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STATE OF MICHIGAN.

SUPREME COURT.

THE PEOPLE

vs.

WILLIAM HODGKIN.

BRIEF FOR THE PEOPLE.

The relator in this case was convicted of what is aptly termed in the statute the "abominable and detestible crime" of beastiality.

Thirty-three assignments of error are found in record, but counsel narrow their discussion down to eight propositions.

I will discuss them in the order found in the brief of counsel for respondent, as it is unnecessary

to extend the argument beyond the points raised by counsel in his brief.

Irwin vs. Schliff, 48 Mich., 237.

I.

In this offense is it necessary to prove emission, or may that be inferred from proof of penetration?

A discussion of this question is not fraught with any great pleasure, but in view of the fact that the point has never been before this Court for adjudication; that it is a most vexatious and perplexing one amongst lawyers whereever presented; and that the decisions concerning it are somewest conflicting, I have deemed it of such importance to the criminal jurisprudence of this State that I have endeavored to place before the Court the opinions of writers and judges for and against the proposition, and let the Court have the benefit of the law on the question as far as I am able to produce it, and as far as time and circumstances will permit.

In the first place I desire to refer, as briefly as possible, to the cases cited in support of counsel's position found on page 5 of his brief.

The first case cited in 22 Ohio St., at page 102, was a case of rape. The counsel for the defense asked the Court to charge the jury that if they did not find the fact of emission, as well as penetration, they must acquit the prisoner. This was refused, and the circuit judge instructed the jury that emis-

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sion was not necessary to constitute the offense. The statute of Ohio is silent as to the proof necessary to convict of rape, the same as our statute is silent as to the proof necessary to convict of this offense. On pages 110 and 111 will be found the discussion of the question by the Court. They say: "The current of English authorities seems to be that, at common law, it was held to be a necessary ingredient. In this country, it must be admitted that the decisions are strongly in the other direction." Speaking of the case in the 14 Ohio, also referred to by defendant in this list of cases, as having stood before the country as the apparent law of Ohio on the subject for so many years, the Court said (22 Ohio St. 126): "Under these circumstances, although, were it a new question, we would strongly incline to a contrary decision, we do not feel at liberty to depart from the doctrine laid down in that case." Hence the rule only obtains in Ohio on the ground of *stan de cuis.*

In the next case, 8 Jones (N. C.) 170, cited by counsel, the prisoner was convicted of carnally knowing and abusing a female under the age of ten years. In the last paragraph of the opinion the Court express themselves like this: "In the case now before us, the presiding judge might have submitted the facts to the jury and left it to them to make the inference that there was emission, if they believed that there was penetration. If the facts were proved to be as testified by the witnesses, then the jury would have been justified in rendering

their verdict that the complete offense had been committed."

That is exactly this case. The jury were left to infer, if they believed the witnesses for the prosecution who testified to the act of penetration, that there was an emission, and consequently, under any view of the case, a complete offense. The Court did not tell the jury, as in the above case, that proof of emission was not necessary, but simply submitted the facts to them and left it to them to infer whether there was an emission or not. Neither were there any requests upon the Court to make such charge to the jury.

See record pages 130-32.
For the charge of the Court, see record pages 133-35.

The case cited in 12 Coke's Reports, 37, holds the doctrine that emission is necessary.

The case of Rex vs. Russel, 1 Moody & Robinson, 122, was a case at nisi prius before Taunton J. The statute of 9 G. 4 c. 31., was in force at that time providing that proof of emission in such cases was unnecessary. This statute is in terms nearly identical with section 9094 Howell's Statutes. The learned judge, however, saw fit to hold that this statute did not do away entirely with the proof of emission. He says: "It is not necessary specifically to prove it, but the circumstances must be such as to infer that * * * took place." As stated in the note to that decision, such a holding makes

the statute absolutely inoperative, for before that statute was passed, it was unnecessary to give *direct* evidence of emission; but it was enough if the circumstances were such as to satisfy the jury that it had taken place.

Hill's case, 1 East P. C. c 10, s. 3,p. 439, 440; Russ on Crimes, Vol. 1, p. 806; Harmweed's case, Ib.; Fleming and Windom's case, 2 Leachels, 854; Burrows' case, R. & R. C. C. R. 519.

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The most learned and exhaustive discussion of this question found in the cases cited by counsel is that of Hill's case, 1 East's P. C., 439.

The second division of the opinion is the only one that discusses the question before the court. It considers most of the cases before referred to. I will not discuss the case, but simply ask the court to examine it carefully.

In the case of Com. vs. Thomas, Vols. 1 to 11 Virginia cases, it was held that the penetration of a beast by a man, against the order of nature, without emission, constitutes the crime of buggery.

In Bacon's Abridgment, at page 158, it is said: "It must be allowed that penetration may be without emission; and it is easy to conceive that it would in some cases be difficult to prove emission.

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where it has in fact been. It seems then, a little strange to make the proof of emission necessary to the proof of sodomy. To the same effect see Coke's 3d Inst., 59."

The opinion of Hale, C. J., was that proof of emission is unnecessary upon an indictment for buggery.

1 Hale, P. C., 628.

At this same page the Chief Justice criticises the decision of Lord Coke, cited by counsel (12 Rep., page 36), and declares that he was mistaken, and that his ruling contradicts what he says in his Pleas of the Crown.

It will be observed that Hill's case referred to was the first to dispute the doctrine that emission is unnecessary in this class of offenses. This case was decided in 1781, long after the settlement of this country. Before the decision of that case, the current authority was clear against its necessity. This being so, the common law of the states must, on general principles, be understood to be the same, and the later English cases cannot bind this Court.

Bishop on Crim. Law, 1128.

In conclusion I respectfully refer the Court to the following American authorities, which in the absence of any statute, hold distinctly that in this

class of offenses positive proof of emission is not necessary.

State vs. LeBlanc, 3 Brev (S. C. Rep.) 239.
Comstock vs. State, 14 Neb. 205.
Pennsylvania vs. Sullivan, Addison's Rep (Pa. Rep.) 143.
Bishop on Crim. Law, section 1127.
Roscoe's Crim. Ev., Vol. 2, 967.

By reason of many of the states expressly doing away with the necessity of such proof by special enactment, there is a noticeable lack of authorities on the question in America.

II.

The next point discussed is whether the Court erred in refusing to grant a new trial on the ground 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 examination of the juror will be found on pages 9 and 10 of the record. There are also three or four affidavits as to what the juror told the affiants as to his citizenship.

Record pages 147, 149, 151 and 152.

The evidence of the juror taken on pages 9 and 10 of the record clearly shows that he was a citizen of the United States, and we submit that the direct

testimony of the juror in open court cannot be refuted by ex parte affidavits of persons who knew nothing of the facts, but based their statements as to his citizenship entirely upon what said juror told them (and without putting him under oath) while they were at his house.

The juror testified that his father came to this country while he was quite young; that he took out his papers in two different states; that he took out his last papers in Michigan; that his father took out his last papers when he was seven or eight years old. What stronger evidence could be adduced to show that this juryman was a citizen and qualified to sit upon the jury. The fact that he afterward took out naturalization papers can have no effect on the question. It was a formal but useless ceremony. His citizenship was perfect and complete the moment that his father took out his last papers in Michigan.

Rev. Stat. U. S. sec. 2172.
Campbell vs. Gordon, 6 Cranch, 176.
Sasportas vs. De La Motta, 10 Rich. Eq. 38;
Boese Hand Book on Naturalization, 22.

To conclude this branch of the case, I call the attention of the Court to the case of People vs. Scott, 56 Mich. 154. The facts in that case appear to be similar to the one under consideration. If Court should not adopt the view here stated as to

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the citizenship of this juror, then this case fully meets the other objection.

III.

Complaint is made against the charge of the Court as to the interest of the parent and sister of respondent in the result of the suit, they being witnesses in the case.

The charge was eminently fair and impartial, and an exception based upon it is hardly worthy the consideration of this court. The Court had a perfect right to tell the jury that in weighing the testimony of the respondent's parents and sister they would have a right to take into consideration the interest they had in the result of the trial.

People vs. Calvin, 60 Mich. 113.

Counsel cite two Michigan cases to support the point that a judge has no right to comment on the evidence, or to give expression to his opinions of the same, which would tend to influence the jury in their determination.

It is unnecessary to cite authorities to sustain such a proposition, as it is too well settled in this State to need any discussion. But what application those cases have to this I am unable to discover. The Court neither commented upon this evidence or expressed any opinion concerning it.

See page 134 of the record.

IV.

The next objection is that the Court erred in allowing a witness to testify as to his seeing tracks of a horse and a person a few days afterwards at the place where it was claimed the crime was committed.

The testimony was evidently introduced for the purpose of showing that the theory of the prosecution was correct, and it certainly did tend to make the proposition at issue more probable. Taking this view, I think it admissable.

Wharton's Law of Ev. section 21.

It was not sought to identify the respondent as the perpetrator of the crime, as that was made out by the positive and direct testimony of the complaining witness.

In a case before this Court, the defendant was charged with rape. He sought to introduce evidence showing that an examination of the ground where the offense was alleged to have been committed was made, and that no signs of struggle were found. The examination was made some six weeks afterwards. The court held that it was properly excluded for remoteness.

Ulrich vs. People, 39 Mich., 245.

I do not understand by this, however, that if the examination had been made within two or three

day[illegible]terwards, as in this case, the Court w[illegible]
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V.

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VII.

The refusal of the Court to give the defe[illegible] second, third and fourth requests to cha[illegible] complained of.

We submit that the charge was fair to the [illegible] ant and gave him the benefit of every leg[illegible] claim.

We think the conviction should be affirm[illegible]

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I submit there was no error committed in the admission of the testimony. But even if it was error it did not prejudice the defendant's rights.

V.

I will pass the fifth and sixth proposition of counsel's brief, as they relate to the same matter contained in the fourth subdivision of the brief.

VI.

The refusal of the Court to give the defendant's first request to charge is made the basis of error.

This relates to the same point discussed in the third subdivision of my brief and I will pass it.

VII.

The refusal of the Court to give the defendant's second, third and fourth requests to charge is complained of.

We submit that the charge was fair to the defendant, and gave him the benefit of every legitimate claim.

We think the conviction should be affirmed.

A. A. ELLIS,
Attorney General.

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State of Michigan.

SUPREME COURT.

THE PEOPLE,

vs.

WILLIAM HODGKIN.

Error to Sanilac.

BRIEF FOR PEOPLE.

STATEMENT.

On the 27th day of June, 1890, between 3 and 4 o'clock in the afternoon one John Lovell while hunting near Black river about half a mile south from Falcon, surprised the defendant while he was in the crime of buggery. Lovell saw the defendant coaxing a certain mare, by rubbing her along the back, etc., then the defendant led said mare into the corner where two fences meet and kept her there by putting a board across the corner from fence to fence behind the mare. Defendant then got one foot on the fence and the other on the board behind the mare and had sexual intercourse with said mare.

There was a house about 80 rods distant but out of sight of the act (R. p. 41.) Lovell being sidewise from the defendant and about 8 or 10 rods distant, distinctly saw defendant enter his penis into the privates of said mare (R. p. 12.) Lovell yelled at defendant who hastily left the mare and ran westward up the river bank toward road leading past the cemetery. Lovell ran eastward up a raise of ground and turning saw defendant still making for the road by the cemetery, which road runs north and south. Lovell turned north and ran toward Falcon, and when on the Lapeer road saw defendant cross the Lapeer road and go north. Lovell turned north a block east of where defendant crossed the Lapeer road and while stopping a moment at his own door to leave his gun, saw the defendant enter the same street some rods ahead of him and continue northward. Lovell pursued and after going a ways saw John Flannery and pointing out defendant ahead of him told Flannery that he wanted to catch him and told him why. Flannery and Lovell joined the pursuit. They followed defendant into Croswell, keeping him in sight most of the time and overtook him in the engine room of a certain mill. Lovell entered and seizing hold of defendant accused him of the crime. Defeneant turned pale, denied the crime and "took a sneak out of the back door." (R. p. 81.)

One Alex. Mudge saw defendant between 3 and 4 o'clock on the afternoon of the offence approaching Falcon from the direction of the cemetery, walking rapidly up the road. When defendant passed him he hailed defendant but received no reply.

On the Sunday following Lovell and Mudge walked down the river and Lovell pointed out to Mudge the place where the act was done. Mudge testified that on that occasion he saw tracks of a horse on the ground in the fence corner heading south and that he saw tracks of a human being there. Other corroborating evidence appears in the record.

Defendant was tried on an information containing two counts, one for completed offence, the other for an attempt, and was convicted of the completed offence, and was sentenced to serve three years in the State House of Correction and Reformatory at Ionia where he now is.

ARGUMENT.

1. In their brief defendant's counsel seek to raise the point upon this record that there was no proof of emission submitted to the jury. When evidence closed on both sides of the case defendant's counsel moved "that the case be taken from the jury on the ground that there is no proof of emission, etc. (R. p. 129,] which motion was denied, This was a proper ruling because emission in such cases is always matter of inference and there was evidence before the jury tending to show emission or from which it might be inferred. [R. p. 12.]

No request was submitted to the court by defencant's counsel asking an instruction to the jury upon the point. The court advised the jury that they must be satisfied beyond reasonable doubt of the fact of penetration before they could convict [R. p. 183.] This instruction was sufficient.

Archibold Crim. Pl. pg 576.
Roscoe's Crim. Ev. pg 943.
R. v. Reckspear, 1 Mood C. C. 342.
Davis v. State, 3 Harris & Johns 154.

The Michigan legislature passed an act in 1841 that "it shall not be necessary in cases of rape, buggery * * * to prove actual emmission of seed in order to constitute carnal knowledge, but that carnal knowledge shall be deemed complete on proof of penetration only.

Statutes of Michigan, 1841, pg. 177.

That statute repealed the common law on that point. The common law upon any subject is repealed by a revision of that subject.

Com. v. Cooley, 10 Pick. 37.
2 Allen 46.

But this statute was again repealed by the Revised Statutes of Michigan of 1846, pg. 730.

The repeal of the statute of 1841 by the statute of 1846 would not and could not revive the common law.

The same rule applies to repeal of the common law in this State as to the repeal of a statute—once repealed always repealed. Sec. 4. chap. 1, Revised Statutes of 1846, pg. 37 is as follows: "Whenever a statute, or any part thereof shall be repealed by a subsequent statute, such statute, or any part thereof so repealed, shall not be revived by the repeal of such subsequent repealing statute.

Howell Statutes, vol. 1, sec. 4 p. 90.

2. Respondent's second proposition, that new trial should be granted because juror Heileg was an alien is without merit. The examination of the juror on the voir dire

by the prosecutor disclosed the disqualification (if any) of the juror to respondent and his counsel (R. pgs 9 and 10, and see affidavit of respondent's counsel, J. B. Houck, R. pg. 142.) No challenge to the juror was interposed and the courts attention was not directed to the disqualification (if any.) No exception was taken to the action of the court in permitting the juror to sit and apparently respondent was satisfied with the juror and was willing to take the chances of an acquittal by him, and the result being unfavorable he since raises the question of the juror's disqualification.

People v. Scott, 56 Mich. 156.
Bronson v. People 32 Mich. 34.

3. It is not error for the court to charge the jury to weigh the testimony of the parents and sister of respondent in the light that they are naturally interested, etc. [R. p 134.]

The instruction upon that point is supported by authority.

4. There was no error in permitting the witness, Mudge, to state what he saw on the Sunday following at the place where Lovell saw the act committed. The testimony was proper and its weight was for the consideration of the jury.

5 and 6. Same as 4.

7. Defendant's first request was given by the court substanially as offered. [R. pgs 133 and 134.]

8. The court did not err in refusing to give defendant's 2nd and 3rd requests, because those requests do not embody the law.

Defendant's 4th request was given by the court [R. pg 133.]

Defendant's 5th request was properly refused. The tracks of a horse there were some evidence tending to corroborate the evidence of the complaining witness, Lovell.

We submit that the conviction should be sustained.

W. H. BURGESS,
Acting Prosecuting Attorney.

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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.