8th Div.

Nos. 581-582

IN THE SUPREME COURT OF ALABAMA

HAYWOOD PATTERSON,
Appellant,

VS

STATE OF ALABAMA,
Appellee.

. . . .
. . .
.

CLARENCE NORRIS,
Appellant,

VS

STATE OF ALABAMA,
Appellee.

. . . .
. . .

APPEALED FROM THE CIRCUIT COURT OF

MORGAN COUNTY

Brief and Argument of Thomas E. Knight, Jr., Attorney General, and Thos. Seay Lawson, Assistant Attorney General, for Appellee.

I

Defendant's rights under the Fourteenth Amendment to the United States Constitution have not been violated by the exclusion of Negroes from the grand jury which indicted them.

We respectfully submit that the defendant at the bar has not been deprived of any constitutional right.

The means of preparation of jury rolls, of appointing the members of the jury and the qualifications of jurors are fixed by an Act of the Legislature of Alabama, 1931, approved February 20, 1931 (General Acts 1931, page 56).

Section 14 of the above cited act is identical with Section 8603, Code of Alabama, 1923, and is as follows:

> "The jury board shall place on the jury roll and in the jury box the names of all male citizens of the county who are generally reputed to be honest and intelligent men and are esteemed in the community for their integrity, good character and sound judgment; but no person must be selected who is under twenty-one or over sixty-five years of agen or who is an habitual drunkard, or who being afflicted with a permanent disease or physical weakness is unfit to discharge the duties of a juror; or cannot read English or who has ever been convicted of any offense involving moral turpitude. If a person cannot read English and has all the other qualifications prescribed herein and is a freeholder or householder his name may be placed on the jury roll and in the jury box."

Under the decisions of the Supreme Court of the

United States it cannot be contended that the above quoted statute in and of itself denies to a Negro defendant the equal protection of the laws.

In the case of Franklin vs. South Carolina, 218 U.S. 161, 54 Lawyers' Edition 980, that court held that a state law fixing the qualifications of jurors, which qualifications were practically the same as the Alabama statutes now under consideration was not unconstitutional. The court said:

> "We do not think there is anything in this provision of the statute having the effect to deny rights secured bythe Federal Constitution. It gives to the jury commissioners the right to select electors of good moral character, such as they may deem qualified to serve as jurors, being persons of sound judgment and free from all legal exceptions. There is nothing in this statute which discriminates against individuals on account of race or color or previous condition or which subjects such persons to any other or different treatment than other electors who may be qualified for an exercise of judgment in attempting to secure competent jurors of proper qualifications."

The South Carolina provision above discussed was section 2 of Act No. 578, Acts S.C. 1902, page 1066, which section is as follows:

> "That the said County Auditor, County Treasurer, and the Clerk of the Court of Common Pleas of each County shall immediately after the passage of this act, and thereafter in the month of December, of this and each succeeding year, prepare a list of such qualified electors, under the provisions of the Constitution, between the ages of twenty-one and sixty-five years and of good moral character, of their

respective Counties, as they may deem otherwise well qualified to serve as jurors, being persons of sound judgment and free from all legal exceptions, which list shall include not less than one from every three of such qualified electors under the provisions of the Constitution, between the ages of twenty-one and sixty-five years, and of good moral character to be selected without regard to whether such persons live within five miles or more than five miles from the Court House."

Under the above cited cases and cases hereafter cited, it must be admitted that Section 8603 is not unconstitutional as violative of the 14th Amendment to the United States Constitution.

Murray vs. Louisiana, 163 U.S. 101, 108;
Gibson vs. Mississippi, 162 U.S. 568;
Tarrance vs. State, 188 U.S. 519;
Williams vs. Mississippi, 170 U.S. 213;
Rives vs. Virginia, 100 U.S. 313.

Appellant, however, does not rely so much on the unconstitutionality of said jury law as upon the proposition that the jury commissioners have not complied with the law and have arbitrarily excluded Negroes because of their race or color. In their motion to quash the indictment they allege as follows:

"6. All of the above defendants are Negroes of the African race.

"7. Each and every indictment heretofore referred to found against all the defendants jointly and severally was and is null and void and without legal effect, and was found and made in a manner and by methods contrary to law, and in that persons of the negro race, duly qualified under the laws of the State of Alabama to serve as members

of the grand jury that found the said indictments hereinabove referred to were excluded from the list from which the said grand jury was drawn and from the said grand jury, solely by reason of their race and color as will appear more particularly hereafter.

"8. That in the year 1930 or 1931, the duly constituted authorities of Jackson County prepared a rol of male citizens in Jackson County, from which rol the panel of the Grand Jury, and finally, the Grand Jury which found the indictments against your defendants hereinabove referred to were selected. That said roll above referred to consisted wholly of white persons and contained the name of no negro citizen who is qualified by law to serve on grand juries solely by reason of the fact that all qualified negroes were arbitrarily and systematically excluded for many years from the rolls of grand juries by the authorities designated by law to make up said roll solely because of their race or color.

"9. Therefore the panel from which was drawn the grand jury which found the indictments against your defendants, and the said grand jury contained the name of no negro citizen "qualified by law to serve on aforesaid grand jury.

"10. That at the time when the said roll above referred to was prepared and when the panel of the aforesaid grand jury and the said grand jury were drawn, there were approximately 36,000 persons who were citizens of Jackson County, of whom approximately 34,000 were white and approximately 2,000 were negro.

"11. That at the said time when the aforesaid roll was prepared and when the panel of the aforesaid grand jury and the grand jury were drawn, there were approximately 18,000 male citizens of Jackson County, of whom approximatly 16,700 were white and approximately 1,300 were negro.

"12. That at the said time when the aforesaid roll was prepared and when the panel of the aforesaid grand jury and the said grand jury were drawn, there were approximately 8,000 male citizens of Jackson County over the age of twenty-one and under the age of sixty-five years who were qualified under the laws of the State of Alabama to serve as grand jurors in Jackson County. That of this number approximately 7,400 were white and approximately 600 were negro.

"13. That at the said time when this aforesaid roll was prepared and when the aforesaid panel of the said grand jury and the said grand jury were drawn there were approximately 600 male citizens of Jackson County of the negro race who were duly qualified to serve as grand jurors and to be enrolled on the aforesaid grand jury roll, and who were eligible for such enrollment and possessed all the requirements set forth in the laws of the State of Alabama for services as jurors.

"15. That at the time when the said roll was prepared and when said penel of the aforesaid grand jury and the grand jury were drawn, there were approximately 600 negro citizens of Jackson County who were male citizens over the age of twenty-One years and under the age of sixty-five years and who were generally reputed to be honest and intelligent men, and who were esteemed in the community for their integrity, good character and sound judgment, and who were not afflicted with a permanent disease or physical weakness rendering them unfit to discharge the duties of grand jurors and who have never been convicted of any offense involving moral turpitude. Among the aforesaid 600 negro citizens there may have been some who "could not read English but who notwithstanding possessed all the other aforesaid qualifications and were freeholders or householders of Jackson County.

"16. That members of the negro race, duly qualified by the laws of the State of Alabama to serve on grand juries and petit juries in the State of Alabama and in Jackson County have been and are systematically, arbitrarily

and in violation of law excluded from serving as jurors as aforesaid solely because they are members of the negro race, that is, by reason of their race and color.

"17. That for the last twenty-five years or more the duly constituted authorities of Jackson County having charge of the preparation of the grand and petit jury rolls, and the selection of panels of grand juries and petit juries in Jackson County, and generally of the laws and regulations pertaining to jury service in Jackson County, have systematically, arbitrarily and invariably refused, neglected and omitted to place the names of negro citizens of Jackson County on the aforesaid jury lists although the said negro citizens were and are qualified under the laws of the State of Alabama to serve as such jurors and grand jurors; and said refusal, neglect, omission and exclusion were due solely to the race and color of the aforesaid qualified negro citizens.

"18. Upon information and belief, no negro has served on any grand jury or petit jury in Jackson County for more than twenty-five years.

"19. That the arbitrary refusal, omission and neglect to place the names of qualified negroes on said roll and rolls, as hereinabove more fully set forth were and are to the detriment, prejudice and damage of the defendants above named, and each of them and in violation of the laws and Constitution of the United States and the Amendments thereto, and their rights thereunder.

"20. That the arbitrary refusal, omission and neglect to place the names of qualified negroes on said roll and rolls, as hereinabove more fully set forth were and are to the detriment, prejudice and damage of the defendants above named, and each of them and in violation of the laws and Constitution of the United States and the Amendments thereto and their rights thereunder."

The State denied in writing each and every one of

the above allegations.

If the defendant has been deprived of any of his constitutional rights, such deprivation must have been brought about through administrative officers of the state, in this instance, the jury commissioners of Jackson County, as there is no question about the constitutionality of the statute or act under which they operate.

The 14th Amendment to the United States Constitution does not guarantee to a Negro defendant the right to have Negroes, members of his own race, on the grand jury which indicts him or on the petit jury which tries him. The mere fact that there were no members of the Negro race on the jury which indicted appellant or on the petit jury which tried him avails him nothing.

Martin vs. Texas, 200 U.S. 316;
Franklin vs. S.C., 218 U.S, 161.

The inhibition placed against the states by the 14th Amendment is to insure that no state by statute or by acts of its executive, judicial or administrative officers, denies to members of a particular race the rights which are enjoyed by other citizens, because of their race or color. No positive action at all is required as a performance of the duty imposed by the Constitution; it requires purely a negative, the abstaining from exclusion of Negroes from the competition of qualifications for selection of jurors, and the chance of gaining places on panels. Indeed, any

selection of a Negro because he is a Negro, or any special consideration given to his race, would be a violation of the law for selecting jurors.

The sole question presented under this phase of the case is whether there has been exclusion because of race or color, and the determination of this query is a question of fact, and the challenger bears the burden of proof:

Martin vs. Texas, 200 U.S. 316;
Virginia vs. Rives, 100 U.S. 313.

We feel safe in saying that the Supreme Court of the United States has never dealt with the question as here raised. The cases which have been decided by that court have been cases where the trial court refused to allow the petitioner to offer proof in support of his motion or where the State by demurrer or similar pleading has admitted the truthfulness of the charges made in the petition or motion. We have carefully examined the following cases and in our judgment none of them have any particular bearing on the question at hand.

Strauder vs. West Virginia, 100 U.S. 303;
Ex parte Virginia, 100 U.S. 339;
Virginia vs. Rives, 100 U.S. 313, 323;
Neal vs. Delaware, 103 U.S. 370, 397;
Gibson vs. Mississippi, 162 U.S. 565;
Smith vs. Mississippi, 162 U.S. 592;
Carter vs. Texas, 177 U.S. 442;
Tarrance vs. State, 188 U.S. 519;
Brownfield vs. South Carolina, 189 U.S. 426;
Rogers vs. Alabama, 192 U.S. 226.

In Strauder vs. West Virginia, supra, it appears that the laws of the State of West Virginia denied to

colored citizens the right and privilege of participating in the administration of the laws as jurors because of their color though qualified in all other respects. Strauder, a colored man, was indicted for murder and upon trial was convicted and sentenced. Appeal was taken to the Supreme Court of that state and the judgment of the Circuit Court was affirmed. The case came to the Supreme Court of the United States on writ of error from the Supreme Court of West Virginia wherein it was affirmed that in the state court the defendant (Strauder) was denied rights to which he was entitled under the Constitution and laws of the United States. Prior to going to trial in the Circuit Court, the defendant filed a petition praying for the removal of the cause to the Circuit Court of the United States assigning his grounds therefor that in the state courts he was denied certain constitutional privileges due to the fact that members of his race were systematically and arbitrarily excluded from the juries. Said petition was denied by the state court and the trial was proceeded with, the outcome of which we have heretofore mentioned. After denial of the petition for removal, the defendant filed a challenge to the array of the jury assigning in support thereof the same grounds as assigned in support of his petition for removal to the Federal court. The Supreme Court of the United States held that the statute, in and of itself, denied to the defendant his consti-

tutional rights and therefore the court not only erred in overruling the challenge to the array but also erred in denying the petition for motion for removal.

With this decision we have no argument. However, it is totally inapplicable to the case at bar. Insofar as we have been able to determine, this case is perhaps the first case dealing with this phase of the 14th Amendment to the Constitution in a criminal case.

In the case of Virginia vs. Rives, supra, it appears that two colored men were jointly indicted for murder. The defendants moved the court that the venire which was composed entirely of white men be modified, one-third thereof to be composed of colored men. This motion was overruled. Thereupon the defendants before the trial, filed their petition praying for removal of the case to the Federal Court. Petition was not based on the unconstitutionality of any jury law of the State of Virginia but was based entirely on the question of a denial of their constitutional rights by administrative officers. The petition was denied. On an appeal, the verdicts and judgments of conviction were set aside. On the second trial one of the defendants was again convicted and a mistrial ordered in the other case. At this stage of the proceedings the cases were, upon petition, ordered to be docketed on the Circuit Court of the United States and a writ of habeas corpus cum causa was issued, by virtue of which defendants were taken from custody of the state author-

ities and delivered into the hands of the Federal authorities. The case at hand through an application filed by the State of Virginia with the Supreme Court of the United States for a rule to show cause why a writ of mandamus should not issue commanding the judge of the Federal Court (Rives) to cause to be redelivered the prisoner by the Federal authorities to the state authorities. The court held that a petition for the removal filed under Section 641, Revised Statutes, must show that the rights which the petitioner claims to have been denied him were denied him by the Constitution or statutes of the and not by the administration of the laws of the state. In other words, it must appear that the things alleged to have been denied him were denied prior to the trial and not during the trial. In view of the fact that the statutes of Virginia, in and of themselves, did not exclude colored citizens from service on juries, that the petition for removal was correctly denied. The court further held, however, in answer to that part of the case where the defendants had asked that the venire be modified so as to include Negroes, that a mixed jury in a particular case is not essential to the equal protection of the laws. It is a right to which any colored man is entitled, that, in the selection of the jurors to pass on his life, liberty or property, there shall be no exclusion of his race and no discrimination against him because of his color. But that is a different thing from that which was claimed as of right and denied in the state court, viz: a right to have the jury com-

posed in part of colored men. Thus it appears that this case has no particular bearing upon the question here involved other than the assertion that a Negro defendant is not entitled as a matter of right to be tried by a jury composed partly or wholly of members of his own race.

In ex parte Virginia, supra, it appears that one, J. D. Coles, Judge of a County Court of that state, was arrested and charged with having excluded and failed to select as grand and petit jurors certain citizens of African race solely because of their race and color although said citizens possessed all the other qualifications prescribed by statute. By an Act of March 1, 1885 such action was declared illegal. Coles filed a petition for writ of habeas corpus in the Supreme Court of the United States and a similar petition was filed by the State of Virginia, the Court considering the two cases as one. Petitions were based on the fact that Coles acted as Judge of the State of Virginia in his capacity as Judge and that the inhibition prescribed by the Constitution was against the state in its own capacity. The court held that the writ should be denied on the ground that the inhibition contained in the 14th Amendment means that no agency of the state, or of the officers or agents by whom her powers are exerted shall deny to any person within her jurisdiction equal protection of the laws; that whoever by virtue of his public position under a state government deprives another of his life, liberty,

or property without due process of law, or denies or takes away the equal protection of the laws, violates that inhibition; and if he acts in the name of and for the state and is clothed with the state's power, his act is the act of the state.

We likewise have no argument with the propositions of law but respectfully submit that the evidence in the case at bar does not show an arbitrary and systematic denial of equal protection of the law to any person or class of persons.

In Neal vs. Delaware, supra, the defendant, Neal, a citizen of African descent, was charged with the crime of rape, an offense punishable by the laws of Delaware by death. Before trial the defendant filed a petition seeking a removal of the cause to the Federal Court assigning as grounds therefor that the administrative officers of that state charged with the duty of selecting jurors arbitrarily and systematically excluded members of the African race. The court denied the petition. Thereupon the defendant, before arraignment, moved to quash the indictment and the list of empaneled grand jurors by whom it was found on the same ground as alleged in his motion for petition for removal. It was then agreed between the Attorney General on behalf of the state and defendant, through his counsel, with the consent of the court that the statements and allegations of the defendant in his petition for the removal of the indictment and prosecution for trial

into the Circuit Court and their verification by oath should be taken andtreated and given the same force and effect in the consideration and decision of the motions to quash the indictment and the lists and panels of grand and petit jurors as if the statements and allegations were made and verified by him in a separate and distince affidavit; the court thereupon overruled and refused to grant the motion of the defendant to quash the indictment and the lists or panels of grand and petit jurors because although no person of African race and color was upon either panel, no evidence had been produced or offered by the defendant to prove his statements and allegations in his petition and affidavit thereto, upon which the motion to quash was founded, that the exclusion by the trial court from the grand and petit juries of all persons of African race and color was because of their race or color and that the court could not accept such fact of exclusion because of race or color to be established by the circumstance that no persons of African race or color were in fact on the said lists, or by his mere unaided affidavit that the same should have been presented affirmatively by competent testimony outside of his own affidavit before the motion could be granted.

Thereupon before the defendant was arraigned and before he had pleaded thereto and after the motion of the defendant to quash the indictment and lists had been overruled, the defendant moved the court that he be permitted to produce

as witnesses in support of his motion to quash the commissioners, clerk and bailiff of the court. The court overruled said motion.

The court held that the trial court did not err in refusing to order a removal to the Federal Court because of the fact that Section 641 of the Revised Statutes does not authorize the removal except in cases where the denial results from the Constitution or laws of the state rather than the denial first made manifest at the trial of the case. The court held, however, that the trial court erred in refusing to quash the indictment and in overruling the motion to allow the defendant to introduce evidence in support of the motion. The court held that the affidavit offered in support of the motion as agreed to by counsel of the parties litigant, was sufficient evidence to warrant the trial court in granting the motions to quash. The state filed no denial nor did it offer any evidence tending to contradict the statements alleged in the petition and affidavit in support thereof. It is to be noted, however, in later cases the Supreme Court of the United States has held that the mere affidavit of petitioner alone is insufficient, but distinguishes the case at bar on the ground that the Attorney General in entering into the agreement admitted the allegations of the petition. In the case at bar no such condition exists. The state vigorously and vehemently denied each and every allegation

of the petition and thereupon the burden shifted to the movant. It might be contended that that part of the decision of the Supreme Court of the United States in the case of Neal vs. Delaware, which we have just discussed, dealing with the presumptions of the state court are here applicable. In this we can not agree. On page 397, supra, the Supreme Court said that the showing made, including as it did the fact that no colored citizen had even been summoned as a juror of the state, presented a prima facie case of denial by the officers charged with the selection of grand and petit jurors, of that equality of protection that has been secured by the Constitution and laws of the United States. It further held it was, we think, under all the circumstances, a violent presumption which the state court indulged that such uniform exclusion from juries was solely because, in the judgment of those officers fairly exercised, the black race in Delaware was utterly disqualified by want of intelligence, experience and moral integrity to sit on juries. We think from a casual reading of that part of the opinion last referred to, it is misleading. In our opinion the reference to the, "violent presumption which the state court indulged," was to a statement made by the Supreme Court of the State of Delaware and not by the trial court. In the case at bar the evidence does not disclose that there has been any

exclusion of a single, solitary Negro citizen because of the fact that he is a Negro or because he is black or most certainly does it not show any exclusion of the Negro race as a whole. The evidence discloses that the jury commissioners had submitted to them a list drawn up by the clerk of the jury board in compliance with law which list contained the names of every male citizen between the ages of twenty-one and sixty-five who were known to the said jury board clerk, that on this list were names of Negroes. The jury commissioners testified that they did not know whether or not any Negroes were placed on the jury roll which was selected from the list presented to them by the clerk. They testified that if the name of any colored citizen whose name was on the list presented to them by the clerk was omitted from the jury roll, it was because of the fact that in their opinion said citizen did not possess the qualifications prescribed by statute. The commissioners further stated that they did not exclude any person because of race or color. They testified that the names of those persons comprising the jury roll were placed thereon because of the fact that in their opinion they were competent to serve as jurors. However, if appears that on the jury roll from which the jury box was filled that contained the names of the men who served on the grand jury which returned the indictments against

the defendants at bar, contained the names of several Negro citizens of Jackson County. This fact is controverted by the defendants to the extent that these names were placed thereon subsequent to the time that said grand jury was drawn and that the names of no Negroes were on said jury roll prior to the time the indictments were returned against the defendants. The defendants' own witness testified that he was clerk of the jury board prior to 1931, that he was clerk at the time that the indictments were found against the defendants, that the names of Negroes seemed to be in his handwriting and that in his opinion he placed them there and that he knew those parties to be Negroes or some of them. The defendant contends that they called the so-called handwriting expert who attempted to uphold defendant's contention but we respectfully submit that after an examination of the original jury rolls which had been brought into this court by the clerk, that they will readily agree that the trial court did not err in holding that the defendants had not proven to him the names of the Negroes placed on the jury rolls were placed there subsequent to the time of the finding of the indictments. In our opinion the testimony of the expert witness shows conclusively that the evidence given by him was nothing more than a series of incorrect guesses.

The case of Gibson vs. Mississippi, supra,

deals with exactly the same question as was considered in the case of Virginia vs. Rives, supra.

The case of Smith vs. Mississippi, supra, states that Smith was charged and indicated with first degree murder. Smith filed a motion to quash the indictment alleging that those persons charged by law with the duty of selecting jurors had arbitrarily and systematically excluded members of the African race because of their race or color even though there were many members of said race who possessed all the qualifications prescribed by statute. He also filed a petition seeking a removal of the case into the Circuit Court of the United States for the Western Division of the Southern District of Mississippi. The court refused to grant either of the motions. The Supreme Court held the action of the court below in overruling the application for removal was not error under authority of Gibson vs. Mississippi, supra. In regard to the motion to quash the indictment, it appears that the defendant offered no evidence in support of his motion other than what purported to be an affidavit appended to the motion. The Supreme Court of the United States held that a motion to quash the indictment against a person of African descent on the ground that it was found by a grand jury from which was excluded, because of their race, all persons of the race to which the

accused belonged, can be sustained only by evidence independent of the facts statedin the motion to quash. The court distinguishes this case from the case of Neal vs. Delaware in that in the latter case the court construed an agreement of the Attorney General of Delaware as being an admission of the allegations in the motion.

In Carter vs. Texas, 177 U.S. 442, it appears that one, Seth Carter, was convicted of the crime of murder. Before arraignment or plea to the indictment the defendant presented to the court a motion to quash the indictment on the ground that members of the African race were excluded from the jury rolls and jury lists because of their race or color although many members of the said race possessed the qualifications prescribed by statute. The defendant asked leave of the court to introduce witnesses and offered to introduce and to prove and sustain the allegations therein made but the court refused to hear any evidence in support of said motion and thereupon overruled same. The Supreme Court of the United States held that the defendant having offered to introduce evidence in support of his motion, the refusal of the court to allow such evidence to be offered constituted reversible error, defendant having been denied his constitutional rights under the 14th Amendment. This case has no particular bearing on the case at bar in view of the fact that the appellant was permitted to introduce

any and all evidence which he desired to offer in support of his motion to quash.

In Tarrance vs. Florida, supra, the court held, "An actual discrimination by the officers charged with the administration of statutes, unobjectionable in themselves, against the race of a Negro on trial for a crime by purposely excluding Negroes from the grand and petit juries of the county will not be presumed but must be proved. An affidavit of persons under indictment and annexed to a motion to quash the indictment on the ground of such discrimination stating that the facts set up in the motion are true 'to their best knowledge and information and "'belief' is not evidence of the facts stated." This case followed the case of Smith vs. Mississippi, supra, and is distinguishable from the case of Carter vs. Texas in that in this case the defendant offered no evidence in support of his motion nor did he attempt to offer any such evidence while in the Carter case it appeared that the trial court refused to allow the defendant to substantuate his claim by proof.

In Brownfield vs. South Carolina, supra, the same situation existed as in the case of Tarrance vs. Florida, supra.

In Rogers vs. Alabama, supra, it appears that the defendant was indicted for murder and in due time filed

a motion to quash the indictment because the jury commissioners appointed to select the grand juries excluded from the list of persons to serve as grand jurors all colored persons although largely in majority of the population of the county and although otherwise qualified to serve as grand jurors, and on the further ground that they were disfranchised and divested of all rights as electors in the State of Alabama by the provisions of the Constitution of Alabama, 1901. On motion of the state, the motion to quash was stricken from the files. Defendant excepted but his exceptions were overruled by the Supreme Court of Alabama on the ground that prolixity was sufficient to justify the action of the court below. The court held that this action of the trial court in striking the motion to quash was error. However, the Supreme Court held that there was no merit in that part of the motion to quash which referred to the Constitution of 1901. Evidently, the United States Supreme Court decided that the pleading was not prolix and therefore the state, not having denied the allegations of the motion, the defendant was entitled to have his motion to quash sustained.

We especially refer the court to the case of Martin vs. Texas, 200 U.S. 316, wherein the court held as follows: "While an accused person of African descent on trial in a state court is entitled under the Constitution of the United States to demand that in organizing a grand

jury and empaneling a petit jury there shall be no exclusion of his race on account of race and color, such discrimination cannot beestablished that no one of his race was on either of the juries and motions to quash based on alleged discriminations of that nature must be supported by evidence introduced or by an actual offer of proof in regard thereto. The court further held that an accused person cannot of right demand a mixed jury some of which shall be of his race, nor is a jury of that kind guaranteed to any race.

We have to the best of our ability exhausted the reports in the Supreme Court of the United States in an effort to find a case wherein a question somewhat similar to the one at hand has been decided. We are frank to state that in our opinion none of the above cited cases have any definite bearing on the final determination by this court of the one prevailing question in this case. Defendant in the case at bar filed his motion to quash the indictment returned by the grand jury of Jackson County in 1931 on the ground that he had been deprived of certain constitutional guarantees in that certain members of his race who possessed all the requirements prescribed by statute for jurors had been excluded from the juries of Jackson County because of their race or color. He asked leave of the court to introduce evidence in support of said motion. This request was granted him. The State of Alabama did not demur or

file any motion as to the form of or correctness of the pleading but on the other hand filed in writing a denial of the allegations contained in the defendant's motion to quash. Under the authorities above cited we respectfully insist that the burden of proof was then upon the movant (appellant) to prove that members of the African race had been excluded from the jury rolls and jury boxes because of their race, color or previous condition of servitude. This they have not done. In the first place, there appeared upon said jury rolls of Jackson County the names of several Negroes. The trial court who had before him the witnesses and saw their conduct and demeanor came to the conclusion that these names had been on the said jury roll prior to the time that the indictment against the defendant at bar was returned. The defendant's own witness, Kelley Morgan, testified that in his opinion the names of the colored persons appearing on the jury roll were in his handwriting and that he had not written in that book since he went out of office as clerk of the Jackson County Jury Board in 1931. But even if it could be assumed that the names of the colored persons were fraudulently placed upon the jury rolls of Jackson County, we respectfully submit that the defendant has not met his burden of proof. The jury rolls were brought into the courtroom. They were examined and the defendant could not prove that there were no Negroes on that jury list.

The members of the jury rolls testified that they had not excluded any person because of his race or color, that they had tried to comply with the law to the very best of their ability, that from the list submitted to them by the clerk they had selected thosemen who, in their opinion, possessed the qualifications prescribed by statute.

The defendant relies largely on the case of Euel Lee vs. Maryland, 161 Atl. 284, but we respectfully insist that this case does not decide the question here involved. In that case it was practically proven that the persons charged with the duty of filling the jury boxes had never considered a colored man. In the case at bar, the case discloses that any number of colored men were considered and for aught that appears from the testimony, there were any number of them on the jury roll.

Appellants, by various means and traps, tried with all their power to bring this case within the rule laid down in Carter vs. Texas, supra. They attempted in every way possible to force the trial court to err by cutting off their proof. However this is so obvious as not to require argument. The trial court offered to give them attachments for their witnesses, this they declined. Then, at the last minute they asked for a continuance, after the court had already informed them to have all of their proof ready as he was anxious to expedite the trial as much as

possible. These same tactics were employed in both cases. The trial judge certainly has the power to protect the dignity of his court and to prevent counsel from employing such illegal methods as they attempted to use in this connection. A continuance or adjournment pending trial, is a matter of discretion with the trial court and in this case we respectfully submit that this discretion was not abused but that on the contrary he displayed the greatest of patience in view of the obvious effort on the part of defense counsel, who were grasping at straws while seeking to force the court into error.

> "Motion for postponement to allow defendant time to get witnesses is so largely in sound discretion of court that in the absence of abuse appellate court will not interfere."
> Brown vs. State, 75 So. 174, 16 Ala. App. 24, Cert. den. Ex parte Brown, 76 So. 995, 200 Ala. 697.

> "Refusal to hold case open until defendant could procure witness from a nother city for corroboration or rebuttal held not error in absence of timely service of or request for compulsory process."
> Bill vs. State, 149 So. 687.

These cases had been tried previously, the same counsel conducting the former trial, they well knew the nature of the case and every step thereof. They knew that the state denied the allegations of their motions. They knew that the burden was on them and that this burden could only be met by witnesses. They knew several weeks ahead of

time when the cases would be tried and the order in which the various motions would be dealt with. However, in the opinion of the writer of this brief, they did not wish the attendance of the additional witnesses. They wanted to have their motion for adjournment overruled. The court did not err in this respect.

Point 2

Alleged exclusion of negroes from trial venire.

The authorities and argument assigned to Point 1 are likewise assigned in support of the court's action in overruling appellants' motion to quash the trial venire.

Point 3

Application for a change of venue.

Appellants next contend that the trial court erred in overruling their motions for a change of venue. In support of said motion, appellants offered no parole testimony but did introduce into evidence as exhibits to said motions several affidavits, all of which were made by non-residents of Morgan County. It appears that the affiants were employees of the defense counsel and were sent into Morgan County for the purpose of securing the feeling of the people of Morgan County towards the so-called "Scottsboro Defendants." The affidavits contained statements alleged to have been made by numerous residents of Morgan County to the effect

that the defendants could not get a fair and impartial trial within said county.

The state introduced a number of affidavits to the effect that in the opinion of the affiants the defendants could get a fair and impartial trial in their county. In addition to the affidavits introduced, the state, in the short time in which it had to answer said affidavits, put on the stand a number of men whose names were contained in the affidavits introduced by the appellants wherein it was alleged that these persons had made statements to the effect that the defendants could not get a fair and impartial trial. Every single person whom we could find denied that he had made any such statement or that he had been interviewed by any of the persons who made the affidavits introduced by the appellants. In addition to this, the state introduced testimony to the effect that at least five of the persons who were alleged to have made statements to the appellants' investigators had been dead for a number of years prior to the time the statements were alleged to have been made. In other words, the state presented evidence to the trial court which proved beyond any question of a doubt that the affidavits were false and contained nothing but perjured testimony. The mere fact that they had listed dead men as having come from their graves and made statements to them destroyed theirtestimony

of any probative force whatsoever.

We respectfully submit that under the authorities of this court, the trial court correctly overruled appellants' motions for a change of venue.

McClain vs. State, 182 Ala. 67, 62 So. 241;
Maloy vs. State, 209 Ala. 219, 96 So. 57;
Owens vs. State, 215 Ala. 42, 109 So. 109;
Hendry vs. State, 215 Ala. 635, 112 So. 212;
Terry vs. State, 120 Ala. 286, 25 So. 176;
Rains vs. State, 88 Ala. 91, 7 So. 315;
Godau vs. State, 179 Ala. 27, 60 So. 908;
Riley vs. State, 209 Ala. 505, 96 So. 599.

Point 4

The court did not err in refusing to exclude for cause certain jurors chalenged by the defendants.

Appellants contend that the trial court erred in refusing to sustain appellants' challenge for cause of the following prospective jurors, viz: Phil Humphrey (Patterson transcript, p. 503), A. T. Shropshire (Patterson transcript, p. 506), Phil Humphrey (Norris transcript, p. 509), Mr. Watson (Norris transcript, p. 506), Mr. Sivley (Norris transcript, p. 510).

On page 503 of the Patterson transcript the following question was asked Mr. Humphrey:

"Mr. Humphrey, you stated that you had an opinion without stating that opinion, whether it was concerning the guilt or innocence of the defendant, since you have that opinion, is it your opinion, Mr.

"Humphrey, that more evidence would be required on the part of the defense than would be required, than if you had not had such an opinion?"

Mr. Humphrey answered as follows:

"I suppose it would take more evidence. It is hard to form an opinion until you hear the evidence."

The appellants challenged for cause. The court overruled the challenge and appellants excepted. The counsel for appellants then asked the witness the following question:

"Mr. Humphrey, you know the defendant as he sits there now, would it take some evidence on the part of the defendant to remove the opinion you now have?"

The answer was:

"Yes, sir."

Appellants renewed their challenge for cause, the court overruled the challenge but no exception was taken to the court's ruling. The court then asked the witness the following question:

"Let me ask the juror another question. Mr. Humphrey, in your judgment, whatever you may have heard or any opinion that you may have had, would that prevent you from fairly and honestly receiving and weighing and considering the evidence that is offered in this case, and giving the defendant a fair and impartial trial, and the benefit of all reasonable doubt?"

The witness answered:

"No, sir."

Later the court recalled Mr. Humphrey and asked him the

following question:

> "Have you such an opinion, either fixed or otherwise, that would prevent you from finding a verdict in favor of this defendant when the state closes its evidence, and the defendant had not put on any, if from that evidence you did not believe beyond a reasonable doubt in his guilt -- would you follow that provision of law?"

The witness answered:

> "Yes, sir."

The answer was, of course, to that part of the court's question: "Would you follow that provision of law."

On page 506 of the Patterson transcript, during the examination of Mr. Shropshire, he testified that he had expressed an opinion on the subject but that he would not hold to that opinion and that his opinion could be changed by the evidence. Upon being asked by the court whether or not he had a fixed opinion, he answered in the negative.

On page 499 of the Norris transcript, appellant challenged for cause Phil Humphrey. On what ground, we do not know as he testified that he did not have a fixed opinion and that he could give the defendant a fair and impartial trial based on the evidence.

On pages 504, 505 and 506 of the Norris transcript, appears the testimony of Mr. Watson. Appellant challenged this juror for cause although he testified that he had no fixed opinion and that if the state's evidence did not prove to him beyond all reasonable doubt that defendant was

guilty that he would acquit him and thathe had no opinion as to the guilt or innocence of the defendant.

On page 511 of the Norris transcript it appears that counsel for appellant challenged for cause Mr. Sivley, a prospective juror, although said juror had stated that if the state's evidence did not satisfy him beyond all reasonable doubt of the defendant's guilt, or if defendant did not offer any evidence at all, he would find him not guilty.

Section 8610, Code of Alabama, 1923, among other grounds for challenge for cause, contains the following:

> "If the juror has a fixed opinion as to the guilt or innocence of the defendant which would bias his verdict."

In dealing with this question the courts have unanimously held that an opinion which would disqualify a juror must be such an opinion that would influence his verdict or such a fixed opinion that would cause him to ignore the evidence in the case.

> "To disqualify a petit juror from service in a criminal trial he must, under this clause, have more than a biased or fixed opinion as to the guilt or innocence of the accused. That opinion must be so fixed as that it would bias the verdict he would be required to render."
> Hammil vs. State, 90 Ala. 577, 8 So. 380.

> "If the juror states that despite his fixed opinion he will be controlled by the evidence, the cases are uniform in holding that he may qualify."
> Thomas vs. State, 150 Ala. 31, 43 So. 371;

Ragsdale vs. State, 134 Ala. 24, 32 So. 674;
Jackson vs. State, 77 Ala. 18;
Godau vs. State, 179 Ala. 27, 60 So. 908;
Pope vs. State, 174 Ala. 63, 57 So. 245;
Jarvis vs. State, 138 Ala. 17, 34 So. 125;
Funderburk vs. State, 145 Ala. 661, 39 So. 672;
Walker vs. State, 146 Ala. 45, 41 So. 878;
Peterson vs. State, 150 So. 156.

Point 5

Conduct of trial court.

We do not think it necessary to deal at length with the question of the trial court's conduct in these cases. This court, after examining the records and reading the testimony as it is required by law to do, will immediately come to the conclusion that the judge who presided at these trials showed patience beyond that of the average person. On every hand he was harassed by certain persons during the trial of the cases. He endeavored in every way possible to conduct the trial in an orderly manner. He attempted to protect the witnesses for both the state and the defense from unfair and misleading cross-examination.

Watson vs. State, 155 Ala. 9, 46 So. 232;
Myers vs. Town of Guntersville, 21 Ala. App. 559, 110 So. 52;
Odom vs. State, 172 Ala. 383, 55 So. 820;
Carmichael vs. State, 197 Ala. 185, 72 So. 405;
Gurley vs. State, 216 Ala. 342, 118 So. 391;
Davis vs. State, 216 Ala. 475, 113 So. 393;
Key vs. State, 8 Ala. App. 2, 62 So. 335;
Bandes vs. State, 17 Ala. App. 390, 85 So. 824;
Snoddy vs. State, 20 Ala. App. 168, 101 So. 303.

Point 6

The appellant next contends that the trial court erred in sustaining the state's objections to certain questions propounded by counsel for appellant during cross-examination of the prosecutrix Victoria Price. All of the questions had for their purpose the discrediting of the witness by showing that she had previously been charged with or convicted of the crime of adultery. Section 7722, Code of Alabama, 1923 is as follows:

> "7722. No objection must be allowed to the competency of a witness because of his conviction for any crime, except perjury or subornation of perjury; but if he has been convicted of a crime involving moral turpitude, the objection goes to his credibility."

Question No. 1 was as follows: "Were you ever convicted of any crime, Mrs. Price?" This question was palpably illegal in that it did not designate the crime involving moral turpitude nor did it ask whether or not the conviction was in a court of competent jurisdiction. - Harwell vs. State, 11 Ala. App. 188, 65 So. 702.

The next question: "Have you ever been convicted of any crime and served a term in the penitentiary for it," was plainly illegal in that it included all crimes and the witness' credibility can only be affected by a conviction involving moral turpitude. If the question had been

worded: "Have you ever been convicted of any crime and sentenced to the penitentiary therefor," it is possible that the sustaining of the state's objection might constitute error, but there are all kinds of crimes and all kinds of prisons and there is nothing in this question to indicate whether or not the crime involved moral turpitude. We are familiar with the case of Moore vs. State, 67 So. 789 but insist that the question there propounded was entirely different from the one here under discussion. The question in the Moore case was as follows: " State whether or not you have been convicted in this court and sentenced to the penitentiary for a term." The question, itself, deals with a conviction in a court of competent jurisdiction and also deals with the penitentiary as distinguished from a prison. However, under the recent rulings of this court to the effect that a conviction of distilling, even though requiring a penitentiary sentence, does not involve moral turpitude, we seriously doubt whether the question discussed in the Moore case, supra, would now be held to be correctly framed or worded. We respectfully submit that the court did not err in sustaining the objection of the state in this instance.

The third question: "Have you ever been convicted of any crime involving moral turpitude." It is plainly shown that the witness did not comprehend the meaning of

these highly technical words, the meaning of which has long been a question of discussion by many members of the legal profession.

The next question was: "Have you ever been convicted of the crime of adultery?" We respectfully insist that the sustaining of the state's objection in this particular was not erroneous. Even if we assume that the crime of adultery is an offense involving moral turpitude, which we do not concede, still the question was not properly framed in that it should have included the words: "In a court of competent jurisdiction." In fact, from a careful reading of the record, it will appear that it was the purpose of defendant's counsel to inject into the record evidence of a conviction of adultery or fornication in a police court in Huntsville. This court has many times held that a conviction in a municipal court cannot be shown as affecting the credibility of a witness. I refer you to the case of Swope vs. State, 58 So. 809, from which we quote: "On the cross-examination of the witness Sherman by the defendant, he was asked if he had not been charged in the 'courts of Huntsville' for selling liquor and if he had not been fined in such courts for that offense." The court properly sustained the objection made by the state to these questions. For aught that appeared from the question, the defendant was seeking to show a conviction for the

violation of the municipal ordinance in the mayor's court at Huntsville; and the competency of the evidence showing a conviction of the crime going to the credibility of the witness contemplates only convictions for violation of of state laws. - Cheatham vs. State, 59 Ala. 40.

The above citation also disposes of the next question: "Have you ever served time in prison in Huntsville for a crime involving moral turpitude?"

The other three questions which are as follows: (1) "Have you ever been convicted of lewdness," (2) "Have you ever been convicted of being drunk," (3) "Have you ever been convicted of vagrancy or fornication," are all covered by the authorities heretofore cited.

Bryan vs. State, 89 So. 894;
Smith vs. State, 49 So. 1029;
Sweatt vs. State, 47 So. 194.

Point 7

Evidence of prior acts of intercourse.

Appellant next contends that the trial court erred in sustaining state's objections to certain questions propounded by counsel for defense which questions called for evidence of prior acts of intercourse between the prosecuting witness and other men.

We respectfully submit that the court did not err in this respect. The rule in this state has long been

settled that in rape prosecutions the general character of a prosecutrix for chastity may be impeached; but this must be by general evidence, and not by particular instances, nor as to criminal intimacy with any other person.

Green vs. State, 19 Ala. App. 239, 96 So. 651;
Story vs. State, 178 Ala. 98, 59 So. 480.

It is true that specific acts with the defendant are admissible; but not specific acts with third persons.

Herring vs. State, 20 Ala. App. 304, 101 So. 634;
Ex parte Herring, 212 Ala. 1, 101 So. 636;
McQuirk vs. State, 84 Ala. 435, 4 So. 775.

The appellants contend, however, that inasmuch as there was evidence of semen having been found on the clothing of the prosecutrix and in her private parts that the defendant should have been allowed to show that she had intercourse with persons other than the defendant a short time prior to the date of the alleged attack.

The State of Alabama, in making out its case, did not introduce any testimony whatsoever tending to show the presence of semen in the vagina of the prosecutrix or on her clothes. The defendant on cross-examination of the prosecutrix, however, did elicit testimony to that effect. They also put on medical experts who had examined the prosecutrix a short time after the alleged rape was committed and who testified as to the presence of semen in the vagina of the prosecutrix.

We submit that they could not put up a straw man

and then knock him down. Appellant relies on the case of Nugent vs. State, 18 Ala. App. 521. The Nugent case has no application here. In that case the defendant was charged with the abuse of a child under ten years of age, in an attempt to carnally know her. It appeared from the evidence offered on the part of the state that the child's private parts were inflamed, which condition one physician testified was caused from pressure and bleeding, but another physician testified the cause to be venereal disease. Defense counsel offered to prove particular acts of intercourse between the child and other persons before and near the time of the alleged commission of the offense, which evidence was not allowed. There was evidence that the defendant was not diseased. The court held:

> "We think the court clearly mistook the law in refusing to permit the accused to prove that before and hear the time of "committing the alleged offense, other persons had carnal knowledge of the girl, upon whom the offense is charged to have been committed, inasmuch as the State had previously proved that she was infected with venereal disease."

In other words, the court held that the testimony offered by the state in regard to the venereal disease created a presumption of guilt against the defendant and he should have been allowed to rebut such presumption. We have no argument with this principle of law. But we do insist that said principle has no application in this case. To

allow the appellants in this case to show specific acts of intercourse between the prosecutrix and third parties on the theory of rebutting or explaining facts and circumstances brought out by them would be to open the flood gates and in practically every rape case, as in this one, this strategy would be resorted to for the purpose of discrediting the prosecutrix, not by proving her general reputation but by specific acts.

In our opinion, the rule stated in the case of State vs. Manard, 169 La. 1197, cited in appellants' brief is decisive of the question here raised. We quote from that case.

> "Counsel, however, say that the evidence was admissible in view of the fact that the prosecuting witness was in a state of pregnancy at least eight months; that her condition was easily discernable by the jury. He cites the Gibbs and Williams cases, supra, and to which we may add State vs. Holland, 169 La. 149, 124 So. 675, 676, decided November 4, 1929.
>
> "The cases cited are readily distinguishable from the present case. In the Gibbs case the child imputed to the defendant was offered in evidence by the state and was exhibited in the arms of its mother to the jury, and the mother was called upon to declare the child's paternity, and she named the defendant Gibbs.
>
> "As the state had opened the door it was held that the defendant had the right to introduce evidence of the mother's acts of intercourse with other men than the defendant.

"In the Williams case it appears that the state again opened the door and caused the prosecutrix on direct examination in chief to testify that the defendant had sexual intercourse with her and in support thereof testified that as a result she became pregnant or gave birth to a child, and it was held that, in order to overcome the effect of the corroborative circumstance of pregnancy testified by the prosecutrix in chief, the defendant had the right to show that about the time the child was conceived the prosecutrix had illicit intercourse with a person other than the defendant.

"In the Holland case, noted supra, the prosecutrix was asked on her direct examination if she had given birth to a child, and she answered in the affirmative. She was then asked who was the father of the child, and she replied that he was the defendant.

"She was asked on cross-examination if she had not had sexual intercourse with several men whose names were mentioned.

"This testimony was excluded and the ruling was held to be error, the court making use of the following language:
'The statement of the prosecuting witness that the defendant was the father of her illegitimate child was elicited for the purpose, and it could have no other purpose, of corroborating her testimony that the defendant had sexual intercourse with her.
'Defendant's object in seeking to introduce the excluded testimony was to rebut his paternity of the child as a corroborating circumstance and to affect the credibility of the witness.'

"The case here presented is entirely different from the three cases referred to.

"The district attorney followed the rule as laid down in these cases, and scrupulously avoided going into the question of the pregnancy of the prosecuting witness and to the paternity of the unborn child. .....

"It would be otherwise had the state offered proof of conception of the birth of a child as a result of the intercourse with defendant and had claimed that defendant was the father "of the child, for the purpose of corroborating the prosecutrix witness' testimony as to the fact of intercourse with defendant.

"The case obviously does not come under the ruling in the three cases cited, supra.

"A defendant who opens up the question of pregnancy and the birth of a child and himself puts at issue the paternity of the child cannot attack the chastity of the prosecuting witness, either as to her general reputation in that respect or by showing particular acts of illicit intercourse nor can he introduce such evidence in order to impeach the witness under such circumstances."

Point 8

The court did not err in refusing to allow the detailed account of the actions of the prosecuting witness while in Chattanooga

Appellants next contend that the trial court erred to a reversal in not allowing them to prove a detailed account of the actions and movements of the prosecuting witness while she was in Chattanooga on the day and night prior to the day on which the rape was alleged to have been committed. We respectfully submit that the court did not err in this regard.

The court refused to allow the witness to answer such questions as:

(1) "When you got off the train where did you go?" (Patterson Transcript, p. 516)

(2) "Did you stay at a rooming house in Chattanooga kept by a woman called Callie Brochie that night?" (Patterson Transcript p. 518)

(3) "Did you look for work in Chattanooga?" (Patterson Transcript, p. 521)

(4) "Mrs. Price did you speak to any person in Chattanooga, just yes or no please." (Norris Transcript, p. 521)

(5) "Did Gilley bring you some food in Chattanooga?" (Norris Transcript, p. 521)

The scope and extent of a cross-examination rests largely in the trial court.

Treadwill vs. State, 168 Ala. 96, 53 So. 290.

The testimony or answers which appellants attempted to elicit from the witness in this connection, of course, had no bearing on the question of guilt or innocence of the appellants. The only purpose which they could have had was to test the bias or credibility or accuracy of the witness.

"The extent of cross-examination on irrelevant facts for the purpose of testing bias or credibility or accuracy of a witness' statements rests largely in the discretion of the trial court."
Birmingham Ry. Light & Power Co. vs. Lipscomb, 198 Ala. 653, 73 So. 962.

"It is not error to refuse to allow accused, on a trial for assault and battery to extend the cross-examination of the prosecuting witness to inquiries on immaterial matters, or to refuse to allow questions fully answered."
Wray vs. State, 2 Ala. App. 139, 57 So. 144.

"The scope of the cross-examination of witnesses as to irrelevant matters to test the accuracy of their testimony is a matter

largely within the enlightened discretion of the trial court."
Allsup vs. State, 15 Ala. App. 121, 72 So. 599.

"Where witness has been fully cross-examined, court will not be put in error for sustaining objection to irrelevant questions."
Grayham vs. State, 22 Ala. App. 170, 113 So. 646.

"In a criminal case court did not err in refusing to permit defendant's counsel to inquire into the details of former transactions and of former relations between the witnesses for the state and witnesses for defendant."
Vaugh vs. State, 17 Ala. App. 383, 84 So. 879.

"On a trial under an indictment for murder, a question calling upon a witness to state a conversation he testified that he had with the deceased the morningbefore the killing, without its being shown that the conversation called for had any relevancy with any of the issues envolved, is properly disallowed upon objection on the part of the state."
Wilson vs. State, 128 Ala. 17, 29 So. 569.

"Evidence is not relevant, when it has no tendency to prove or disprove any issue involved in the trial."
Powell vs. State, 5 Ala. App. 75, 59 So. 530.

The evidence attempted to be introduced by defendant called for matters entirely foreign to the one issue in this case - "Did the appellants forcibly ravish Victoria Price?" It dealt with issues wholly collateral to the main inquiry and had no bearing on the question of guilt or innocence. We respectfully insist that the court did not err in this regard.

Point 9

Argument of Attorney General in the Patterson Case was not an appeal to passion or prejudice.

The proceedings on which this point is based are found on page 730 of the Patterson transcript. Upon careful reading, it will be discovered that appellants' brief does not truly and fairly show the exact circumstances.

> Mr. Leibowitz: "We object to the statement by the solicitor that if you cannot avenge the assault on Victoria Price, you cannot stop the attacks on our womanhood. We object to it because it is an appeal to the passion and prejudice of the jury. And I therefore now move for a mistrial." It was not shown what state's counsel said.
>
> Court: "I overrule the motion."
>
> Mr. Leibowitz: "Exception."
>
> Mr. Knight then stated: "We have a passion for protecting our womanhood of the State of Alabama."
>
> Mr. Leibowitz: "He has repeated the statement, and we object to it."
>
> Mr. Knight: "I did not repeat all of it. I said 'We do have a passion for protecting the womanhood of the State of Alabama.'"

Appellant cites a number of cases in support of his contention that the argument of the Attorney General was an appeal to passion and prejudice and thus should have been excluded and the jury instructed not to consider it. We have examined the cited authorities and we submit that in practically every instance where this court re-

versed the trial court on the argument of the solicitor, it was a case where the solicitor injected racial issues. This question does not appear in the instant case.

> "In prosecution for murder, statement by solicitor in argument that if jury let accused go, there would be more still, cold forms in cemeteries, held not so objectionable as to constitute reversible error."
> Davidson vs. State, 211 Ala. 471, 100 So. 641.

> "The prosecuting attorney may properly argue that if accused was guilty he ought to be convicted and that it is dangerous to society to turn a guilty man loose."
> James vs. State, 72 So. 294, 14 Ala. App. 652.

> "In a prosecution for murder, refusal to exclude a statement of solicitor that, if the jury would convict accused, it would be a long time before another similar crime would be committed, was not error, it being merely statement of opinion."
> Snoddy vs. State, 20 Ala. App. 168, 101 So. 303.

The statement of the Attorney General contains no reference to race. It is merely an appeal to the jury that the State of Alabama does not sanction the crime of rape but on the contrary does all in its power to protect the womanhood of the state from suffering insult and humiliation at the hands of a lustful male regardless of his race or color. It was nothing more than an appeal to the jury to convict the defendant and put upon him the severest penalty of the law if they should believe him guilty of the offense.

Olden vs. State, 176 Ala. 6, 58 So. 307.

It is also to be noted that counsel for appellant

did not move to exclude the remarks of the Attorney General.

> "Objections to remarks of the prosecuting attorney in his argument to the jury may be first raised by a request for a charge to disregard such remarks."
> Ethridge vs. State, 124 Ala. 106, 27 So. 320.

> "Objection to improper argument of counsel must be proper and timely."
> Anderson vs. State, 209 Ala. 36, 95 So. 171;
> Elliott vs. State, 19 Ala. App. 263, 97 So. 115.

It is true that appellants moved for a mistrial but we submit that if the argument can be said to have been prejudicial it was not of such degree that the trial court could not have eradicated any injury and the court should have been requested to instruct the jury not to consider the remarks of the Attorney General before he can be put in error for not doing so.

Point 10

The court did not err in the Patterson case in denying the defendant an overnight adjournment

Appellant devotes several pages of his brief to this proposition (pages 122-125). In presenting the question, he cites a number of pages in the Patterson case. In practically every single instance the citation refers to the allegations contained in his motion for a new trial. He does not cite the actual record.

Appellant contends that the court erred in not granting an overnight adjournment to await the arrival

of a witness from Chattanooga and the arrival of the deposition of Ruby Bates from New York.

The following statements by appellant's counsel in their brief are not supported by the record. "About ten minutes after the beginning of the summations Dr. Reisman arrived in court. A request that the case be re-opened so that his testimony might now be taken was refused; and the court even refused to permit counsel to make a record of the Doctor's arrival and of his request, thus preventing the noting of an exception to the court's refusal (Page 123 of brief).

> "As a matter of fact the deposition was returned by nine o'clock on the following morning, Thursday, November 30th. Its arrival was called to the court's attention but it refused to permit the summations to be suspended so that the document might be read to the jury." (Brief; p. 123)

The actual proceedings as they occurred in this connection are set out on pages 722-729 of the Patterson transcript. The court had acceded to the defendant's demand and took quite a lengthy adjournment to await the arrival of the Doctor from Chattanooga. The court had agreed to permit the Doctor to testify out of order. In regard to the deposition of Ruby Bates this witness was absolutely under the control and dominance of the defense counsel. They knew what she would testify to. On page 498 of the transcript is recorded the

court's suggestion to defense counsel that the testimony offered on the former trial could be used. Both of the witnesses, Bates and the Doctor, were outside the jurisdiction of the court.

We insist most respectfully that the trial court did not abuse its discretion in refusing the adjournment requested by appellant Patterson. We refer the court to the following case.

> "It was not error to refuse to delay the trial of a criminal case and issue an attachment for a witness who was not shown at the time to be within the jurisdiction of the court."
> Gaines vs. State, 146 Ala. 16, 41 So. 865.

> "Accused is entitled to a continuance on the ground of absence of witnesses only when the witnesses are within the court's jurisdiction."
> Curtis vs. State, 9 Ala. App. 36, 63 So. 743;
> Jarvis vs. State, 220 Ala. 501, 126 So. 127;
> Gaines vs. State, 23 Ala. App. 166, 122 So. 699;
> cert. den. 219 Ala. 422, 122 So. 700;
> Williams vs. State, 23 Ala. App. 297, 124 So. 402.

Point 11

Trial court did not err in its oral charge.

In the Patterson case at the conclusion of the court's oral charge, counsel for appellant, reserved a general exception to the court's charge (Transcript, page 747).

It has been the uniform rule of this court that a general exception to the oral charge of the court is

not sufficient. That one not satisfied with the charge of the court must except to that part of the charge which in his opinion is erroneous, thus enabling the court to correctly state the law on that phase of the case if he should determine that he had erred in his charge.

> "Where the charge given in a crim nal case, involves several distinct instructions or propositions, a general exception to the entire charge is unavailable, if any one of such instructions or propositions is correct."
> Dick vs. State, 87 Ala. 61, 6 So. 395.

Bonner vs. State, 107 Ala. 97, 18 So. 226;
Ragsdale vs. State, 134 Ala. 24, 32 So. 674;
Sims vs. State, 146 Ala. 104, 41 So. 413;
Untreinor vs. State, 146 Ala. 26, 41 So. 285;
Spencer vs. State, 154 So. 529 (Ala.).

- B -
NORRIS CASE

On page 639 of the Norris transcript it appears that part of the court's charge is as follows:

> "That the mere presence renders one guilty as well as he who committed the crime."

The court said:

> "I said that if his presence was known to the party committing the act, and his presence encouraged the commission of the act, he would be guilty."

The defendant excepted.

Counsel for appellant did not correctly quote the court. We refer this court to page 629 of the Norris transcript where the court charged as follows:

"Now, gentlemen, there are some other principles of law on which it is necessary for me to instruct you in order for you to apply it in the consideration of the contentions of the parties. One is what is called the law of aiding and abetting. It is not necessary for me to undertake to give you the legal, technical definition of these words, but I can tell you in general terms what it means. It means this: that all parties who intentionally assist, encourage, or participate in the commission of a crime are just as guilty as if they had committed the crime themselves. To illustrate: If some party comes to you and tells you that he wants to break into a store in this town and wants to borrow your tools with which to break in, and you lend them to him for that purpose, and he breaks into that store with the tools, you are a burglar and you are just as guilty of breaking into that store as if you had been there by yourself and had done it by yourself. That is true of any other crime. And further, and more on that subject. If you stand by while a crime is being committed by another or others and you stand by for the purpose of giving aid or encouragement by your presence, and that purpose is known to the party or parties committing the offense, and your mere presence does encourage him, and the act is done, then, gentlemen, you are an aider and abettor, and you are just as guilty as the party who committed the act."

We submit that the above is a correct statement of the law on the subject.

"Exceptions to parts of the oral charge, which are descriptive merely, are not sufficient to meet the rule."
Buckley vs. State, 19 Ala. App. 308, 98 So. 362.

"Where, by agreement or arrangement, two or more persons enter upon the commission of a criminal offense, and their purpose is carried out, each is guilty of the offense committed, though he may have done no overt act in its commission."
Sankey vs. State, 128 Ala. 51, 29 So. 578.

"If the defendant encouraged or procured, or was instrumental in causing a robbery to be committed, he would be guilty though he did not actually participate in the crime."
Montgomery vs. State, 169 Ala. 12, 53 So. 991.

"The words 'aid and abet' comprehend all assistance rendered by acts, or words of encou agement, or support, or presence, actual or constructive, to render assistance should it become necessary. No particular acts are essential. If encouragement be given to commit the felony, then the fact that accused is an aider or abettor is made out."
Jones vs. State, 174 Ala. 53, 57 So. 31.

Johnson vs. State, 21 Ala. App. 565, 110 So. 55;
McMahon vs. State, 168 Ala. 70, 53 So. 89;
Furguson vs. State, 134 Ala. 13, 32 So. 760;
Raiford vs. State, 59 Ala. 106;
Section 3196, Code of Alabama, 1923.

The other exception to the court's charge discussed in appellant's brief deals with a part of the court's charge that dealt with the proof of reputation for truthfulness and veracity. The court did not charge that a witness could not be impeached in any way other than by proof of reputation of lack of truthfulness but did state that the side remarks of counsel which had no connection with the evidence were not to be considered. (See bottom of page 635 - middle of page 636)

This court has oftentimes held that requested charges must be in writing and that the court does not err in refusing to charge upon oral request.

"Requested charges must be in writing and given or refused in the terms in which written but mere repetition need not be given."

McKenzie vs. State, 97 So. 155;

Section 9509, Code of Alabama, 1923.

Point 12

Admitted Evidence

-A-
Patterson Case

Appellant contends that the court erred in overruling his objection to the question propounded state's witness Hill (Transcript, page 56);

Q"Did you hear these women, either one or both, make any complaint as to their treatment on that train?"

Mr. Leibowitz: "I object to that." Overruled.

Mr. Leibowitz: "Exception."

A "Yes, sir."

Q "Which one was that?"
A "Ruby Bates."

Q "Did you hear Mr. Price say anything about it?"
A "No, sir."

Q "Were you up at the store and hear them do any talking, did you go up to them at the shade tree?"
A "It was right when they got off the car."

Q "Did you get to the shade tree where they were seated?"
A "No, sir, I didn't go there."

We submit that the court did not err in this regard for the following reasons:

1. The statement was a part of the res gestae and, therefore, was admissible. The witness testified that

the statement was made as soon as the girls got off or were taken off the train.

2. There was only a general objection and if the statement had been made by Victoria Price it would have been admissible regardless of whether it was a part of the res gestae or not.

3. Although the witness testified that a statement was made, no details were given and consequently no injury was done the appellant, Patterson.

We will deal only with the second ground above referred to; The question inquired of the witness whether he heard either of the girls make any complaint. It has long been settled by the rulings of this court that in a rape case the prosecution may show that prosecutrix made a complaint.

Anderson vs. State, 22 Ala. App, 193, 114 So. 14;
Rountree vs. State, 20 Ala. App. 225, 101 So. 325;
Buckley vs. State, 19 Ala. App. 508, 98 So. 362;
Marshall vs. State, 18 Ala. App. 46, 88 So. 369.

Therefore, the question called for evidence that was competent and admissible and a general objection thereto was not sufficient. Hence the court correctly overruled the objection. It is true that a specific objection to evidence illegal or irrelevant on its face is not necessary but in this instant the question called for evidence which was admissible and, therefore, a specific objection should have been interposed.

"Accused cannot complain of the admission of evidence which was partly admissible, where his objections were to the whole."
Wilson vs. State, 12 Ala. App. 97, 68 So. 543;

Stokes vs. State, 13 Ala. App. 294, 61 So. 303;
English vs. State, 14 Ala. App. 636, 72 So. 292;
Valentine vs. State, 19 Ala. App. 510, 98 So. 483.

It is to be noted that no objection was interposed to the question: "Which one was that?"

We submit, however, that the statement was a part of the res gestae.

Aplin vs. State, 19 Ala. App. 604, 99 So. 734;
Erskine vs. State, 21 Ala. App. 307, 107 So. 720.

The evidence is certainly corroborative of the prosecutrix as she had testified that Ruby Bates was also attacked and consequently a complaint by Ruby Bates at the time the offense was committed was admissible.

There is absolutely no merit in appellant's next contention that the court erred in allowing the state to show in the Patterson case that the defendant had testified in the trials at Scottsboro that he had seen the girls raped. The theory of appellant's counsel being that the Supreme Court of the United States had held that there was in fact no trial in Scottsboro and consequently statements there made were inadmissible. This position is unavailing. The statements, contradictory of his testimony in the instant case, would have been admissible regardless of where made.

Paradise vs. State, 131 Ala. 26, 31 So. 722;
Hicks vs. State, 99 Ala. 169, 13 So. 375;
Smith vs. State, 137 Ala. 22, 34 So. 396;
Carpenter vs. State, 193 Ala. 51, 69 So. 531;
McQuire vs. State, 57 So. 57.

-B-

NOrris Case

In the Norris case appellant contends that the trial court erred in permitting state witness, Simmons, to testify that the defendant while confined in the Scottsboro jail made certain statements incriminatory in nature.

"Testimony of the jailer as to what one of the defendants told his attorney concerning the case in witness' presence was properly admitted."
Cotton vs. State, 87 Ala. 75, 6 So. 396.

"Declarations by defendant, both before and after the homicide with which he is charged, tending to connect him with it, are admissible as evidence against him."
Brindley vs. State, 193 Ala. 43, 69 So. 536;

Fincher vs. State, 211 Ala. 388, 100 So. 657.

Point 13

In regard to appellant's motion for a new trial we think it unnecessary to do more than cite to the court the case of Morris vs. Corona Coal and Iron Co., 109 So. 278.

In the instant case the judgment was rendered prior to the 23d day of December, 1933, the date on which that term of court expired by operation of law.

Section 6667, Code of Alabama, 1923.

The motions for new trials were not filed until after the expiration of said term of court on to-wit, the 29th day of December 1934. No continuance was entered prior to the expiration of the 1933 term and, therefore, at the expiration of the term at which the judgment was rendered the trial court lost all power over said judgment. The Stateof Alabama did not enter any agreement to continue the hearing on the motion for new trial nor did it in any way waive its right to move to strike the motion for a new trial. We submit that the facts in the Morris case, supra, are practically identical with the facts of the instant case and that said case is direct authority for the action of the lower court.

> "Under circuit court rule 22 (Code 1923, Vol. 4, p. 901) motion for new trial made and called to court's attention after expiration of term at which judgment was rendered, held properly stricken."

Respectfully submitted,

(SGD) THOMAS E. KNIGHT JR.
Attorney General,

(SGD) THOS. SEAY LAWSON
Assistant Attorney General.

Ihereby certify that I have this day mailed copy of the foregoing brief and argument to Hon. Osmond K. Fraenkel, Attorney for Appellants, whose proper postoffice address is 76 Beaver Street, New York City. This the 12th day of June, 1934.

(SGD) THOS. SEAY LAWSON
Assistant Attorney General.