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JUDICIAL DECISIONS ON CRIMINAL LAW AND PROCEDURE.

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ABANDONMENT OF CHILD.

Phelps v. State, Ga. Ct. App., 72 S. E. 524. *Statute of Limitations.* Defendant had abandoned his child some four or five years before the beginning of the prosecution and had not since contributed to its support. The period of limitation was two years. A prior decision of the Supreme Court held that a conviction of abandonment was a bar to a prosecution for a continuance of the same abandonment. Held, that the crime consists of two elements: Separation from the child, and failure to supply its needs. The continuance of the latter element keeps the offense alive, though it began and the separation occurred more than two years before the prosecution was begun. The dinstinction between this and the prior decision seems to be that in that case the defendant, having been convicted of both elements, could not be again put in jeopardy upon the original separation, and the continued failure to support, without a new separation, was not made criminal by the statute.

ALIENS.

In re Ross, 188 Fed. 685. *Naturalization.* Where an alien, applying for admission to citizenship, has not behaved as a man of good moral character while residing in the United States, the court, in the exercise of a sound discretion, will refuse his petition, though his behavior has been good during the five years preceding the petition.

An alien, pleading guilty to murder in the second degree, will not be admitted to citizenship, though before the offense and for more than five years after the expiration of the term of imprisonment, his conduct reveals no cause for censure.

APPEAL.

Hoffman v. State, Ind., 95 N. E. 1002. *Technical Errors.* Alleged technical errors relating to the evidence and instructions in a criminal prosecution for rape are not ground for reversal, where they could not have affected the result.

ARRAIGNMENT.

State v. Drown, Vt., 81 Atl. 641. *Waiver.* P. S. 2264 provides that in all criminal cases, where the party indicted on being arraigned, shall refuse to plead, it amounts to a denial of the facts charged in the indictment, and the same judgment after trial shall be given against him as if he had pleaded in proper form. Held, that accused, in a prosecution for rape, could not waive arraignment, and, having been placed on trial without having been arraigned, his conviction was void.

ARREST.

Robertson v. Territory of Arizona, 188 Fed. 783. *Rights of Officer.* Instructions, on the trial of a peace officer charged with homicide committed

while attempting to arrest the deceased for a misdemeanor, considered, and, taken as whole, held to correctly charge that, while the defendant did not have the right to kill deceased for attempting merely to avoid arrest by running away, he had the right to overcome actual resistance to arrest by such force as was necessary, even to the taking of life.

BIGAMY.

People v. Dauchy, 131 N. Y. Supp. 993. *Knowledge of Death of First Wife.* Under Penal Law, Sec. 341, Subd. 1, providing that one shall not be guilty of bigamy whose former wife has been absent for five years successively, then last past, when the second marriage is consummated, without being known to the husband within that time to be living and believed by him to be dead, a man was not guilty of bigamy if his first wife was absent for five years immediately preceding his second marriage, without his knowledge that she was alive within that time, and he believed at the time of the second marriage that she was dead, even though he may have believed that she was living at some time within the five-year period.

BURGLARY.

Martin v. State, Ind., 95 N. E. 1001. *Venue.* Bill of Rights, Sec. 13, provides that accused shall have a public trial in the county in which the offense shall have been committed. Burns Ann. Stat. 1908, Sec. 1867, declares that every criminal action shall be publicly tried in the county in which the offense was committed, except as otherwise provided in the act; and Sec. 1875 provides that when property taken in one county by burglary, robbery, larceny or embezzlement has been brought into another county the jurisdiction is in either county. Held, that Sec. 1875 had reference only to the offense of bringing stolen property from one county into another, and did not authorize the prosecution of accused for burglary in a county other than that where the burglary was committed, by reason of the fact that he subsequently brought some of the stolen property into such other county.

CONSPIRACY.

United States v. Stone, 188 Fed. 836. *Deprivation of Right to Vote.* Pen. Code, Par. 19 (Act March 4, 1909, c. 321, 35 Stat. 1902), punishing persons conspiring to injure any citizen in the free exercise of any right or privilege secured to him by the Federal Constitution or laws, covers a conspiracy to deprive a citizen of his right to vote at a congressional election and thereby injure him, within the ordinary meaning of the word injure, and a conspiracy to deprive illiterate negro voters of their right to vote by preparing the ballot in such a way as to make it difficult to vote for their candidate for Congress is punishable.

CONSTITUTIONAL LAW.

State v. Broadway, N. Car., 72 S. E. 987. *Ex Post Facto Law.* A statute providing for the punishment of incest by imprisonment "for a term not exceeding five years," was amended by striking out the words "five years" and inserting the words "fifteen years," the amendment to take effect from its ratification. After the ratification defendant was indicted for incest committed before that time. Held, that repeals by implication are not favored by law. The legislature had simply added ten years to the maximum punishment of future

offenses, and had left the prior statute still in force as to offenses already committed. Hence the conviction and sentence to imprisonment for a term not exceeding five years was affirmed.

Strickland v. State, Ga., 72 S. E. 260. *Right to Bear Arms.* A statute prohibiting having or carrying any pistol or revolver without first having obtained a license from the ordinary of the county, for which a fee of fifty cents is charged, does not violate the provision in the state constitution that the right to keep and bear arms shall not be infringed, but the General Assembly shall have power to prescribe the manner in which arms may be borne, as that provision relates to military arms, and the express power to regulate is given. It does not violate the like provision in the Constitution of the United States, as that prohibition is limited to Congress and does not apply to the states.

EMBEZZLEMENT.

People v. Goodrich, Ill., 96 N. E. 542. Where accused, who was agent for the prosecuting witness, brought her a large sum of money, which she placed in a safety deposit box, and the evidence tended to show that she owed accused a small sum and expected to pay him out of the money in the deposit box, but did not wish to pay then, accused, who had access to the box, and embezzled the money therein, was not a joint owner with the prosecuting witness, and an instruction that if the jury believed he was such a joint owner there could be no conviction was properly refused.

EVIDENCE.

Darby v. State, Ga. Ct. App., 72 S. E. 182. *Dying Declarations.* A statement as to the cause of his death and who killed him, made by the victim of a homicide after he was wounded and "when he was conscious that he would die" and "was aware of his approaching death" is not admissible as a dying declaration unless he was at the time in a dying condition, "in the article of death."

State v. Brumo, Ia., 132 N. W. 817. Deceased, who had received a mortal wound, fully realized his condition and was conscious that death could not be long delayed, made a declaration stating what had taken place when he was wounded. He died from the wound nineteen days later. He continued to believe that he would die from the effects of the wound. Held, that his statement was rightly received as a dying declaration.

State v. Stumbaugh, S. Dak., 132 N. W. 666. *Photographs.* On a trial for murder, a photograph showing the location of the parties at the time of the shooting, was received in evidence, over the objection that the photograph was taken after the tragedy, and that there had been some change made at the place in the intervening time. It appeared that the change was so slight as not materially to affect the value of the photograph as indicating the position of the parties, the location of the fence, and the topography of the ground. Held, that the admission or rejection of photographs is largely within the discretion of the trial court. There should be no reversal unless there has been a manifest abuse of this discretion. No such abuse appearing here the conviction was affirmed.

State v. Leak, N. Car., 72 S. E. 567. *Harmless Error.* A witness was asked if the defendant was "considered bright," and if he did not have the

reputation "of not being strong-minded." Objections to both questions were sustained. As there was nothing to indicate what was expected to be proved, or what answer would have been given to the questions, it did not appear that the defendant was purejudiced by the rulings. Hence the conviction was affirmed.

McKay v. State, Neb., 132 N. W. 741. *Bloodstained Garments.* On a trial for murder, the bloodstained garments of the deceased were admitted in evidence. It was conceded that a murder had been committed, and the only question was whether the defendant committed it. Held, that as the garments could in no manner identify, or tend to identify, the prisoner as the murderer, and their introduction could only excite the passions and inflame the minds of the jurors, it was error to admit them. For this and other reasons the conviction was reversed.

FUGITIVE FROM JUSTICE.

Southerland v. State, Ind., 96 N. E. 583. *Right to Appeal or Object to Indictment.* One, while a fugitive from justice, cannot test the sufficiency of an indictment or information for a felony, or prosecute an appeal.

HABEAS CORPUS.

State v. Floyd, N. Dak., 132 N. W. 662. *Not Remedy for Error.* On the trial of an information for robbery, in the absence of the defendant, who was in jail, and of his counsel, and without the consent of either, the jury came into court, reported that they were unable to agree, and were discharged. The defendant then petitioned for a writ of habeas corpus. Held, that even if the act of the court was erroneous, which was expressly not decided, the court did not lose jurisdiction over the case, hence the writ should be quashed. The error, if any, should be attacked by a plea of former jeopardy at the new trial.

INDICTMENT.

People v. Peck, N. Y., 130 N. Y. Supp. 967. *Materiality of Evidence.* An indictment for perjury committed during an examination of accused in a proceeding by the superintendent of insurance, relating to the affairs of the insurance company of which he was an officer, alleged that it became material in such inquiry whether a contract between accused and the corporation, requiring it to pay him three cents for each quarterly capita tax paid by every member, and one-half cent from each monthly rate payment on certificates issued, was a liability of the corporation, whether the contract was valuable and was binding and a legal claim against it, and whether the corporation owed defendant thereunder, and that defendant falsely and wilfully testified that he "thought" the contract was a liability of the corporation, and "believed" that it was binding upon it and was valuable, and that he "considered" that the corporation owed him thereunder, when accused well knew that the facts were contrary to his statement of what he thought, believed, or considered them to be. Held, that the indictment did not show false testimony as to a material question of fact, the validity and existence of the contract being questions of law upon which accused's opinion could not be material, and hence the indictment was insufficient.

INDICTMENT AND INFORMATION.

McKay v. State, Neb., 132 N. W. 741. *Effect of Amendment.* An information filed April 28, 1910, charged the defendant with the commission of a mur-

der on December 7, 1910. After the trial began, on defendant's objecting to the introduction of evidence because of the date alleged, the county attorney was permitted to amend, by substituting 1909 for 1910. Defendant objected to going to trial without having twenty-four hours after the service of the amended information in which to plead to it. His objection was overruled. A statute provided that no one should be arraigned or called on to answer any indictment until one day after the receipt of it. Held, that the information as first drawn was fatally defective; the amendment was properly allowed; but the court erred in forcing the defendant to immediately proceed with the trial, without arraignment under and plea to the only information filed which stated an offense, without giving him the statutory time in which the plead thereto, and before a jury which had been impaneled under the former void information. The conviction was reversed.

State v. Francis, N. Car., 72 S. E. 1041. *Defects Cured by Verdict.* To arrest the judgment, an indictment must be so defective that judgment can not be pronounced upon it. Hence judgment will not be arrested, because neither the county in which the indictment was found nor the term of court appear in the caption; nor because the time at which the offense was committed is not stated, time not being an essential part of the offense charged; nor because the state failed to show that the offense was committed within the period not covered by the statute of limitations, as failure to make such proof should be taken advantage of by a request for an instruction. The county appeared in neither the caption nor the body of the indictment.

Bright v. State, Ga. Ct. App., 72 S. E. 519. *Description of Property.* An indictment charged larceny of "the personal goods of W. T. Lockett then and there being found, to-wit: 100 pounds of seed cotton, of the value of $10." On special demurrer, assigning as ground that the property was not described with sufficient definiteness and particularity, it was held that the particular property alleged to have been stolen must have been described. "The marks, quality or kind of the property must be incorporated in the description, or the transaction in some way individualized. Merely to charge the defendant with having stolen 'seed cotton' without even saying whether it is long or short staple, or without in any way informing him of the locality from which it is claimed he stole the cotton, is too vague, general, and indefinite to withstand a timely special demurrer."

State v. Lewis, W. Va., 72 S. E. 475. *Bill of Particulars.* Defendant was indicted for larceny. At his request the court ordered the state to furnish a bill of particulars. The state refused to do so, defendant was tried on the indictment and convicted on proof that he had knowingly received stolen goods. By judicial construction of the West Virginia statutes there can be a conviction on an ordinary indictment for larceny, on proof of larceny, receiving stolen goods, obtaining goods under false pretenses, or embezzlement. The statute providing for bills of particulars possibly applied to civil actions only. Held, that even though the statute did not apply to criminal prosecutions, the constitutional provision that "the accused be fully and plainly informed of the character and cause of the accusation" gave the court discretionary power to order such a bill to be furnished. Conviction reversed.

People v. Gray, Ill., 96 N. E. 268. *Variance—Name of Prosecutrix.* An indictment for rape on an illegitimate child, whose mother married when the

child was three years old, which gives as the surname of the child the surname of the husband of the mother, is sufficiently supported by proof that after the marriage the child was generally known by such name; a bastard not necessarily bearing its mother's name; a "name" being one or more words to designate a person or thing.

People v. Burke, 131 N. Y. Supp. 122. *Grounds for Motion to Dismiss.* Accused was subpoenaed to testify before the grand jury, and was cautioned that anything he said might be used against him. The only evidence connecting him with several forgeries which was inquired into was his own testimony. Held, that a motion to dismiss the indictment found against him for such forgeries, on the ground that his constitutional rights were invaded, will be denied.

People v. Castaldo, 131 N. Y. Supp. 545. *Variance—Materiality.* Pen. Code, Sec. 217, makes it an offense to make an assault with intent to kill or to commit a felony upon the person of the one assaulted or of "another," etc. Code Crim. Proc., Sec. 281, provides that, when an offense involves commission of a private injury and is described sufficiently to identify the act, an erroneous allegation as to the person intended to be injured is not material. Code Cr. Proc., Sec. 542, requires an Appellate Court to give judgment regardless of defects not affecting substantial rights, and Secs. 293-295 authorize the cure of immaterial variances by amendment on the trial. Held, that there was no fatal variance between a charge that accused assaulted B with intent to kill him, and proof that the assault was made with intent to kill G, though no amendment was attempted.

INSANITY.

Commonwealth v. Lee, Pa., 81 Atl. 812. *Burden of Proof.* To establish the defense of insanity, the evidence must so preponderate in favor of insanity as to overbalance the presumption and proof of sanity.

INSTRUCTIONS.

People v. Hubert, Ill., 96 N. E. 294. *Harmless Error.* Though the instruction that the question the jury had to determine was simply one of fact, the guilt or innocence of defendant, is inaccurate, the question of guilt or innocence being one of mixed law and fact, and, the jury being judges of the law as well as the facts, it is harmless.

Hudgins v. State, Ga., 71 S. E. 1065. *Harmless Error.* Defendant appealed from a conviction of murder. The trial judge had instructed the jury that if they had a reasonable doubt that he was guilty of murder they should acquit him, notwithstanding they might consider that, under some view of the evidence and the law, he might be guilty of some lesser grade of homicide. Held, that while this was inaccurate, yet in view of the evidence, the statement of the accused and the entire charge of the court, the inaccuracy was not sufficient to require the granting of a new trial.

Morse v. State, Ga. Ct. App., 72 S. E. 534. *"Autoptic Proference."* In a trial certain bottles and their contents were introduced in evidence and given to the jury for their consideration. The judge instructed with reference to them that "evidence may be autoptic proference." This charge was objected to as (1) abstractly incorrect; and (2) misleading. The court said, "Considering

these points in reverse order, we may say (to borrow a Hibernicism from the private vocabulary of an ex-justice of the Supreme Court of this state) that the language excepted to is neither leading nor misleading. As to the other objection—that the language is abstractly incorrect—if incorrectness from a legal standpoint is intended, the objection may be disposed of by citing Wigmore on Evidence, Sec. 1150 et seq. If philological incorrectness is referred to, the objection is more tenable; for, while 'autoptic' is a good word, with pride of ancestry, though perhaps without hope of posterity, the word 'proference' is a glossological illegitimate, a neological love-child, of which a great law writer confesses himself to be the father (see Wigmore on Evidence, Sec. 1150, note 1). Despite all this, we cannot brand the statement as reversible error. This court is rather liberal in allowing the judges on the trial benches the privilege of big words. * * * * Following Wigmore, Judge Felton used this expression, and then most clearly explained, and illustrated to the jury, in plain, simple, homely language, just what the big words mean." It does not appear whether the jury wished to have the "autoptic proference" refilled.

Luery v. State, Md., 81 Atl. 681. *Court Not Bound to Charge Jury in Criminal Cases.* Inasmuch as the courts do not charge juries in criminal cases, the jury being made judges of the law and of facts, the trial court might well adopt the practice of granting prayers, advising juries against conviction on testimony of accomplice, without corroboration, although there is no statute in the state requiring corroboration.

State v. Carlisle, S. Dak., 132 N. W. 686. *On Defendant's Failure to Testify.* The court, of its own motion, charged the jury that the fact that the defendant had not testified should raise no presumption against him. Held, that this reference to the fact did not violate the statute providing that failure to testify should raise no presumption against the defendant, distinguishing cases in which the prosecuting attorney had referred to the failure to testify. One judge dissented.

MUNICIPAL ORDINANCE.

Manor v. City of Bainbridge, Ga., 71 S. E. 1101. *Reasonableness.* Under the general welfare clause a city may by ordinance penalize the sale of what is commonly known as "near beer" within the city limits. It may except a prescribed portion of the city from the operation of the ordinance if the exception is reasonable. The fact that when the ordinance was passed, and when the application for an injunction to restrain its enforcement was heard, every building in the excepted tract suitable for the sale of "near beer" was occupied and plaintiff could not get a building in which to carry on the business in that tract at a reasonable price, does not make the exception unreasonable. The fact that for two years before the passage of the ordinance the plaintiff had been engaged in the sale of "near beer," outside the excepted tract, under a city license, and had made valuable improvements at that place for the purpose of continuing the business does not invalidate the ordinance.

POLICE POWER.

State v. Boone, Ohio, 95 N. E. 924. *Constitutionality of Compulsory Report of Vital Statistics.* Secs. 14, 17, 21, of an "Act to establish a bureau of vital statistics and to provide for the prompt and permanent registration of all births and deaths occurring within the state of Ohio" (99 O. L. 296), so far

as they relate to a physician or midwife, in attendance upon a case of confinement, are unconstitutional and void, because they were enacted by an unnecessary, unreasonable and arbitrary exercise of the police power.

RAPE.

People v. Trumbley, Ill., 96 N. E. 573. *Woman as Principal.* A woman may be convicted of aiding and abetting in a commission of rape, and hence, under the statute abolishing all distinction between principal and accessories, could be indicted as principal.

SENTENCE.

People v. Coleman, Ill., 96 N. E. 239. *Indeterminate Sentence Law.* Hurd's Rev. St. 1909, C. 38, Sec. 498, provides that every male person over 21, who shall be convicted of a crime punishable by imprisonment in the penitentiary, except treason, murder, rape and kidnapping, shall be sentenced to the penitentiary for not less than one year, nor more than the maximum term provided by law for the crime of which the prisoner is convicted, making allowance for good time. Held, that where defendants were indicted for murder and were found guilty of manslaughter, it was error for the court to sentence them to a fixed term of imprisonment: they being entitled to an indeterminate sentence.

But where no reversible error occurred in the proceedings of the trial prior to verdict, and reversible error intervened thereafter, the cause should be remanded for resentence only.

Ex-parte Hinson, N. Car., 72 S. E. 310. *Suspension of Execution.* The petitioner was convicted of a crime and sentenced to be imprisoned in the county jail for eight months. The judge then told her that if she would leave the county and not return, she would not be compelled to serve the sentence, and directed the clerk not to issue the capias to carry it into effect until fifteen days after the adjournment of the court. The petitioner left the county, remained away eight months and then returned. She was arrested on the capias and committed to serve her sentence. A writ of habeas corpus was denied. Held, that the judge has the discretionary power to suspend the issue of the capias. It was not equivalent to a decree of banishment, as the petitioner left of her own accord and was legally a fugitive from justice. The fact that she had remained out of the county for eight months was not equivalent to a like term of imprisonment in the county jail.

TRIAL.

People v. Blevins, Ill., 96 N. E. 214. *Appointment of Counsel for Accused.* An indictment for first degree murder was returned against defendant and on the same day he was arraigned, and having no counsel, the court appointed two attorneys to defend him. One of these had been in practice less than two years and the other had given most of his attention to civil cases and had but little experience in criminal law. At the trial two days later, the regular state's attorney, the state's attorney of W. County and two other experienced lawyers appeared for the state. After but three jurors had been accepted, one of the defendant's counsel moved that the state's attorney of W. County and the two private attorneys be not permitted to appear and assist in the prosecu-

tion, showing that defendant's counsel had not had sufficient time to prepare his defense, that they had but limited experience in such cases and were greatly overmatched in experience and practice by counsel appearing for the state, two of whom had been employed and paid by outside persons for their services, and that by reason thereof defendant was being oppressed and was in danger of losing his life or liberty. Held, that while the court may permit private counsel to assist the state's attorney, where there is no oppression of defendant or injustice to him, the court, under the facts, should have limited the attorneys assisting the state to one, or should have appointed additional experienced counsel for accused.

People v. Marks, Ill., 96 N. E. 231. *Verdict.* The court submitted two forms of verdict, one for conviction and the other for acquittal, writing the word "give" on the margin of the form to be used in case of conviction. without making any notation on the margin of the other. Each of the instructions given also had the same word written on the margin and no direction or explanation was given as to the use of the respective forms of verdict, dependent on the jury's conclusion as to the guilt or innocence of accused. Held, that such indorsement was calculated to induce the jury to believe that they should find the defendant guilty and fill in the blank therein finding the value of the property alleged to have been stolen and was prejudicial error.

State v. Davenport, N. Car., 72 S. E. 7. *Improper Argument.* The prosecuting attorney made an improper argument to the jury. The judge instructed the jury to disregard it. Held, that the instruction cured the error. If it was insufficient the defendant should have requested a further instruction. As the defendants were guilty on the admitted facts, the error was not prejudicial.

Radin et al. v. United States, 189 Fed. 568. *Dismissal of Witness.* Where none of the testimony of a witness had been material to any issue and he was being cross-examined on wholly irrelevant matters, it was within the right of the judge to dismiss him from the stand.

Foster v. United States, 188 Fed. 305. *Propriety of Judge Expressing Opinion.* Although the trial judge in a federal court may express an opinion as to the weight of the evidence in civil cases and as to the guilt of the defendant in criminal cases, yet the greatest caution should be used in the exercise of this power and the jury should be left free and untrammeled in the determination of questions of fact which are to be passed upon by them; and in no instance should the judge express an opinion as to the guilt of a defendant after the case has been submitted to the jury and they have reported their inability to agree.

Colt v. United States, 190 Fed. 305. *Misconduct of Jury.* In a prosecution for using the mails in furtherance of a scheme to defraud, misconduct of one of the jurors in procuring from the bailiff a copy of the federal statutes while the jury were deliberating on a verdict was not ground for a new trial, where it did not appear that such misconduct influenced the verdict.

People v. Freeman, N. Y., 96 N. E. 413. *Improper Conduct of Prosecuting Attorney.* Where accused, charged with larceny by obtaining money by false representations, was forced, in consequence of the conduct of the prosecuting attorney in the framing of questions on cross-examination and the admissions of accused that he had received money from third persons, who were subse-

quently called by the prosecution and asked only trivial questions, to submit the case to the jury under the false impression thereby created that he was guilty of obtaining by false representations money from such persons, or to enter on a trial of the issues involving the transactions with such persons, the misconduct of the prosecuting attorney constituted reversible error.

Bohall v. State, Ind., 96 N. E. 576. In a prosecution for homicide, where the killing was done with a 38-caliber pistol and cartridges to fit it were found on the accused, the exhibition by the prosecuting officer of smaller cartridges cannot be complained of for the first time on motion for new trial, where counsel for accused learned of the mistake before verdict, and the prosecuting attorney in his concluding argument demonstrated that the cartridges in evidence would not fit the pistol.

VERDICT.

People v. McGrath, N. Y., 96 N. E. 92. *Motion to Vacate—Withdrawal.* A jury having convicted defendant of murder in the second degree, his counsel asked the court to reserve motions until the day of sentence. This the court refused to do, whereupon defendant's counsel, without time for consultation, made the usual motion to set aside the verdict as against the evidence and on all the grounds mentioned in the Code of Criminal Procedure. The court immediately asked the assistant district attorney what he had to say to the motion to set aside "that" verdict. Before the district attorney had responded, defendant's counsel asked the court to wait a moment, but the court cut him off in the midst of an unfinished sentence and repeated the question to the district attorney, who immediately stated that he did not oppose the motion, when the court granted the motion. Defendant's counsel then finished what he had previously started to say, that he would like to withdraw the motion, to which the court responded that it was too late. Held, that defendant seasonably abandoned his attempt to destroy the verdict and that the conviction of murder in the second degree remained, notwithstanding such proceedings.