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Judicial Decisions on Criminal Law and Procedure

JUDICIAL DECISIONS ON CRIMINAL LAW AND PROCEDURE.

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ATTORNEY AND CLIENT.

State v. Frazier, S. D., 128 N. W. 322. *Neglect of Counsel.* Defendant's counsel failed to file an abstract and brief within the time fixed by rule of court, in taking an appeal. No proper excuse for the failure was shown. Held, the appeal should be dismissed. "It may seem hard that one should suffer through the neglect of his counsel . . . but appellant has been tried before a jury of his peers and found guilty. Such verdict and judgment entered thereon are presumed to be just. The right to appeal to a higher court is purely a statutory right dependent upon the appellant complying strictly with the laws and rules governing such appeal. And appellant chooses his own counsel to act for him and is bound by all they do or fail to do. Without rules of procedure it would be impossible for courts to transact business."

State v. Johnson, Ia., 128 N. W. 837. *Disbarment.* In disbarment proceedings an attorney was shown to have charged extortionate fees, under written contracts with clients whose knowledge of English was imperfect, and who did not understand the contracts. He had also compounded a felony. Held, he was properly disbarred.

ALIBI.

State v. Hassan et al., Ia., 128 N. W. 161. *Reasonable Doubt.* An instruction, that if, in view of all the evidence, the jury have a reasonable doubt as to whether defendants were in some other place when the crime was committed, they should be given the benefit of the doubt, and acquitted; that they are not required to prove an alibi beyond a reasonable doubt to be entitled to an acquittal; but it is enough if the evidence raises a reasonable doubt of their presence at the time of the commission of the crime.

ASSAULT AND BATTERY.

State v. Russo, 77 Alt. 743. Del. *Insufficiency of Defense.* Neither looks nor gestures, however insulting, nor words, however opprobrious or offensive, can amount to a provocation sufficient to excuse or justify even a slight assault.

AMENDMENT AND IMPEACHMENT OF VERDICT.

People v. Duffek, Mich., 128 N. W. 245. *Separation of Jurors.* On a trial for assault with intent to kill, the jury, pursuant to an instruction from the court, but without the consent of the defendant, delivered a sealed verdict to

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These cases have been digested from the National Reporter series, from July, 1910, to January 6, 1911.

By courtesy of the West Publishing Company of St. Paul use has been made of the head notes in their reports.

the clerk at night and were then allowed to separate, being cautioned to keep the verdict secret and not to talk about it. The next morning eleven jurors appeared, one being ill. The jury again separated, with a like caution. The next morning all the jurors being present, the verdict was returned to them unopened; they retired and later returned the verdict amended in a matter of form. The verdict was opened, the jury polled and the verdict recorded. Held, the conviction should be affirmed, as the case was not capital; there was no intimation that the jury did not render an impartial verdict, supported by the evidence and the law, and no suspicion of undue influence was averred. The diversity of practice in different common law states shows that the whole matter is one of practice, and that there is no constitutional or so-called common law right of the accused person to have jurors kept together until a verdict is returned into court, except in capital cases.

People v. Stewart, Mich., 127 N. W. 817. *Impeachment.* A motion for a new trial was based upon the affidavits of two jurors that the jury considered the failure of the defendant to take the stand as a witness in her own behalf and agreed to the conviction largely for this reason. Held, the affidavits of jurors were not receivable to impeach their verdict. The conviction was affirmed.

EVIDENCE.

State v. Hassan et al., Ia., 128 N. W. 961. *Admissible Evidence.* Allowing a witness to testify that he heard his brother say it was a certain time when he was talking with defendants was not prejudicial, where the brother testified what the time was. Testimony that certain tracks were horse tracks, though in the nature of conclusion, is a fact to which a witness may testify, where no adequate description of the tracks can be given. It was also held sufficient to authorize admission in evidence of a coat, on which are human blood stains, that defendant had it three days after the murder, though whether it was worn by him on the night of the murder can only be established by circumstantial evidence, there having been no eye-witness. Testimony given by witness to fix the time when he heard him talking with his brother, that he heard his brother say it was a certain time, though hearsay, was admissible as part of the transaction, if the brother made the remark at the time of the transaction, or so near as to be explanatory of the time.

People v. Yund, Mich., 128 N. W. 743. *Res Gestae.* Where, on a trial for assault and battery, the evidence showed that accused and prosecutor had an altercation, culminating in the assault while they were going to a depot about 125 feet from the scene of the altercation, evidence that the quarrel continued at the depot, and that prosecutor there called accused a foul name and threatened him, was admissible as part of the *res gestae,* the quarrel at the depot being a continuation of the original quarrel, without interruption.

State v. Sloah, Ia., 128 N. W. 842. *Immaterial Evidence.* In a trial for murder immaterial evidence was admitted, tending to show that the accused was engaged in the transaction. He conceded that he was. Held, not a ground for reversal in the absence of a showing that the testimony could be prejudicial to the defendant.

Jones v. State, Neb., 127 N. W. 158. *Improper Evidence.* On a trial for murder the defendant claimed he was acting in self-defense. The eye-witnesses were interested, and their testimony contradictory. The main question was

whether deceased or defendant was the aggressor. A letter written by the defendant more than six months after the homicide, showing ill feeling against the widow and children of deceased, was improperly admitted in evidence. In charging the jury the trial judge gave fourteen instructions requested by the defendant, introducing each with the oral statement, "At the request of the defendant I instruct you as follows." He then said, "Gentlemen of the jury, the court on its own motion instructs you," and gave seventeen other instructions. He further instructed the jury that they should give the same weight and consideration to the instructions asked by the defendant as to those given by the court on its own motion, but inquiries made by the jury, after they had failed to agree, indicated that they did not attach as much weight to some portions of the instructions as to others. Held, that as the jury would look outside of the conflicting testimony of the witnesses to other proofs for the defendant's motives and propensities, and would find in the letter, when unexplained, a disposition to be unkind or cruel to the widow or orphans he had made, its effect would be to prejudice defendant in the minds of the jury. Hence, this was prejudicial, although ordinarily such a ruling would be harmless error. Ordinarily the trial court should not emphasize the fact that some of the instructions given were requested by the defendant and others given by the court on its own motion. The instructions requested by the defendant were, in some measure at least, discredited by the manner in which they were submitted to the jury, and in the other instructions the law on the subject of self-defense was not as fully or accurately stated as it should have been. While this might not be prejudicial in many cases, in the peculiar circumstances of the present case it was prejudicial error. Hence the conviction should be reversed.

State v. Laper, S. D., 128 N. W. 476. *Improper Evidence.* A prosecution for receiving stolen property turned largely upon the identification of the animal stolen with one found in the defendant's possession. The defendant introduced several witnesses to prove that the latter animal had been in his possession before the larceny and belonged to him. The state introduced several witnesses who testified that the animal was the one stolen. On motion for a new trial the affidavits of twenty-three witnesses were introduced, all tending to prove the defendant's prior possession. Held, a new trial should be granted, as the defendant was not bound to anticipate that the rebutting testimony would overcome the testimony introduced by him in support of his ownership of the property, and hence, was not wanting in due diligence in not procuring those witnesses at the first trial. That as the new evidence, while tending to establish the ultimate fact that the defendant was the owner of the mare, did not corroborate the statement of any witness at the trial that at a particular time and place he had seen the mare in the possession of the defendant, it was not merely cumulative. Where the court can see from the evidence sought to be introduced that on a new trial that it would probably change the result or tend to raise doubts in the mind of the jury, it should grant a new trial. Rules established by the courts for the promotion of justice and the ending of litigation should not be used for the purpose of injustice.

State v. Preuss, Minn., 127 N. W. 438. *Insufficient Evidence.* In a prosecution for seduction the evidence showed that defendant seduced the prosecutrix in one county, and some thirty days later in a second county. Held, the two acts could not be treated as one continuous act, as they might if

committed in the same jurisdiction. Without proof that after the prosecutrix was seduced in the first county, she had acquired the virtue of chastity before the seduction in the second county, the offense was not made out. Hence the conviction should be reversed.

People v. Stewart, Mich., 127 N. W. 817. On a trial for arson two witnesses gave their opinion that a person whom they saw near the building burned was the defendant. On motion this testimony was stricken out and the court charged the jury that they should not consider it in their deliberations. Held, under the repeated rulings of the court and his final instructions to the jury at the close of the case, they could not have been misled into supposing that they were at liberty to consider the opinions of the witnesses. Hence the conviction should be affirmed.

FORMER JEOPARDY.

State v. Barnes, S. D., 128 N. W. 170. *Larceny.* Five horses were stolen from one owner, and two from a different owner at another place, but on the same expedition and the same night. Defendant was tried and acquitted for stealing the five horses. On an indictment for stealing the two horses, held there were two distinct larcenies, and that he had not been in jeopardy as to this second charge.

People ex rel. Stabile v. Warden, 124 N. Y. Supl. 341. *Discharge of Jury Without Verdict.* The improper discharge of a jury after they have retired to consider of their verdict, before agreeing upon a verdict, is equivalent to an acquittal.

Gaussin v. State, 92 N. E. 651. Ind. *Refusal to Receive Verdict.* The verdict was read in open court and the jury polled, when the prosecuting attorney, noticing accused's absence from the court room, objected to receiving the verdict, and the court directed the verdict to be returned to the jury and directed it to retire, whereupon accused was brought into court and the jury recalled and presented the same verdict. Held, that the direction to retire until accused was brought in was a refusal to receive the verdict first presented, and did not place accused twice in jeopardy, upon receiving the verdict when he was in the court room.

GRAND JURY.

State v. Hassan et al., Ia., 128 N. W. 961. *Method of Selection.* Substantial compliance with the law, as to the manner of selecting and drawing a grand jury, is all that is required; and such technical defects as failure of the notice to the board of supervisors to name the number of grand jurors to be drawn, failure to serve the notice on the board, failure to record the list of grand jurors selected by the board, and in the call of the board, will be disregarded as without prejudice. Defendant's motion to quash an indictment because the grand jury was illegally drawn and impaneled was overruled, but at the next term of court, on motion of the county attorney, the grand jury of the year was discharged, as illegally drawn, and the indictment dismissed. A new grand jury was drawn and discharged on defendant's challenge, as illegally drawn and impaneled. A third grand jury was drawn, defendants' challenge overruled and defendants were reindicted. They contend that the first grand jury was illegally dismissed and the subsequent proceedings invalid. Held, that if the discharge of the first jury and the setting aside of the indictment

found by it were error, it was harmless, as defendants have no vested rights in any particular grand jury list.

INDETERMINATE SENTENCE.

State v. Ferguson, Ia., 128 N. W. 840. *Constitutionality.* The statute providing for indeterminate sentences in criminal proceedings is constitutional.

State v. Davenport, Ia., 128 N. W. 351. *Punishment.* The defendant was sentenced to a definite term of imprisonment for burglary, contrary to the indeterminate sentence law. It was objected that the punishment was excessive. Held, that the punishment may be adjusted by the board of parole, under the statute, in spite of the sentence for a definite period, and that the court could not interfere.

INDICTMENT, REVERSAL.

State v Preuss, Minn., 127 N. W. 438. *Sufficiency.* In an indictment for seduction the phrase, "being then and there an unmarried female of previous chaste character," was not connected with the prosecutrix, and as it stood was meaningless. A statute required the court to pronounce judgment on a conviction according to the right of the case, and to disregard formal defects which do not tend to the prejudice of the substantial rights of the defendant. Held, the indictment was sufficiently definite and certain to comply with the rule.

People v. Parsons, Mich., 128 N. W. 225. *Sufficiency.* A complaint intended to charge that defendant imputed a want of chastity to the prosecutrix was possibly ambiguous. Held sufficient. "The language is to be construed as those to whom it was spoken would naturally understand and clearly imputed a want of chastity. We are not inclined to indulge in sophistical conjectures that the complaining witness might have been a recently divorced woman."

State v. Weaver, Ia., 128 N. W. 559. *Sufficiency.* Indictment for uttering a forged instrument failed to state the name of the person to whom the instrument was uttered or to state that the name was unknown to the grand jurors. Held, not a ground for reversal, as it was not essential that the instrument be actually transferred to and accepted by another as genuine, especially under a statute providing that where an intent to defraud is required to constitute an offense the person intended to be defrauded need not be named.

People ex rel. Brettor v. Schlett, Warden, 123 N. Y. Supl. 686. *Sufficiency.* That upon the hearing after conviction of grand larceny, before sentence, authorized by Code Crim. Proc. par. 485 a, added by Laws 1909 c. 66, defendant admitted that he had been in prison three terms under as many charges for grand larceny, did not authorize the court to impose sentence under Pen. Law (Consol. Laws c. 40) par. 1942, providing that a person convicted of felony who has three times before been convicted of felony, may be sentenced to imprisonment for life, where the indictment did not charge the prior convictions.

U. S. v. Eccles, 181 Fed. 906. *Duplicity.* The crime of conspiracy to defraud the United States within Rev. Stat. par. 5440 (U. S. Comp. St. 1901, p. 3676) is not necessarily complete when the first overt act is committed; but, where it contemplates a series of acts, it is a continuing offense, as to all conspirators who have not withdrawn therefrom as long as any act or acts are committed by one or more of them in furtherance of the object thereof, and

such acts are not separate and distinct offenses, but a part of the substantive offense, and may be charged in the same count of an indictment without rendering it bad for duplicity.

State v. Ferguson, Ia., 128 N. W. 840. *Sufficiency.* An indictment for burglary, alleging that the accused broke and entered the ticket office of the Chicago, Milwaukee & St. Paul Railway Company in Sac City with the intent to steal property therein, was not defective in not alleging the ownership of the property, since the ownership will be presumed, if necessary, from the allegation of possession of the ticket office, which was sufficiently alleged. Held also, that it was unnecessary to allege that the railway company was a corporation, since the name sufficiently imported that such was the case, or that the company was organized under the laws of any state or the nation. Nor need it be alleged in an indictment, charging that accused broke into an office with the intent to steal money therein, that the money stolen was lawful money, since the essence of the offense of burglary is against the building.

People v. Mead, 92 N. E. 1051. N. Y. *Embezzlement.* The name, "The People's Mutual Life Insurance Association and League," raising a presumption that the league is an association or corporation, an indictment under Penal Code par. 528, subd. 2, making embezzlement by the agent, "of any person, association or corporation" larceny, charging that defendant feloniously appropriated to his own use the money of said league, need not allege it to be an association or corporation.

People v. Parsons, Mich., 128 N. W. 225. *Harmless Error.* In a prosecution for misdemeanor pending before a justice, the magistrate failed to properly impute the plea of not guilty, an adjournment, and the offense charged, but the affidavit for the writ of certiorari and the return showed that the proceedings required by law were correctly had, and that defendant was regularly and legally convicted. A statute provided that the appellate court should "give judgment in the cause as the right of the matter may appear, without regarding technical omission, imperfection or defect in the proceedings before the justice, which would not affect the merits." Held, the conviction should be affirmed, as the omission and defects complained of in no way affected the merits of the case nor interfered with the defendant's rights. He had a fair and impartial trial, and the evidence was conclusive of his guilt.

Bowman v. State, Ark., 129 S. W. 80. *Harmless Error.* On an appeal from a conviction of rape the transcript did not show that the mandate of the supreme court upon the reversal of the case on a former appeal had ever been filed in the circuit court, nor did it show a judgment of the circuit court overruling the defendant's demurrer, as directed by the mandate. On permission granted by the supreme court the record of the circuit court was amended to show both of these in accordance with the facts. In the trial below the jury was not drawn as provided by statute. The state's attorney, in opening the case, made an improper remark, was rebuked by the court, and it was withdrawn by him. The court charged that the consent of the witness would not be a defense if she was under the age of twelve years, and "on account of her tender years was incapable of understanding the nature of the act"; but there was no evidence to show that she was incapable of understanding it. The court also charged that if an impeached witness was corroborated, his testimony should be taken and considered by the jury. A statute provided that judgment should be reversed for prejudicial errors only. The verdict was amply

supported by the evidence. Held, under the statute it was not necessary to reverse the judgment "on account of mere matters of form which do not affect the substantial rights of the defendant." Filing the mandate gave the circuit court jurisdiction, and even if the demurrer had not been acted upon it would be considered as waived. As the defendant's peremptory challenges were not exhausted, he was not prejudiced by the improper selection of jurors. The admonition of the court and the withdrawal of the improper remark would prevent prejudice to the defendant. As there was no proof that the defendant consented to the act, the charge respecting her consent could not prejudice. As the testimony of the witnesses who were impeached was verified by that of others who were not impeached, there was no prejudice to defendant in this charge. Hence the conviction should be affirmed.

People v. Yund, Mich., 128 N. W. 742. *Instructions.* The supreme court will not reverse a misdemeanor case for failure to charge on presumption of innocence and reasonable doubt where there was neither a request for charges thereon, nor exceptions therefrom, and were no miscarriage of justice resulted from the court's decision. And while the supreme court may consider omissions in instructions, though no request was made nor exceptions taken, yet it will only do so in cases clearly demanding it because of the miscarriage of justice.

State v. Jacobs, S. D., 128 N. W. 162. *Prejudicial Error.* On a trial for murder the defense was that deceased shot herself. The state contended that defendant shot her at close range, and introduced expert testimony to show that the weapon must have been held between slight contact and one-fourth of an inch from the clothing of the deceased. Held, the conviction should be reversed. The evidence was immaterial, as it did not tend to disprove the theory of the defense, but as the counsel for the state and the circuit judge failed to observe the immateriality, it is not reasonable to assume that it was observed by the jury, and it would produce an impression unfavorable to the accused.

Adler v. U. S., 182 Fed. 464. *Cross-Examination by Judge.* While it is the duty of the trial judge, in a criminal prosecution in the federal court, to facilitate the orderly progress of the trial and to shorten unimportant preliminaries and discourage dilatory tactics of counsel, it is improper for the judge to take part in the cross-examination of defendant's witnesses in such a manner as to impress the jury with the idea that the judge had a fixed opinion that accused was guilty and should be convicted.

Humes v. U. S., 182 Fed. 485. *Effect of Good Reputation.* In a criminal prosecution for alleged fraudulent use of the mails, in which defendant introduced evidence of his good reputation, the giving of an instruction that, if defendant had a good reputation "it only accentuates the measure of his responsibility" and enabled him the better to impose on others, was error.

Garst v. U. S., 180 Fed. 339. *Expression of Opinion by Trial Judge.* While it is not error in the federal courts for the trial judge to state his opinion as to the guilt or innocence of the defendant in a criminal case if given to the jury with the proper instruction that it has no binding force, yet, when such opinion is given, it should be in connection with the instructions, and withholding it until it appears likely that the jury will not agree is a practice not to be commended.

People v. Yund, Mich., 128 N. W. 743. *Improper Argument of Counsel.*

The improper argument of the prosecuting attorney on trial in the circuit court, on appeal from a conviction in justice's court, that if the jury found accused guilty they would only be doing what another jury had done before, was not ground for reversal, since the fact must have been known from the record, especially where the trial court directed the jury to pay no attention to what had been done in the justice's court.

People v. Biddell, Mich., 127 N. W. 33. *Misconduct of Attorney.* In a prosecution for giving away intoxicating liquors, the prosecuting attorney used in argument evidence that had been stricken from the record. On objection by the defense the court directed him to confine himself to the testimony as admitted, and later charged the jury to disregard the testimony stricken out. Held, the conviction should not be reversed for this misconduct of the attorney.

Pard v. State, Wis., 128 N. W. 65. During a trial for wilfully burning insured property, several of the jurymen examined the burned premises. A statute provided that such misconduct should not cause a reversal of a judgment unless in the opinion of the court it appeared that it had affected the substantial rights of the defendant. Held, the conviction should be affirmed, though this was misconduct, as after an examination of the entire record the court could not see that the substantial rights of the defendant were affected.

HOMICIDE.

People v. Gilbert, 92 N. E. 84. N. Y. *Indictment.* Where an indictment for first degree murder, after specifying the time, place and means used, and other particulars in the usual way, alleged that the defendant did thus kill and murder Viola Hughes feloniously and in malice aforethought, the word "murder" implied that a rational being was the subject of the crime, and the use of the ordinary given name and surname raised the presumption that a human being was meant, so that the indictment was not objectionable for failure to allege that the person killed was a human being.

Goodlove v. State, 92 N. E. 491. Ohio. *Identity of Deceased.* Where an indictment charges accused with having assaulted and killed one "Percy Stuckey, alias Frank McCormick," evidence that the defendant assaulted and killed a person commonly known as Frank McCormick will not sustain a verdict of guilty against the defendant, unless it also be shown that the Frank McCormick assaulted and killed and Percy Stuckey were one and the same person.

Commonwealth v. Chapler, 77 Atl. 1013. Pa. *Degree of Crime.* It is the right of the jury to ascertain the degree of homicide, and the right of accused to have it ascertained by the jury, and it is reversible error to instruct that the jury are bound to find a verdict of murder in the first degree.

State v. Primrose, 77 Atl. 717. Del. *Self-Defense.* In order that one may avail himself of the plea of self-defense, although he could have reasonably believed that he was in danger of death from deceased's attacks, yet he must have retreated, if he could safely have done so, or used such other means as were in his power to avoid killing deceased.

State v. Collingsworth, 92 N. E. 22. Ohio. *Unlawful Act.* Violation of an ordinance regulating speed of horses in public streets, whereby a person was killed, is not manslaughter within Rev. St., par. 6811.

JURIES.

Wilson v. State, Neb., 128 N. W. 38. *Want of Impartiality.* On trial for murder in the first degree, a juror was accepted whose *voir dire* examination showed that he had an opinion as to the guilt or innocence of the defendant, based upon his actual knowledge of many of the facts and upon a personal investigation, that it could be changed, but would take some evidence to change it. The state was permitted to prove that defendant had deserted from the United States Army shortly before the crime was committed, that though defendant was a married man he had agreed to marry another woman, and the prosecution caused his lawful wife, who could not testify against him, to be placed within the bar, pointed out, and thus made to appear as a living witness against him. The cross-examination of the defendant was long and persistent, going into minute details of his domestic life and violating the ordinary rules of cross-examination. During the cross-examination the court asked a sarcastic question. The prosecutor, in arguing the case, appealed to public sentiment to induce the jury to recommend the death penalty and was reprimanded by the trial court and the jury strongly and fitly cautioned against his appeal. Held, the juror was not impartial and the constitutional right to a fair trial had been violated. It was the duty of the prosecutor to aid the court and jury in ascertaining and arriving at the truth. He should not browbeat and abuse the defendant and witnesses, nor intimidate juries. Instead of inflaming the public mind against an accused, he should seek to allay bitterness and deliberately and dispassionately search for the truth. The court should not interfere in the examination of witnesses except in case of urgent necessity. Hence the conviction should be reversed.

State v. Jacques, 76 Atl. 652. R. I. *Competency.* A juror testifying on his *voir dire* that he has formed an opinion from newspaper articles, and stating in response to the statement of the court that the test is not whether he has formed an off-hand or temporary opinion, such as an ordinary man will form from reading a newspaper in regard to an event in which he is not particularly interested, but the question is, whether one can sit as a juror, take the case, listen to the evidence and decide the case on the evidence heard in court, is properly permitted to serve as juror.

Holt v. U. S., 31 Sup. Ct., Rep. 2. *Opinion. Influence.* The trial court's refusal to sustain a challenge to a juror for cause will not be disturbed by an appellate court, where it appears from an examination of such juror that he had not talked with anyone who purported to know about the case of his own knowledge, but that he had taken newspaper statements for facts, that he had no opinion other than that derived from the newspapers, and that evidence would destroy it very easily, although it would take some evidence to remove it, and he testified that if the evidence failed to prove the facts alleged in the newspapers he would decide according to the evidence or lack of evidence at the trial, and thought that he could try the case solely upon the evidence, fairly and impartially.

Burns v. State, Wis., 128 N. W. 961. *Conduct of Jury.* Though the press is to be condemned for publishing the secrets of the jury room while the jury is considering a case, and though the jury and the officer in charge of it are to be condemned where the jury, after retiring, was permitted to be possessed of a paper, whereby they learned that their deliberations were known to the public, and particularly that one juror was persisting against the opinions of the

others that defendant was not guilty, yet, under St. 1898, *2829, requiring error not affecting substantial rights to be disregarded, a conviction will not be reversed therefor, where it cannot be concluded that, had the improper conduct not occurred, the result might within reasonable probability have been different.

State v. Hassan et al., Ia., 128 N. W. 961. *Opinions Based on Newspaper Reports.* Though a juror has formed an opinion from what he has heard and read as to defendant's guilt, and still has that opinion, yet he testifying that he can, and, if accepted as a juror, will, try the case on the evidence alone, and reach a fair and impartial decision, regardless of any such opinion, overruling challenge to him, which is discretionary, is not error.

SPECIFIC CRIMES.

People v. McDonald et al., Mich., 128 N. W. 737. *Larceny.* While unexplained possession of property recently stolen is *prima facie* evidence of guilt, of larceny, such fact, unaccompanied by other proof or circumstances indicating guilt, is insufficient to sustain a conviction of burglary.

People v. Gaylord, 124 N. Y. Supl. 517. *Larceny.* The constitution provides that the forest preserve and the lands of the state constituting the forest preserve shall be forever occupied as wild forest land, and Art. 7, par. 7, provides that they shall not be leased, sold, exchanged or taken by any corporation, nor shall timber be sold, removed or destroyed. Accused, employed by the state to patrol and protect its forest reservation, entered into an understanding with a lumberman by which the latter was to cut down trees on the forest preserve, and accused sold the trees to other persons, and he and an accomplice received from the sale of the timber $7,750. Held, that the state timber was a subject of larceny, although the constitution provides that it shall not be sold, and the same constitutional provision does not deprive the timber of value, and, therefore, accused was properly convicted of grand larceny.

State v. Whitmarsh, S. D., 128 N. W. 580. *Crime Against Nature.* A statute providing for the punishment of the "crime against nature" is not limited to the common law crime of sodomy, but includes every unnatural carnal copulation.

State v. Weyant, Ia., 128 N. W. 839. *Desertion.* A deserted wife is destitute within Code Supp. 1907, *4775a, punishing one who without good cause abandons wife or child under 16 years of age, leaving either in a destitute condition, when she is left in a condition of great need, or has no money on which she can rely for support, though she is not left unhoused, or in a condition of actual starvation; and where a husband deserted his wife and infant child, leaving them in a rented house, with only a cow, which belonged to her, and sufficient provisions to sustain them for a few days, potatoes, which the wife sold for $10, and some articles of furniture, and she was afterward compelled to live with her father, except when she worked out for a living, the question whether she was left destitute by the accused was for the jury.

THE ALABAMA PEONAGE CASE.

On January 3, 1911, the Supreme Court of the United States, through Mr. Justice Hughes, handed down an opinion in the case of Bailey v. the State of Alabama, involving some interesting and important points of criminal and constitutional law. Bailey, the plaintiff in error, was convicted in the Montgomery city court under an Alabama statute purporting on its face to

make it criminal to fraudulently obtain and keep money or property secured under contracts of employment. The question in the case was whether this statute was in violation of the Fourteenth or Thirteenth Amendments to the constitution of the United States.

The Court held that the statute authorized the holding of persons to service under the system known as peonage, contrary to the Thirteenth Amendment and to Section 1990, Rev. Stat., enacted to enforce the provisions of the amendment. The Alabama statute in question was enacted in 1896 and amended in 1903 and 1907. The amended act read: "Any person, who, with intent to injure or defraud his employer, enters into a contract in writing for the performance of any act of service, and thereby obtains money or other personal property from such employer, and with like intent and without just cause, and without refunding such money or paying for such property, refuses or fails to perform such act of service, must on conviction be punished by a fine in double the damage suffered by the injured party, but not more than $300, one-half of said fine to go to the party injured and one-half to the county * * * and the refusal or failure of any person who enters into such a contract, to perform such act of service * * * or refund such money, or pay for such property without just cause, shall be *prima facie* evidence of the intent to injure his employer or defraud him." [General Acts of Alabama, 1907, p. 636.] By a rule of evidence enforced in the courts of Alabama, the accused, for the purpose of rebutting the statutory presumption, was not allowed to testify "as to his uncommunicated motives, purpose or intention." The Court said this rule most be regarded as having the same effect as if read into the statute itself."

The facts of the case as stated by the Court were, in brief, as follows: "Bailey made a contract to work for a year at $12 a month. He received $15, and he was to work this out, being entitled monthly only to $10.75 of his wages. No one was present when he made this contract but himself and the manager of the employing company." Then follows this strong statement by the Court showing absence of actual intent to defraud. "There is not a particle of evidence of any circumstance indicating that he made the contract or received the money with any intent to injure or defraud his employer. On the contrary, he actually worked for upwards of a month." However, the trial court, in accordance with the statute, charged that the conduct of the defendant was *prima facie* evidence of intent to defraud. Nor was the defendant, by the rule of evidence heretofore referred to, allowed to testify as to his "uncommunicated motives, purpose or intention." Defendant was convicted, fined thirty dollars, and in default thereof, sentenced to hard labor "for twenty days in lieu of said fine, and one hundred and sixteen days on account of said costs." The Supreme Court of Alabama affirmed this sentence and upheld the constitutionality of the statute.

In the Supreme Court of the United States the statute was held unconstitutional and the judgment below reversed. Mr. Justice Holmes wrote a dissenting opinion in which Mr. Justice Lurton concurred. All the members of the court, however, agreed on some points. It was agreed to be immaterial that the defendant was a black man. The statute on its face made no racial discrimination. The record did not show any unfair administration of the law, such as would constitute a denial of the equal protection of the laws under the rule of Yick Wo v. Hopkins, 118 U. S. 356, 373. It was also agreed that no question of sectional character was involved, and that the Alabama statute might be viewed in the same manner as if it had been enacted in New York or Idaho.

The point of disagreement was as to whether the statute fostered or permitted the system known as peonage. What is peonage? The answer in the words of Mr. Justice Hughes is: "Peonage is a term descriptive of a condition which has existed in Spanish America, and especially in Mexico. The essence of the thing is compulsory service in payment of a debt." A peon is a person who is compelled to work for his creditor until his debt is paid. The Alabama statute, according to Mr. Justice Hughes, though purporting to punish fraud, made the mere breach of the contract to serve, a crime. It was argued that the statute did not require a verdict of guilty without actual fraud. The Supreme Court of Alabama, in fact, said as much in deciding the case. (161 Ala. 78.) But the reply of Mr. Justice Hughes was that although the statute did not make it obligatory to find defendant guilty without intent to defraud, yet it authorized the jury to do so, and it had in fact done so in this case. Before the statute had been amended, fraud was an essential ingredient of the offense. (Ex parte Riley, 94 Ala. 82.) It was "the difficulty in proving the intent made patent by that decision," which "suggested the amendment of 1903." (Bailey v. State, 158 Ala. 25.)

The conclusion, then, is that the statute authorizes a conviction for a mere breach of contract. The last step in the argument is that this amounts to compulsion. "The state may impose involuntary servitude as a punishment for crime, but it may not compel one man to labor for another in payment of a debt, by punishing him as a criminal, if he does not perform the services or pay the debt." * * * "There is no more important concern than to safeguard the freedom of labor upon which alone can enduring prosperity be based. The provisions designed to secure it would soon become a barren form if it were possible to establish a statutory presumption of this sort, and to hold over the heads of laborers the threat of punishment for crime, under the name of fraud, but merely upon evidence of failure to work out their debts."

The dissenting opinion of Mr. Justice Holmes attacks both points made in the argument of the majority. He maintains: (1) that the Alabama statute does not punish the mere refusal to labor according to contract, as a crime; (2) even if it does, it is not in violation of the Thirteenth Amendment. On the first point he says: "*Prima facie* evidence is only evidence, and as such may be held by the jury insufficient to make out guilt, citing 161 Ala. 78, and 80 Maine 57. "The Alabama statute as construed by the state court, and as we must take it, merely says, as a court might say, that the prosecution may go to the jury. * * * In my opinion the statute embodies little if anything more than what I should have told the jury was the law without it. The right of the state to regulate laws of evidence is admitted, and the statute does not go much beyond the common law."

On the second point he says: "The Thirteenth Amendment does not outlaw contracts for labor. That would be at least as great a misfortune for the laborer as for the man that employed him. * * * But any legal liability for breach of a contract is a disagreeable consequence which tends to make the contractor do as he said he would. Liability to an action for damages has that tendency as well as a fine. If the mere imposition of such consequences as tend to make a man keep his promise is the creation of peonage when the contract happens to be for labor, I do not see why the allowance of a civil action is not, as well as an indictment, ending in fine. Peonage is service to a private master at which a man is kept by bodily compulsion against his will. But the

creation of the ordinary legal motives for right conduct does not produce it. Breach of a legal contract without excuse is wrong conduct, even if the contract is for labor, and if a state adds to the civil liability a criminal liability to fine. it simply intensifies the legal motive for doing right; it does not make the laborer a slave."

"Finally," he argues, "if a fine is permissible, imprisonment with hard labor is also. Compulsory work for no private master in a jail is not peonage." * * * "I do not think the fact that the liability to imprisonment may work as a motive when a fine without it would not, and I think it would induce the laborer to keep on when he would like to leave. But it does not strike me as an objection to a law that it is effective." C. G. V.