STATE OF MICHIGAN,

IN THE

SUPREME COURT.

The People vs William Hodgskin. } *Error to Sanilac Circuit Court.*

Brief for Defendant.

J. B HOUCK and McGINLEY & DURNING,

Defendant's Counsel.

Sanilac Centre, Mich.,
REPUBLICAN STEAM PRINTING HOUSE,
1892.

State of Michigan. Supreme Court.

The People
vs
William Hodgskin. } *Error to Sanilac Circuit Court.*

Brief for Defendant.

STATEMENT OF FACTS.

The information in this case contains two counts; one charges defendant with committing, and the other for attempting to commit the crime of bestiality. The defendant refused to plead to the information, and a plea of "not guilty" was entered by order of the court. Record, pages 5, 6 and 7.

There was but one direct witness for the people.

Upon the trial the people introduced testimony that one John Lovell was on the east side of Black river, about one mile south of the villages of Croswell and Falcon, and saw defendant, who was on the west side of the river in an open field, about 2 rods from the river, and 20 rods from a dwelling house, with a certain mare.

The said Lovell claimed to have seen penetration but not emission, and there was no proof of emeission whatever. Said Lovell claimed to have yelled at defendant before he had his will of the beast, and defendant ran west to the river road, a distance of about half a mile. Witness ran east about six rods and lost sight of defendant and came up the river to the village of Falcon, where he saw defendant, who was going from the village of Falcon across the river to the village of Croswell. Lovell told one John Flannery what he claimed to have seen and they followed defendant across the river to Croswell into a certain grist mill where there was some talk between said Lovell and defendant, and defendant denied that he was seen by Lovell or any other person at the time and place where the crime was claim-to have been committed.

The next Sunday said Lovell took one Alex Mudge down to the place where he claimed to have seen the crime committed and the court allowed said Mudge to testify as to what he saw at that place and and to what Lovell showed and told him, and said Mudge stated that he saw tracks of a horse, which were not shown to be the tracks of any particular horse, at that place, and that said Lovell told him that it was the place where the crime was committed. And there was some kind of a plat shown to said Mudge, which was not shown to be a plat of Falcon or any other place, and said plat was allowed to go to the jury as a plat of the village of Falcon aud said Mudge was allowed to testify certain things from said plat.

The defense was an "alibi". Three witnesses besides himself testified that defendant was working in his father's garden over one mile from the place where the alleged crime was committed, at the time the said crime is claimed to have been committed, and when Mr. Mudge and Mr. Flannery saw defendant and when said Lovell saw him the second time he was going from his home in Falcon over the river to Croswell, and that defendant's sister accompanied him as far as Falcon postoffice, and defendant went the rest of the distance alone.

After the testimony on both sides was closed the defendant's counsels moved the court to take the case from the jury on the ground that proof of emission was not made by the people. Record, page 129. Which motion the court over-ruled.

The defendant filed five requests to charge. Record, pages 130, 131 and 132.

The judge charged among other things that there was no room for a charge of an attempt to commit crime, and that Lovell is the only direct witness as to the actual commission of the crime, and the judge further charged that "the evidence of the parents and sister of the accused should be weighed in the light of the fact that they are naturally interested and it is for you to determine whether their testimony is biased by such interest or not. It is all for your careful consideration." The whole of said charge can be found on pages of 133, 134, and 135 of record.

The jury brought in a verdict of guilty. The defendant was sentenced to three years imprison-

ment at the Ionia House of Correction.

After the trial it was discovered that one of the jurors was an alien. A motion was made for a new trial, founded upon affidavits tending to show alienage of the juror. The judge denied the motion on ground that the defendant had waived his right to object to the competencyof the juror, and that the defendant should have made that objection before the verdict, which was impossible for defendant to do, because he did not discover that fact until after the trial.

ARGUMENT.

The letter of the statute under which the defendant was arrested and tried is as follows: "Every person who shall commit the abominable and detestable crime against nature, either with mankind or with any beast, shall be punished by imprisonment not more than fifteen years.

Howell's statutes. section 9292.

The offense consists in a carnal knowledge committed against the order of nature by man with man or in the same unnatural manner with woman or by man or woman in any manner with beasts.

Tiffany's criminal law, 916.

By statute laws of1841 179(after reciting that many offenders had escaped on account of difficulty of proof), it was provided that in this crime, as well as rape, the offense should be complete on proof of penetration only, but this law was repealed by an act revising and consolidating the general statutes of the state of Michigan.

Revised statutes 1846, 35.

Chapter 173, section 1, enacts: That the following acts are hereby repealed, and recites, among others, the said act doing away with necessity of the proof of emission in crime of sodamy, etc.

Revised statutes 1846, page 730.

The provisions in regard to the proof of emission was re-enacted in regard to rape.

Revised statutes 1846, page 660.

But not in regard to the "crime against nature," which stands the same as it did prior to 1841.

Revised statutes 1846, page 682.

There is no statute in this state making proof of emission necessary. Therefore the common law prevails in regard to such proof and in this state we insist proof of penetration and emission are both necessary to convict of the crime of sodamy.

Blackburn vs. State, 22 Ohio St. 102.
State vs. Gray, 8 Jones (N. C.) 170.
Williams vs. State, 14 Ohio 226,
Stafford's case, 12 Coke reports 37.
Rex vs. Russell, 1st Moody & Robinson 122 note.
Fleming's case, 2 Leach 854.
Rex vs. Burrows, Russ & Ry. 519.
Hill's case, 1 East P. C. 439.
State vs. Pough, 7 Jones (N. C.) 61.

In Blackburn vs. State above cited, it was alalleged that the court erred in refusing to charge that pentration and emission are both essential to this crime. The court says, "with respect to

whether emission is an necessary ingredient to this crime. The current English authorities seem to be that at common law, it was held to be a necessary ingredient'' in England and in many states there has been statutes passed eliminating proof of this element, the case of Williams vs. State 14 Ohio 222 in which the court seems to hold that emission is a necessary element in this crime, and we do not feel at liberty to depart from the doctrine laid down in that case, the remedy if any is needed should be left with the legislature. We are of the opinion that there was error in the said judge refusing to charge as above stated and for this reason the judgement must be reversed.

22 Ohio St. 110–11.

In Williams vs. State above cited, the court says "that to constitute carnal knowledge, there must be both penetration and emission, both these are necessary elements in the crime.

In State vs. Gray above cited, Judge Battle in substance said;"The only question in this case which we deem it necessary to to take notice of, is whether emission of seed in addition to proof of penetration is necessary in a crime of this nature

This question has not hitherto been before the Supreme court of this state for adjudication and after stating that there was some contrariety of opinion as to the law on this subject up to 1781, but in 1781 a case occurred before Judge Buller in which the jury found there was penetration but not emission. The learned judge respited the prisoner until he could obtain the opinion of the other judges.

Two of them, to wit: Lord Loughborough and Heath J., held that the offense was complete, but eight others, including Lord Ch. B. Skynner and Lord Mansfield, were of contrary opinion, upon the ground that carnal knowledge must include both penetration and emission. The opinion of most of these judges prevailed until the year 1829, when by statute 9th, Geo. 4, chapter 31, it was declared (after reciting that many offenders had escaped on account of difficulty of proof) that it shall not be necessary to prove the actual emission of seed, etc. Our statute law with regard to these offenses is now the same as that which existed in England prior to 9 Geo. 4, above referred to, and as our legislature has not yet passed an act similar to that of 9 Geo. 4, his honor erred in telling the jury that proof of emission was not necessary

8 Jones, 174.

In 12 Coke, 37, it is said to make this offense, he ought to bring forth the matter and penetrate the thing and the seed of nature be emitted (planted) for the indictment is opposed to the command of the Creator and to the natural order of things, it must have the venereal matter (substance) and as it has been said he has known the beast carnally, every of which imply penetration and emission of seed, and so it is held in the Stafford case, and it is said in Stamford, 44, there ought to be penetration and emission of seed.

For an elaborate discussion of what the law of England was on this subject prior to the said statute 9 Geo. 4, see the note to Rex vs. Russell, 1 Moody and R., 123.

It has been held in some cases that emission could be inferred from evidence of penetration unless the contrary appeared probable from circumstances, as for instance, where the offender was frightened away by the approach of other persons before he had had his will of his victim as in the case at bar

8th Jones, 173.
Record page 12.

The information charges defendant with carnally knowing the said mare.

Webster gives the following definitions for the word carnally, viz: "In a manner to gratify the flesh on sensual desire"

Leo XVIII, 20. Every word of which implies emission before that can be accomplished, or that desire satisfied.

And as emission was not proven, we submit that the judge should have granted defendant's motion and charged the jury to bring in a verdict of not guilty.

II. A new trial should be granted on the grounds that one of the jurors who sat upon the panel when said cause was tried, was an alien and not an elector or citizen of this state. The people and not the defendant selected the jury by which the defendant was to be tried, find it was the judge's duty to see that no incompetent juror sat on said panel, and also to see that the prisoner was tried by twelve of his peers and that a trial by less than twelve men was illegal and no trial at all, and that if one of the twelve was an alien and not an elector, it would virtually be a trial with eleven jurors.

Hill vs. People, 16 Mich. 351.
Swart vs. Kimball, 43 Mich. 448.
People vs. Harding, 53 Mich 56 and 58.

In Hill vs. People above cited, it appeared on a trial for murder that one of the jurors was an alien, but the fact was unknown to defendant or his counsel until after the verdict.

On a motion for new trial it was held that it was incompetent for a defendant to waive his constitutional right of a trial by 12 men, and that it must be treated as though he had been tried by but 11 jurors.

HELD FURTHER, that it is the duty of courts to see that the constitutional right of a defendant in a criminal case should not be violated however negligent he may be in raising the question.

In Swart vs. Kimball it was held that the provision in the constitution of Michigan that the right of trial by a jury shall remain "means the right as it had become known to the previous jurisprudence of the state and a person accused of crime cannot wave any esential right of trial by jury.

The question of waiver should not be considered in determining the case at bar for reason that the defendant refused to plead and a plea of "not guilty" was entered by order of the court, ahd therefore the defendant waived nothing.

III. The court erred in calling the attention of the jury to the testimony of Miss, Mr. and Mrs. Hedgskin, sister and parents of accused, as that they

being in interest as to the result of the trial, as he did in his charge. Record, page 134.

Wright vs. Commonwealth, 2 S. W. Rep. 904 and 909.

85 Ky. 123.

Comment by the judge in the hearing of the jury on evidence introduced, giving expression to his opinion of the same, and which may tend to influence their conclusions or weight given to such evidence is error.

People vs. Hare 57 Mich 505.

McDuff vs. Journal Co. 84 Mich 10.

In Wright vs. Commonwealth above cited the court charged the jury as follows: "The Jury is the judges of the creditibility of the witnesses and should give the testimony of each witness such consideration and weight as they believe it is entitled to and in coming to a conclusion they have a right to take in consideration the consistency and inconsistency of the statements of the witnesses which each other and with the circumstances and established facts proven in the case also the interest of the witnesses in the result of the trial." Judge Lewis in delivering the opinion of the court of appeals says: "The instruction is improper because the court had no right to direct attention to the interest of witnesses in the result or character of statements made by them, the jury being the sole judges of the weight of evidence and of the credibility of the witnesses page 129.

IV. The court erred in allowing witness Mudge to state what he the complaining witness Lovell showed him three or four days after the crime was committed, for said evidence was clearly incompetent for the reason that it was manfactured and secondary. The place which Lovell showed Mudge might have been a different place than the one where the crime was claimed to have been committed.

See Record pages 51, 52 and 53.

V. We submit that the judge should have charged the jury that they should not take in consideration any evidence of horse tracks seen at the place where this crime is alleged to have been committed unless they identify that they were the tracks of the mare upon which this crime was committed.

VI. The court erred in not granting defendant motion to strike out the testimony given by the people's witness Mudge, for the reason that the same was incompetent, immaterial, hearsay and secondary.

VII. We submit that the court erred in refusing to give the defendant's 1st request to charge. (Record, page 130.

People vs. Hare, 57 Mich., and note 24, N. W. 843.

VIII. The judge should have given the defendant's 2d, 3d and 4th request to charge without alteration. (Record, pages 130 and 131.)

We submit that the judgement should be reversed, and as emission under the laws of Michigan is a necessary ingredient to this crime, and was not proven by the people, the defendant should be discharged.

J. B. Houck,
Chas. H. McGinley,
Attorneys for Defendant.