O 051—Appearance Bond of Attached Witness—Class 4. Clarke & Courts, Stationers, Printers, Lithographers, Galveston

No. 1787

THE STATE OF TEXAS, } In District Court,
County of Lampasas } November Term, 188 8

Know all Men by these Presents,

That we Jesse Vanwinkle as principal, and
C J Parker and L E Walker
as sureties, are held and firmly bound unto the STATE OF TEXAS in the penal sum
of one Hundred Dollars, jointly and severally;
conditioned, however, that if the said Jesse Vanwinkle
principal, shall make his personal appearance before the Honorable District
Court of Lampasas County, at the Court House thereof, in
on the 12th day of November 188 8 and there remain from day to
day and from term to term of said Court until discharged by due course of law,
then and there to testify as a witness in behalf of Deft in a certain
cause No 1787, pending in said Court, wherein THE STATE OF TEXAS is plaintiff
and Andy Cox is defendant,
then this obligation to be null and void, otherwise to remain in full force and effect.

Witness our hands, this 25th day of July 188 8

J T Van Winkle
C J Parker
L E Walker

Approved the 8th day of August 188 8

J M Miller Sheriff
McCulloch County.
By Jno McLean Deputy.

in the Record and the law as given in charge that the verdict of the Jury is not supported by the law and the evidence and that the Court erred in this regard in not [redacted] because the evidence is insufficient, the Judgment is reversed and cause remanded.

Reversed and Remanded.

Filed June 26/89

John A. White P. J.
Court of Appeals.

CLERK'S OFFICE, COURT OF APPEALS,
AUSTIN, TEXAS.

I, P. WALTON, Clerk of the Court of Appeals of Texas, at Austin, do hereby certify that the foregoing Eight pages contain a true and correct copy of the opinion of this Court delivered in Cause No. 6643, wherein Grady Cox was Appellant and The State of Texas was Appellee, now on file in this office.

Witness my hand and seal of said Court, this 27th day of June A. D. 1889.

P. Walton
Clerk, Court of Appeals.

[illegible] & Co., Pub., St. Louis.

vs State 26 Tex Apps 673; Duncan v State decided at Galveston Term March 9th 1889; Williams Crim Stats § 2545]

But whilst we have differed from learned Counsel [redacted] we are constrained to agree with him as to the sufficiency of the evidence. We are of opinion that it is of too doubtful a character upon the issue of fraudulent intent to authorize us in upholding the verdict and Judgment.

All the evidence shows that defendant was employed in gathering his sister's horses. He did not know - had never seen the animals in question. It was running in the bunch with his sisters animals. All his acts with regard to the animals were open without effort at concealment and to several offers made him to buy and bet the animals he declined because it was not his but his sisters. He cut and turned out of those he had gathered such animals as he knew were not his sisters.

It is true that there is some evidence showing that his brand was placed upon the animals after he took her into possession, but if he did so after he had taken the animals believing it to be his sisters this would not establish the fraudulent intent at the time of the taking.

We believe that under the facts exhibited

that after consultation they had failed to agree, two of their number to-wit: Sinecum the foreman and one Clayton standing out against and dissenting from the majority. That in this attitude of the case one of their number, one Rasberry stated to the jury that defendant was a man of bad character, had been charged with divers thefts, had been known to harbor thieves and that his defendants witnesses were all of bad character. That after this statement of Rasberry Sinecum and Clayton came over and voted for conviction.

On the trial of this issue presented in defendants motion for a new trial the two jurors Sinecum and Clayton each testified that in finding and agreeing to the verdict as returned by the jury they were not influenced by anything which the Juror Rasberry had said but that they found their verdict solely upon the law and the testimony.

A mere statement made by one juror to another or his fellows in reference to the character of the defendant is not per se ground for a new trial, ✓ Austin v State 42 Texas 355-7 and unless the verdict was probably influenced by the statement of a juror to his fellows as to the character for credibility of a witness for defendant a new trial will not be granted on that ground. ✓ Auschincks vs State 6 Ct App 524: Dill & Kissick

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fied to nothing concerning the ownership of the animal. Had the witness himself been alive and testifying this evidence would beyond question have been admissible legitimate and pertinent to the issues in the fourth Count. No good reason has been assigned why under the circumstances its reproduction he being dead was not equally as competent & and legitimate. We are of opinion that it was both competent and admissible and that even if it been objected to or a motion made by defendant to withdraw it that such objection or motion should have been overruled.

Nor did the evidence come within the rule which would require the Court to limit or restrict it in the charge to any specific purpose, it was not introduced for any specific purpose foreign to the main issue. The objection to the charge of the Court that it did not withdraw the evidence is untenable.

It is urgently insisted that the verdict and Judgment should be set aside on account of misconduct of the Jury or rather because the verdict was not a fair and impartial one by reason of new and additional testimony or statements made to the Jury in their retirement and when they were considering of their findings by one of their number.

Affidavits impeaching the verdict were made by several of the Jurymen to the effect

witness testified nothing as to ownership and knew nothing about it. The facts testified to by him unquestionably related to the same transaction, the same defendant and the same animals as were involved in the former trial and were as pertinent to the one case as the other. Moreover the right to be confronted with the witness as to his testimony and the right of cross examination had been fully accorded to and exercised by defendant at the former trial. More than that the facts deposed to by this witness only tended to show that the animal was thrown down and defendant's brand pierced upon her in Bailey pen and these same facts are substantially established by other testimony which shows that she was unbranded when she was taken up by defendant and that when she was seen the next day at Blalock's pen by Pool and others she had defendant's brand which appeared to have been pierced upon her. Under these facts and circumstances it would appear that to say the least of it if we concede that the reproduced evidence was inapplicable to the allegations of ownership in the fourth Count simply because it had been admitted in support of the first count which was no longer in this case, yet nevertheless as to the facts deposed to it was in truth and fact as applicable to one Count as the other because the witness knew nothing about and had testi-

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him to get down and go away and he did so."
This is the whole of the testimony of George Mallaney as reproduced by Wood.

After all the evidence for the State and prosecution was in and closed the District Attorney nolle prossed the three first counts of the indictment and announced that he would claim a conviction alone upon the last count to wit: the one alleging the ownership of the animal to be in "some person to the grand jurors unknown".

It is insisted that the whole case became changed after the Count alleging ownership in Sarah Sparlin was dismissed, and that it was no longer the same case as that in which the deceased witness Mallaney had testified and that being another and a separate and distinct case his evidence on the former trial became inapplicable, inadmissible and illegal and could not be used or further considered in support of any of the issues involved in the case upon which the prosecution now claimed a conviction.

We have quoted the testimony in full and it will be noted that at the time of its introduction it was both legal and admissible to prove the account alleging ownership in Sarah Sparlin that being the identical charge in the indictment on the former trial. This is conceded on the part of appellants Counsel.

It will further be noted that the deceased

It appeare that there had been a previous trial of this defendant for the theft of this same animal under an indictment which alleged the ownership of the animal to be in one Sarah Sparlin. On that trial a boy the name of George Mahoney had testified for the State and subsequently had died. In the present case the indictment contained four counts. The first alleging the ownership of the animal in Sarah Sparlin; the second in Arminda Wolf; the third in G. W. Smith and the fourth in some person to the Grand Jury unknown. On the trial the evidence of the deceased witness George Mahoney as given on the previous trial was reproduced by Wood who had heard him testify on that trial. No objection was made by the defence to the reproduction of this evidence by Wood and the same went to the Jury without objection of any character. His testimony was that he Wood had been of Counsel for defendant on the former trial, remembered the boy George Mahoney who then testified. Witness then said "This boy testified that he was at the Baker pen in May 1886 when somebody penned some horses there in the pen one animal was at the pen when he got on it and some of the parties rope a gray animal and throw her down and some one with a knife in his hand but did not know who it was. Some of the parties held

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Andy Gray
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It is not essential that the venue of an offense be established by direct testimony but that may be established in evidence the Jury may reasonably conclude that the offense was committed in the County alleged. The doctrine of reasonable doubt does not apply to the issue of venue. Circumstantial evidence is as competent to establish the venue as it is to establish any other issue in the case. 1 Wilson's Crim Stats 817 197

John Cook, States witness testified "The brand L F more was 8 or 10 years old and the and the grey filley, - the latter being the alleged stolen animal - ran on the range in Hampasas County." "The black SE mare and the branded L F mare ran on the range together and had been running on the range since I had seen them. The grey filley and the black horse also ran in the same bunch." It was proven by several witnesses that the animals ranged on Indian Branch and Patterson Creek. The two Ellis witnesses for the State testified that they lived on Patterson Creek in Hampasas County Texas." We are of the opinion that the venue of the offense was alleged to be in Hampasas County is sufficiently proven.

I did not Copy all of this as its almost a book.
They were aiming to hang Andy over one horse.
When we read the whole thing we knew who killed
him. This was in old records in basement of Court house.
This Came to trial twice - but he was not found
guilty. people were afraid to tell on the killers in that
time. His wife knew who did it. I know.

No. 6643

MANDATE.
COURT OF APPEALS.
AUSTIN.

Andy Cox

VS.

The State of Texas

Issued June 27th 1889

A. Walton.
Clerk

Filed June 29th 1889
[illegible]
[illegible] Deputy