confesses that he was engaged in the massacres and that he shot a white man." *Statement to Riggs*: Wahpadoota (Red Leaf) is an old man. He says he was mowing when he heard of the outbreak. He saw some men after they were killed about the Agency, but did not kill any one there. He started down to the Fort, and went on to the New Ulm settlement. There he shot at a man through a window, but does not think he killed him. He was himself wounded at New Ulm. (Satterlee execution list #6). Executed in Mankato.]

* * * * *

U. S. vs. WA-HE-HUA *
Case #12

[Order #55 Constituting Order]

[The Military Commission meets: October 3, Camp Release]

Witness: David Faribault

[Charges and Specifications]

Charge 1: Murder

Specification 1: [general] and did at New Ulm on, at or near Fort Ridgely Minn., on or about the 25th day of August 1862 kill a soldier of the United States Army named Richardson. **

Charge 2: [general]

Specification 2: [general]

The prisoner being asked whether he was guilty or not says: I am not guilty. I have been in 3 battles. Have shot at white people but I never took good aim. I was threatened by the Indians if I didn't go. Don't remember of having killed a white man. If I had I would be with Little Crow. At the battle of Birch Cooley. I was below the Fort with a party to take horses. The Indians killed one and took one alive. I have stolen horses and I tell you I fired at white men in battle. The Indians gave me powder and ball and the soldiers made me go.

David Faribault being first duly sworn says— I heard him say to another Indian that Richardson *** was coming on horse back and they shot him off his horse and wounded him and then tried to get some news (?) of him and

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* Other names: Wa-he-hud; Wahehna; Wahena (Satterlee); Wa-he-hua (Koblas).

** Eliphalet Richardson was born in Mino, Maine, November 9, 1826.

*** The killing of Richardson is not recorded in any history, although the recorder of this court, A. S. Neille, wrote one. The body of Eliphalet Richardson, near the Fort, was discovered and recognized by Rev. M. N. Adams; his story is on record in the Historical Society Files. Little Crow was not at the Birch Coolie battle (Folwell, 1927, 17).

after they got it they shot him dead. It was near the Fort or New Ulm. The man said now you have got the news (?) let me go and he shot him. The prisoner shot him. I heard him say so soon after the battle at New Ulm. Don't recollect the time. The prisoner further states that he joined the soldier's lodge after the outbreak.

[Courtroom cleared and commission deliberates]

Found guilty and sentenced to be hung.

[Isch commentary: *After the Trial*: Reviewed by Whiting and Ruggles: "Convicted of participating in the battles, and of murder." *Statement to Riggs*: Wahnekna (do not know what this name means) **** says that he did not kill any one. If he had believed he had killed a white man, he would have fled with Little Crow. The witnesses lied on him. (Satterlee's execution list #7) Executed in Mankato.

**** Folwell's comments: "Of this name, which Antoine Freniere, US Interpreter for the court, or Rev. Riggs, spiritual adviser for the condemned, seem to have been unable to translate. Samuel J. Brown writes: 'Sometimes 'k' is used instead of' 'h', Wahehnu, meaning a sacred ceremony. It may be well to explain that the performer, usually a medicine man, before beginning his incantations, prays to the Great Spirit, through mother Earth, by kneeling on the ground and pressing the flat of his hands firmly down on it, and appealing for success, and crying out loudly for help.' Mr. Brown adds: I can hardly blame the missionaries for not knowing the meaning of this word." (Satterlee, 1927, 17)].

* * * * *

U. S. vs. O-TON-KA-HUM-BA *

Case #13

[Order #55 Constituting Order]
[The Military Commission meets: October 4, Camp Release]

Witnesses: Henry Milard, David Faribault.

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* Other names: Otanka; O-ton-kee, Winnebago. *The Mankato Semi-Weekly* (11/15/1862) reported that when Sibley arrived in West Bend, he had two Winnebago warriors with the prisoners. One was described as the son of the old Chief Prophet, who fought in the Black Hawk War. He probably was this defendant.

[Charges and Specifications]

Charges: [general]

Specification 1: did on or about the 18th day of August 1862 join a war party of the Sioux Indians in a raid against the inhabitants of New Ulm and did participate [general]

Specification 2: [general].

Otanka being asked whether he is guilty, or not guilty says—I have been along with the Sioux. The chief that I was with went to Washington and died. I have good counsel from him. I intermarried with the Sioux and have been living with them for some time. I am a Winnebago. I lived this s1de of Yellow Medicine and the day previous to the outbreak I went down without a gun to Red Wood to make hay. I was with the party when the outbreak took place but having no arms took no part in it.

After the outbreak I would have been glad to go back to my tribe, but I had my wife, 2 children here and I came back to them. After that I was prohibited from going back. I have been afraid. I fled before the Sioux until the troops came in sight.

The soldiers came but let me go back. They knew I was a Winnebago and knowing that they were friendly to the whites suspected me and I was obliged to hide myself and sleep away from my lodge at night. I have been with the Sioux and have done nothing and I have been brought here. I suppose through the accusations of the Sioux because I am a Winnebago.

At the time of the pillage at Red Wood I went into Roberts store but took nothing. Since then I came up here but have done nothing. God was watching me and it was his providence that saved me from mixing up in this affair. I have lived with the Mdewakanton Indians. I never knew them to do anything bad.

At the last battle I was compelled to go. Red Iron advised the Indians not to go. Another Indian took a black horse. It got away from him and I took it. I got a wagon at my lodge. I was not at New Ulm but I heard 9 Winnebago were there. I saw Little Crow with my own eyes at the battle of Birch Coulee. Saw him Lire.

David Faribault being duly sworn says— I have heard a great deal about this man. He was a great brave at Red Wood. I saw him with a horse at Red Wood and he told me he had taken it from a peddler (?) I saw him at Red Wood running around. I saw him start for New Ulm. I know he was as far as the Fort.

Henry Miller [Millard] being duly sworn says— I know the prisoner. I saw the prisoner before the troubles. Didn't see him during the troubles. I was at Fort Ridgely but had no gun. I saw the Indian at Ridgely. I was at battle of New Ulm. Didn't see prisoner there.

The prisoner further states—All the nine Winnebago were there at Red Wood. Oko-na-kah or Little Chief was there and Waschasta-titappe, Chestna, Ha-Kak, Ky-wa-ze, Kah fired at whites. I saw three with my eyes.

HunKah, the brother of Hah-ya-Ka, Kay the son of Hom-me-Kah, a chief, a big fat fellow and two I can't see clear were there. I did not mean they were at Birch Coulee. They were at the first outbreak at Red Wood. Two were killed at New Ulm. I saw three of them fire at whites and I heard the rest did.

I now recall the names of the other two: E-du-kon-ni-Kah and Hay-mindt-Kah. The name of the son of Hom-we-kah is Sen-che-wan-cho-kah. There was still another Winnebago whose name I do not recollect. He belongs to Ke-ne-hut-e-Kah's band. There were 12 in all with myself instead of nine.

[Courtroom cleared and commission deliberates]

Not guilty of all charges but held as a witness against the Winnebago and to answer to future charges until the commission is satisfied of his innocence.

* * * * *

APPENDIX FIVE

THE STATE OF MINNESOTA

vs.

A. C. TOWNLEY AND ANOTHER

149 Minn. 5, 182 N.W. 773 (April 29, 1921)

. . .

George Hoke, George Nordlin and *Vince A. Day*, for appellants.
Clifford L. Hilton, Attorney General, *James E. Markham*, Assistant Attorney General, and *E. H. Nicholas*, County attorney, for respondent.

LEES, Commissioner.

Defendants were indicted in Jackson county in May, 1918, on a charge of criminal conspiracy. The substance of the indictment and the questions raised by their demurrer to it are reported in State v. Townley, 142 Minn. 326, 171 N.W. 930. Defendants were brought to trial in June, 1919. The trial lasted three weeks and resulted in a verdict of guilty. They moved for a new trial. On July, 1920, their motion was denied and they appealed, specifying 102 alleged errors. Some of the assignments are not of sufficient importance to justify discussion, but none have escaped our careful consideration. Some have been combined for examination and others will be considered separately.

. . .

After both sides rested, counsel for defendants made the following statement to the court:

"All of the attorneys of record * * * for defendant Townley * * * withdraw from this case arid terminate their employment in this case as attorneys for defendant Townley and * * * continuing to represent defendant Gilbert * * *

request the court * * * to indicate whether the court will permit one of us to address the jury solely as attorney for defendant Gilbert."

The court ruled that each side would be allowed to make but one argument. When the county attorney had finished his address, the defendant Townley said:

"I am advised that * * * I may dispense with the services of my attorneys and handle my own case. I have done that and I now ask the permission of the court to address the jury in my own behalf, not in any measure representing Mr. Gilbert."

The state objected. Defendants' attorneys announced that they waived their right to address the jury in Gilbert's behalf. The court denied Townley's request. Defendants' counsel then said: "Mr. Gilbert forbids me to argue the case under the circumstances for him." The result was that the case went to the jury without argument in behalf of either defendant. The denial of Townley's request is assigned as error. Two questions are involved: (1) The right of the defendant in a criminal action to make an unsworn statement to the court and jury. (2) His right to make the argument to the jury in his own behalf in a case where he is represented by counsel who have conducted his defense up to that point.

As to the first, it was the common law rule at least in capital cases, that the accused was entitled to make an unsworn statement to the jury at the close of the case. 1 Wharton, Crim. Ev. §427; 3 Wharton, Crim. Proc. §1515; 5 Minn. Law Rev. 390. The right, according to some of the English decisions, was not absolute, if the accused was defended by counsel. 1 Wharton, Crim. Ev. §427; Archbold, Crim. Prac. 196. In some American states there are, or have been, statutes giving the accused this right. Higginbotham v. State, 19 Fla. 557; Blackburn v. State, 71 Ala. 319, 46 Am. Rep. 323; Walker v. State, 116 Ga. 537, 42 S.E. 787, 67 L.R.A. 426 ; People v. Thomas, 9 Mich. 314. The practice originated because, until recently, the accused was not a competent witness in his own behalf. Since he may now testify, if he wishes to do so, there is no longer any reason why he should be permitted to enjoy a privilege which enabled him to tell his story to the jury without being sworn

or submitting to cross-examination. Commonwealth v. McConnell, 162 Mass. 499, 39 N.E. 107. We, therefore, hold that the accused has no right to make an unsworn statement to the jury.

With reference to the second question, we find no constitutional provision which confers on the accused an absolute right to make the argument to the jury in his own behalf. Attention is called to section 6, art. 1, Minn. Const., but that section merely declares that the accused is entitled to have the assistance of counsel in his defense. Section 4947, G. S. 1913, relating to the practice of law, recognizes the right of a party to appear in his own behalf in courts of record. That right undoubtedly exists independently of the statute. The assistance of counsel cannot be imposed on the accused against his will. 8 B.C.L. 83. But, if he elects to be represented by counsel, he waives his right to be heard himself according to some of the English cases. Reg. v. Rider, 8 Car. & P. 539; The Queen v. Manzano, 2 Fost. & F. 64; Reg. v. Beard, 8 Car. & P. 142. In the first of these cases the court remarked that a prisoner defended by counsel should be entirely in the hands of his counsel, that, if he stated as a fact anything which could not be proved by evidence, the jury should dismiss it from their minds, and, if he merely commented on what was already in evidence, his counsel could do it better than he could. Other English cases hold to the contrary. See 3 Wharton Crim. Proc. 1515; Archbold, Crim. Prac. 197.

Commonwealth v. McConnell, supra, is the only American case cited to sustain defendants' contention. We are not inclined to follow it under the special facts of this case. Both defendants were represented by three experienced attorneys, who had entire charge of the defense until the time came to make the argument to the jury. At this point Townley ostensibly discharged all of them. We say "ostensibly," because it can hardly be claimed that there was a bona fide termination of their employment. After the verdict was returned the same attorneys again appeared for both defendants, moved for a new trial, had a case settled and allowed, took this appeal and appeared in this court and argued the case for them. At the oral argument we understood counsel to say that their alleged discharge was entered of record, solely to avoid the question that would arise if Townley asked leave to argue his own case while still represented by counsel. Since

their discharge was only colorable, we hold that it was within the discretion of the trial court to grant or refuse Townley's request. In the exercise of its discretion, the court might properly take into consideration the fact that a party who has not testified is almost certain, in the guise of argument, to make assertions of fact favorable to his cause, which may properly be made only from the witness stand. It might also consider the circumstances under which the pretended discharge of counsel took place, which indicated an attempt by Townley to gain by subterfuge an opportunity to become at once a witness for himself and his own advocate.

Defendants insist that they have not had a fair trial, for the reasons already discussed and for others which we deem of too little merit to justify the further extension of this opinion. They were tried in an agricultural county, presumably by a jury composed in part of farmers. Their speeches had been principally addressed to farmers. Their printed matter was circulated among them. When the jury was impanelled, they announced that they were satisfied with its membership. Their counsel was diligent and earnest in their defense.

It is our conclusion, after a thorough examination of the record, that their guilt was clearly established and that none of the errors of law of which they complain resulted in their being deprived of any of their substantial rights. Their conviction is, therefore, sustained and the order denying a new trial affirmed. ■

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