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Judicial Decisions on Criminal Law and Procedure

JUDICIAL DECISIONS ON CRIMINAL LAW AND PROCEDURE

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Two decisions appearing in the issue of August 4, 1913, of the *Pacific Reporter,* one in *Hager v. State,* by the Criminal Court of Appeals of Oklahoma, July 5, 1913, 133 Pac. (p. 623), and the other in *Territory v. Lynch,* by the Supreme Court of New Mexico, May 31, 1913, 133 Pac. (p. 405), it seems to me contain expressions that are very significant.

The Oklahoma court, after reciting quite fully what it evidently deemed an outrageous method of proceeding on the part of the prosecution, said: "This court stands squarely for the doctrine of harmless error, but it is equally committed to the doctrine that fairness must prevail in the trial of criminal cases. We will not tolerate police court methods in courts of record. Trial courts should confine the cross-examination of witnesses to legitimate subjects of inquiry, and should not permit a witness to be brow-beaten or asked insulting questions."

Now, in Heaven's name, why should such conduct be permissible, by implication at least, in a police court although properly the subject of severe condemnation and treated as ground for reversal when occurring in a court of record? Is not such conduct in reality more harmful to society at large, as well as more indefensible in its injury to the individual concerned, if there is any distinction, in the police court where the ones least able to defend themselves, whether innocent or guilty, are on trial and appeal is comparatively rare?

But the entire police department and private detective and police court methods will go unchecked so long as the state does not provide a competent and experienced public defender, equal in every respect to the public prosecutor, and give such public defender all the necessary power to prevent and overcome such abuses that privately retained defenders can possibly exercise now in courts of record.

In the New Mexico case, the court notes the distinction between the extent of resistance which may be allowable in cases of arrest by officers and by persons who do not hold an official position, and says, "the law seeks to protect the officer in the discharge of his duty, and calls upon the citizen to exercise patience, if illegally arrested, because he knows he will be brought before a magistrate, and will, if improperly arrested, suffer only a temporary deprivation of his liberty."

But with our toleration of arrest by detectives of all kinds, and of keeping *incommunicado,* and rushing from one jail and keeper to another, this pretense of the law as to being brought before a magistrate and treated decently and fairly has become an actual stench in the nostrils of the patient citizen and makes the defective ones a greater menace to society. And there are judges who do not hesitate to even praise, not being content with excusing, such "police" executive if not court methods.

R. S. GRAY, of the San Francisco Bar.

TWO IMPORTANT DECISIONS IN KANSAS.

The Supreme Court of Kansas at its sitting in January, handed down a number of decisions which would be of interest to the readers of this Journal. The progressive tendency and common sense of the court is shown again, as usual, in the decisions on criminal appeals. For example, in *State v. Mattie Johnson,* where the journal entry showed that a defendant was sentenced under count six, instead of count one, the Supreme Court permitted a new journal entry *nunc pro tunc,* after the appeal had been filed in the Supreme Court, and then sustained the conviction below. The matter of paroles, too, has received interpretation in the cases of *in re* Carroll, and *in re* Welsh, petitioner. The bench was badly divided on these questions, which related to paroles by city judges, and the court, three concurring, one concurring specially, and three dissenting, held that the conditions of the parole could not extend beyond the term of the sentence, and hence where defendant was sentenced for six months, no punishment could be imposed upon him after the end of the six months' period, even though he were meantime on parole. I fear that until the legislature acts again, this has destroyed all real value in the parole law so far as relates to cities, as I fear the result will be that whatever respite from punishment a defendant can gain is clear gain to him, without any compensating or corresponding power on part of the court to punish further in case of disobedience. In other words, if a man is sentenced to jail for thirty days and paroled for a period which under the law may last two years, if he can induce the court now to parole him, all he needs to do is to behave tolerably well for thirty days, and after that time, he may snap his fingers at the court, knowing that it will be wholly incapable of recommitting him to jail, or giving him any further punishment after the thirty day limit has expired, whether he has been meantime in jail or not.

J. C. RUPPENTHAL, Judge 23rd Judicial District of Kansas.

VARIANCE CAUSED BY USE OF "STRANGLING" IN INDICTMENT AND "SMOTHER" IN INSTRUCTION.

In *Law Notes* for February, 1914, we find the following interesting account of an unfortunately typical kind of judicial decision:

"A good illustration of the protection afforded a defendant on a trial for a crime is seen in the case of *Lanier v. State,* (Ga.) 80 S. E. 5. An indictment charged the defendants, husband and wife, with the murder of their infant by "choking, strangling, and by beating and striking." An instruction to the jury stated that if the defendants acted in concert with each other it would make no difference which "actually struck the blow, or choked, or smothered the child; each would be responsible, regardless of who may have struck the fatal blow." It was held by a majority of the court that there was a fatal variance between the indictment and the instruction, entitling the husband, who was convicted of the crime, to a new trial. The court said: "To smother is to stifle, to suffocate by stopping the exterior air passages to the lungs; to strangle is to suffocate by a pressure or constriction of the throat. The jury may have believed that under the evidence the child was smothered and not strangled. This instruction permitted them to find the defendant guilty of murder accomplished in a manner not charged in the indictment." The presiding justice and Judge Lumpkin, refusing to take so technical a view, dissented, saying: "We do not think that a new trial should be granted on account of the instruction contained in the fourth division of the opinion. The lexicons define both words

to mean 'to stifle; to suffocate.' Death accomplished by strangling results from inability to inspire and expire air into and from the lungs, and death from smothering results from the same physiological cause. The charge in the indictment that death was produced by choking and by strangling indicates that strangling was not limited to suffocation produced by a constriction of the throat. While there may exist some technical difference in the terms, yet in common speech one is generally understood as the equivalent of the other. We do not think that the difference is so radical as to imply essentially different means of producing death."

The only comment which the opinion of the majority seems to call for is a reference to the language of Justice Gould in the early case of *Coggs v. Bernard* (1703) 2 Lord Raymond 909, where, in referring to a particularly vicious instance of judicial technicality, he said that it was "a thing no man living that is not a lawyer could think of."

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ACCOMPLICE.

People v. Duffy, 144 N. Y. Supp. 699. Where the defendant asked F., who had previously collected bribes for police protection, but had withdrawn or been withdrawn from that position, for a list of persons from whom he had collected, and told F. he was going to collect from them, F., who merely furnished him the list, was not an accomplice in the subsequent receiving by defendant of bribes from such persons.

Though the trial court erroneously ruled a witness was an accomplice, his testimony can on appeal be considered as that of one not an accomplice, and so not requiring corroboration.

ATTEMPT TO INFLUENCE COURT.

Curtis v. State, Ala. App., 63 So. 745. *By letters written to the court.* In affirming a conviction of forgery, the Alabama Court of Appeals says that there is no merit in the exceptions reserved, the defendant was protected by the trial court in every legal right and was treated with due courtesy and consideration. "The evidence of his guilt is, in our opinion, overwhelming and yet he has enlisted in his behalf the sympathies of a number of philanthropic workers, who have visited the jail during his confinement, and who have, apparently at his instance, addressed to us numerous written appeals in the shape of letters, begging for leniency and a reversal of the case here for a new trial below, intimating, as expressed by some, that he had not had "a square deal" on the former trial, basing their assertion, so far as appears, on mere hearsay. These communications have no place in this court, and are highly improper; but, believing the motives pompting them to have been sincere, and that they were not designed by the authors in any evil purpose to improperly sway or influence this court from the discharge of its duties, but rather originated in a misconception as to what those duties were, we shall take no action against the parties in the matter, except to give this warning and express our disapproval in this way of such appeals, and this with a hope of saving the necessity of having to resort to other methods in the future to prevent a recurrence. The function of this court is solely to review the questions of law presented by the record, and a reversal or affirmance on an appeal is not a matter of discretion with us, but of law; hence, urging upon us, with a view to obtaining a reversal, any other consideration than the law is entirely out of place.

BIGAMY.

Garner v. State, Ala. App., 64 So. 183. *Marriage before age of consent.* Defendant was convicted of bigamy. The proof was that while under the age of consent, being between fourteen and fifteen years of age, he contracted a marriage, co-habited with his wife for a day or two, and left her. About five years later he married another woman, and was prosecuted for contracting this second marriage. The first marriage had not been annulled by judicial proceedings. The defendant offered evidence that when he left his first wife he told her he "was no longer her husband and that she was no longer his wife," and that he then and there severed the marriage relation and disaffirmed the marriage. The trial court excluded this evidence. Held that the first marriage was only voidable and "could not be annulled or disaffirmed by the mere *ipse dixit* of the defendant by renunciation or denial of it, or by his repudiation of the wife at his election for this or that cause," but could be annulled only by the state through a court having jurisdiction. Hence the evidence was properly excluded and the conviction was affirmed.

BLOODHOUNDS.

Carter v. State, Miss. 64 So. 215. *They must be corroborated.* Defendant was convicted of burglary. The proof was that a store had been entered and some money stolen. Bloodhounds were put upon the trail of the thief, at least thirty-two hours after the burglary, and followed it to the defendant's house, and to the defendant in person. There was no other evidence to connect him with the crime. He bore a good reputation for honesty in the community. Held that while the fact that the bloodhounds when put upon the trail went to the defendant was admissible as evidence of guilt, alone and unsupported it was insufficient to sustain a conviction. "There must be other and human testimony to convict." The conviction was reversed.

BURGLARY.

People v. Walton, 144 N. Y. Supp. 308. *Breaking and entering.* Pen. Law (Consol. Laws 1909, c. 40) Sec. 404, declares that a person who, with intent to commit a crime therein, breaks and enters a building, shall be guilty of burglary in the third degree, and section 400, subd. 2, provides that the word "break," as so used, means "opening, for the purpose of entering therein, by any means whatever, any outer door of a building." Held that, where a prosecutor, having loaded a wagon with merchandise, left it in a barn, closing the barn door, without locking it, and defendant opened the door and took goods from the wagon, he was guilty of breaking and entering sufficient to sustain a conviction of burglary in the third degree.

CONSPIRACY.

People v. Davis, 144 N. Y. Supp. 284. *Preventing exercise of lawful trade.* Penal Law (Consol. Laws 1909, c. 40), Sec. 580, subd. 5, provides that conspiracy may consist of an agreement to prevent another from exercising a lawful trade by force of threats, or by interfering or threatening to interfere with property belonging to another, or with the use thereof. Section 583 declares that no agreement except to commit a felony on the person of another, or to commit arson or burglary, amounts to a conspiracy, unless some act beside the agreement be done to effect the object thereof. Held, that an indictment charging that at least three persons conspired to prevent L. from exercising the trade of a horseshoer by threatening his customers to cause strikes on work on which

their horses were used unless they refrained and refused to have their horses shod by L., alleging the overt acts to consist in threats to the customers to cause such strikes, sufficiently charged a conspiracy to oppress L. in the exercise of his lawful calling.

CONSTRUCTION OF STATUTES.

Thomas v. State, Ala. App., 64 So. 192. *Carrying concealed weapons.* The defendant was convicted of carrying concealed weapons. The proof was that he placed a pistol in his pocket, where it was concealed from view, and soon after was arrested and the pistol taken by the officer. The defendant did not take a step between the time when he put the pistol into his pocket and the time when it was removed by the officer, but had stood still. He contended that he had not "carried" the pistol as that word necessarily required locomotion. Held that the word "carried" in the statute meant "to have concealed about the person, or to bear concealed about the person" so that the concealed weapon was so connected with the person that locomotion of the body would carry with it the weapon as concealed. The conviction was affirmed.

Holley v. State, Ala. App., 63 So. 738. *Shooting across highway.* The defendant was convicted under a statute making it is a misdemeanor to "discharge a gun or other firearm along or across any public road." The proof was that the defendant while sitting in the rear end of a wagon which was traveling along the center of a public road fired his gun to one side and consequently across only a part of the road. The appellate court thought that the legislature intended "that the greater (that is, the width of the whole road) should include the lesser (that is, part of the public road)," as the statute was designed to protect the lives and persons of those in or traveling on the public highways from accidental shooting, and sustained the convcition.

DEMURRER.

United States v. Kennerley, 209 Fed. 119. *Question of obscenity not decided by court on demurrer.* In a prosecution under Cr. Code (Act March 4, 1909, c. 321, 35 Stat. 1129), Sec. 211, as amended by Act March 4, 1911, c. 241, Sec. 2, 36 Stat. 1339 (U. S. Comp. St. Supp. 1911, p. 1651), for sending an obscene book through the mails, whether or not the book is obscene must be determined by the jury under instructions, and the court on demurrer, even when the book is stipulated into the record as a part of the indictment, has power only to decide whether it is so clearly innocent that the jury should not pass on it at all. Rule in *Regina v. Hicklin,* L. R. 3 Q. B. 36, disapproved.

ERROR.

State v. Duff, Mo., 161 S. W. 683. *Fair trial and proper record necessary.* The defendant was convicted of burglary on proof that he had been caught in the act. The prosecuting attroney cross-examined the defendant as to his having been arrested some seven or eight years before on a like charge and the state introduced the testimony of two deputy sheriffs that they had previously arrested the defendant. No objection was made by the defendant. The court held that the cross-examination and the above testimony were improper as prejudicing the defendant before the jury and denying him a fair and impartial trial, but as the attention of the trial court was not called to the matter by an objection that this did not constitute reversible error.

The indictment charged burglary in the first count and larceny in the second. The defendant was convicted of burglary but acquitted of larceny. The record

stated that the defendant was "informed by the court that he stands charged with larceny, and pleads not guilty," and failing to show cause why judgment should not be pronounced against him was sentenced to the penitentiary. The appellate court held that the judgment was invalid, as shown by the record, because the defendant was sentenced for a crime of which he had been acquitted and because the record showed that he was sentenced not because he had been tried and found guilty, but because he had pleaded not guilty, and said that if there were no other error the case should be reversed and remanded for proper sentence.

The record of the inpanelling and swearing of the trial jury stated that "the jury being by the clerk sworn, and after the selection the following good and lawful men of the county were chosen to try this cause," giving their names. The appellate court held that this record was fatally defective. If the word sworn in the record related to the examination on their *voir dire,* the record does not show, that they were sworn to try the cause, if the word means that they were sworn to try the cause, the record does not show that they were properly examined on their *voir dire.* For this error the case was reversed and remanded for new trial.

It will be noticed that the court had no way of knowing whether the jury had been properly impanelled and sworn or not. The defect may have been in the record rather than in the proceedings in the lower court. The record did not affirmatively show that the proceedings below were defective. It simply failed to allege that all necessary steps were taken. It would seem that the appellate court might properly have relied upon the presumption that the acts of the trial court were regular, in the absence of a showing to the contrary. But even if the court should not rely upon this presumption, it should not be necessary to reverse the verdict if the defect was simply in the record.

Commonwealth v. Croson, 243 Pa. 19. *Error in limiting cross-examination.* On the trial of an indictment for murder where the defendant admitted the killing but contended that the act was done in self-defense, and it appeared that defendant had been the host at a party at which deceased was present; that deceased had acted in an outrageous and violent manner, using vile language and assaulting other members of the party; that when deceased had gone outside the house, several shots were heard; that after being induced by defendant to leave the house he had come back and approached defendant, who was seated by the fire, threatening to kill him, whereupon defendant raised his shotgun and shot deceased dead, the court erred in limiting the cross-examination of the witnesses for the commonwealth to what took place at the particular instant when the shots were fired. It was the right of the defendant to have all the facts connected with the shooting fully and fairly disclosed by the prosecution, as well as by any witness which he might call in his behalf. Where in such case defendant offered evidence of good character the court erred in permitting the defendant to be cross-examined as to whether or not he had made statements years before to the effect that he had shot a woman; and in allowing the commonwealth to offer evidence in rebuttal of defendant's denial that he had made such a staetment, without any offer to prove that he had actually done such a thing. The evidence was not competent as affecting his reputation for good character at the time of the commission of the homicide or for years preceding it. The charge to the jury in such case was inadequate where the jury were merely told that defendant, in his own house, had rights that would

not attach to one outside with means of fleeing or escaping, but were given no adequate explanation of the rights of one who, without fault of his own, is assaulted in his own dwelling house by one who has no right to be there at the time, and a judgment upon a verdict of guilty of murder of the first degree was reversed. J. L.

EVIDENCE.

People v. Katz, N. Y. 103 N. E. 305. *Admissibility of evidence of other crimes.* The larceny with which defendant was charged being committed by means of a conspiracy, requiring a large number of actors to carry out the involved plot, and it being quite possible that his connection with the scheme, confessed in certain phases, might, as claimed by him, have been without criminal knowledge or purpose on his part, evidence of his prior suggestion to another of a scheme essentially the same is admissible, on the question of guilty knowledge of intent, and this though such scheme was carried out; and likewise testimony that such other person then expressed to defendant his opinion that the proposed transaction was criminal, and also communicated to him the like opinion of another. Hiscock, Collin, and Hogan, JJ., dissenting.

People v. Duncan, Ill. 103 Ill. 1043. *Admissibility of evidence of attempted suicide.* In a criminal prosecution, evidence that after accused's arrest he attempted to commit suicide is admissible, as tending to prove guilt of crime charged.

FALSE PRETENSES.

People v. Warfield, Ill. 103 Ill. 979. *Subject matter of the offense.* An instruction in a prosecution for conspiring to obtain money and property by false pretenses that whoever, with intent to cheat another, designedly, by any false pretense, obtains the signature of another to any written instrument or obtains from any person money, personal property, or other valuable things is guilty of obtaining money and property by false pretenses was erroneous as authorizing a conviction if the object of the conspiracy was to obtain prosecuting witness' signature to any written instrument or obtain any valuable thing from her by false pretenses, when the obtaining of her signature to a book order and to certain notes, as was done, would not be an offense.

FOOD.

People v. Frudenberg, N. Y. 103 N. E. 166. *Construction and validity of ordinance regulating sale of milk.* New York City Sanitary Code, Sec. 183, declaring that it shall be the duty of all persons having in their possession receptacles containing milk to cleanse or cause them to be cleansed immediately upon the emptying, and that no person shall receive or have in his possession any such receptacle which has not been washed after holding milk or cream, is a valid police regulation, being for the benefit of the public health, the expression "immediately" meaning "forthwith," and implying prompt and vigorous action, but not being unreasonable, so as to prevent a dealer from retaking soiled receptacles used for the conveyance of milk. A driver of a milkwagon who collected unwashed receptacles, and, instead of taking them directly to a sterilizing plant, delivered them at a railroad station, where they were to be returned to his master, is guilty of a violation of New York City Sanitary Code, Sec. 183, requiring the immediate cleansing of receptacles containing milk, and providing that no person shall receive or have in his possession any unwashed receptacles. Willard, Bartlett and Miller, JJ., dissenting.

INDICTMENT AND INFORMATION.

United States v. Breinholm, 208 Fed. 492. *Sufficiency.* To make an indictment under Cr. Code (Act March 4, 1909, c. 321) Sec. 211, 35 Stat. 1129 (U. S. Comp. St. Supp. 1911, p. 1651), for mailing a nonmailable letter, giving information as to where and how and by whom and by what means certain acts and operations could and would be done and performed for procuring and producing an abortion, the letter set out need not be such that a stranger would know what information it gave, nor need the indictment contain explanatory matter to show that the letter did give such information.

People v. Tait, Ill. 103 N. E. 750. *Sufficiency.* An information for violating quarantine regulations, which alleged that the board of health having previously established certain rules for the prevention of the spread of scarlet fever, and "having directed" that accused, "his residence, and family be placed under quarantine, because a member of his household was infected with a dangerously communicable disease," in pursuance of said rules, and that accused did then and there unlawfully violate such rules by disregarding the quarantine, did not sufficiently show the existence of an emergency justifying the quarantine of accused, since the person in accused's household alleged to have the fever might not have been in his dwelling house at the time; "household" being equivalent to "family."

People v. Gray, Ill. 103 N. E. 552. *Waiver.* Though a defendant can, in a criminal case, by pleading to the indictment, waive all the irregularities in the constitution of the grand jury, he cannot waive failure to swear the grand jury, or any grand juror.

INSANITY.

Commonwealth v. Simanowicz, Pa. 89 Atl. 562. *Preliminary inquest to determine sanity.* In the trial of a preliminary issue to determine the sanity of accused, error in instructing that the burden was on accused to establish insanity beyond a reasonable doubt was not cured by the withdrawal of the plea of not guilty, entered by direction of the court when the prisoner stood mute and by the entry on advice of counsel of a plea of guilty, the alleged insane person not being bound by such plea.

JURORS.

State v. Schlosser, N. J. 89 Atl. 522. *Improper conduct as ground for review.* During cross-examination of one of the state's witnesses, a juror interrupted, asking what the inquiry had to do with the case, and stated that they were busy men and were compelled to listen "to a lot of stuff" that had nothing to do with the case. After the court had ruled that the examination was proper, the juror again interpolated: "It is a waste of time." Held, that such interruption though highly improper, was not prejudicial to accused, it appearing that the examination then being conducted had reference to matters not applicable to the merits of the case.

MISNOMER.

Hinktom v. State, Ala. App., 64 So. 193. *Name of defendant.* An affidavit charging assault and battery, stated that the defendant's name was "George Hinktom, whose name is to affiant otherwise unknown." The warrant was issued against George Hinktom. At the trial, prosecuting witness testified that he knew defendant's name was "George Haughton" and not "George Hinktom" and that

he knew this when he made the affidavit. This evidence was undisputed. The defendant was convicted, and appealed on the ground of variance between the name as stated in the accusation and as proved. Held that the party charged with crime has a substantial right to be so designated that there be proper record evidence of his identity. When his name is known he must be designated by it. If his name is alleged to be unknown and the proof shows that it was known, there is a fatal variance. Hence the conviction was reversed. In *Thomas v. State,* Ala. App., 64 So. 192, the court sustained an indictment against "Arthur Thomas" where the plea in abatement alleged that his true and correct name was "Buddie Thomas," but admitted that he was known and called by the name of "Arthur Thomas."

NEUTRALITY.

United States v. Steinfeld & Co., 209 Fed. 904. *What shipments forbidden.* Neutrality Resolution, March 14, 1912, prohibiting the violation of neutrality by shipment of munitions of war procured in the United States and exported to an American country in which conditions of domestic violence exist, does not prohibit the shipment of munitions of war from one point in the United States to another, but only from a point in the United States to a point in a foreign country; and hence an indictment merely alleging that defendants caused to be made a shipment of munitions of war from New Haven, Conn., to Tucson, Ariz., to be there trans-shipped to the state of Sonora, Mexico, as its ultimate destination, merely charged an intent to violate the law, and was therefore fatally defective.

PARENT AND CHILD.

Dunn v. State, Ind. 103 N. E. 439. *Neglected child.* Burn's Ann. St. 1908, Sec. 1643, defines a "neglected child" as any boy under 16 years of age or girl under 17 years of age, who has not proper parental care, or is found living in a house of ill fame, or with any vicious or disreputable persons, or whose home, by reason of depravity of its parent, is an unfit place for the child. After accused's husband went to another town to work, she began to visit wine rooms until late at night, and brought a man home with her, on a number of occasions, and had sexual intercourse with him for hire until a late hour in a room near where her young children were, and on one occasion had intercourse with a man while another man had intercourse with her 17-year-old daughter in the same room, thus practically making her apartments a house of prostitution. Held, that accused's children were "neglected," within the statute, and she was liable thereunder contributing to their neglect by virtually requiring them to live in a disreputable house.

REASONABLE DOUBT.

Hooten v. State, Ala. App. 64 So. 200. *Possibility of guilt.* On a trial for murder, the court gave the following charge: "If you believe from all the evidence, beyond a reasonable doubt, that the defendant is guilty, though you may also believe that it is possible that he is not guilty, you must convict him." Held that the charge stated a correct proposition of law. The conviction was affirmed.

SENTENCE.

O'Brien v. McLaughry, Warden, 209 Neb. 816. *Discharge from sentence illegal only in part.* A prisoner confined in a federal penitentiary under a

sentence imposing two terms on different counts of the indictment to be served successively, the second of which terms is illegal, is entitled to be discharged on habeas corpus from such part of the sentence, although his first term has not expired, because of the effect which the illegal part of the sentence has on his right to petition for parole after he has served one-third of the total of the term or terms for which he was sentenced," under Act June 25, 1910, c. 387, Sec. 1, 36 Stat. 819 (U. S. Comp. St. Supp. 1911, p. 1702).

TRIAL.

People v. Hotz, Ill. 103 N. E. 1007. *Improper request for instructions.* It was an imposition on the trial court to ask him to pass upon 52 instructions, many of which covered the same ground as those given, dealt with the same subject, differing only in phraseology, and assumed that matters excluded by the court were in evidence.

People v. Annis, Ill. 103 N. E. 568. *Reference to refusal of accused to testify.* Cr. Code (Hurd's Rev. St. 1911, c. 38), Sec. 426, provides that if a defendant in a criminal case does not testify it shall not create a presumption against him, nor shall the court permit any reference to be made to such neglect. Held, where a defendant did not testify, a reference thereto by the state's attorney by stating in argument, "For some reason not known to me and not known to you, gentlemen, she did not testify and tell you anything about the case or say one word in her behalf," was prejudicial error and was not cured by the sustaining of objections to the remarks.

WITNESSES.

People v. Scott, Ill. 103 N. E. 617. An officer in charge of the court, who remains in court, notwithstanding a rule excluding the witnesses, is properly permitted to testify.