

BURROW vs. THE STATE.

In an indictment for false pretences, it is not sufficient to charge false pretences in general terms; but it is necessary to set them out specifically and with strict certainty.

False pretences, within the meaning of the statute, must be of some existing fact, and not of future transactions, as held in *McKenzie vs. The State*, (6 Eng. 594.) Hence, an indictment, charging that defendant obtained the property of A. by falsely pretending to him that his goods and chattels were about to be attached, is bad.

A count in the indictment charged that defendant falsely represented to A. that divers persons had conspired to seize and unjustly deprive him of a slave, by means of which false pretences defendant induced A. to convey to him said negro: HELD, That the pretences here charged were of too vague and indefinite a character to deceive a person of ordinary prudence and understanding, and therefore not within the purview of the statute.

In criminal cases, the jury should be sworn to try the issue according to law and evidence.

Writ of Error to Poinsett County.

Tindrell Burrow was indicted, for false pretenses, in the Green Circuit Court, at the September term, 1847; changed the venue to Poinsett, and was tried before the Hon. JOHN T. JONES, then one of the Circuit Judges, in April, 1849.

There were four counts in the indictment. The first charged: That Burrow, on the 15th day of April, 1847, at, &c., unlawfully did falsely pretend to one Richard S. Hodge that divers

persons had conspired and agreed to seize a certain negro boy slave named Bill, of the value of five hundred dollars, of the property of him the said Hodge, by which he, the said Hodge, would be unjustly and unlawfully deprived of the said negro boy Bill; he, the said Tindrell Burrow, well knowing, at the same time, that no such conspiracy or agreement was in existence; by means of which said false representations, he, the said Tindrell Burrow, induced him, the said Hodge, to convey to him, the said Burrow, the said negro boy Bill, for safe keeping, with the felonious intent then and there to cheat and defraud him, the said Hodge, out of the said negro boy Bill; to the great damage of said Hodge, contrary, &c., and against the peace, &c.

The second count charged:

That said Tindrell Burrow, on the 15th day of April, 1847, at, &c., unlawfully and falsely did pretend to said Hodge that he was about to be attached, by all and singular the goods and chattels, rights and credits of him the said Hodge, by means of which such attachment, unless he, the said Hodge, would put his property into the hands of him, the said Burrow, he, the said Hodge, would unjust and unlawfully be deprived of all and singular his goods and chattels, rights and credits; he, the said Burrow, well knowing, at the same time, that no such attachment was in contemplation; by means of which said false pretensions, he, the said Burrow, did then and there unlawfully obtain from him, the said Hodge, a negro boy slave named Bill, of the value of five hundred dollars, the property of the said Hodge, with intent then and there feloniously to cheat and defraud the said Hodge of the same, contrary, &c., &c.

The third count charged:

That said Tindrell Burrow, on the 15th day of April, 1847, at, &c., unlawfully and falsely did pretend to said Hodge that a criminal prosecution was being instituted against him, the said Hodge, which would take from him and cause him to lose all the goods and chattels, rights and credits which he, the said Hodge, at that time had, and thereby deprive his family of the means of sustenance; and that he, the said Hodge, would

be imprisoned in the Penitentiary of the State not less than two years; and that he, the said Hodge, had better put his said property into the hands of him, the said Burrow, for safe keeping, and for the benefit of his said family; and by means of which said false pretences the said Burrow did then and there unlawfully obtain from him, the said Hodge, a certain negro boy slave named Bill, of the value of five hundred dollars, of the property of him, the said Hodge, with intent then and there to cheat and defraud the said Hodge out of the same: whereas, in truth and in fact, the said Burrow well knew that no such criminal prosecution had been or was about to be commenced; and he also knew that the said Hodge would not be so imprisoned as aforesaid, or lose his said property in manner aforesaid; to the great damage and deception of the said Hodge, contrary, &c.

And the fourth count charged:

That said Tindrell Burrow, on the 15th day of April, 1847, at &c., by means of divers false, fraudulent and unlawful pretences, did obtain from said Hodge a certain negro boy slave named Bill, of the value, &c., with the felonious intent to defraud and cheat him, the said Hodge, out of the same, contrary, &c., &c.

The defendant pleaded not guilty. The record entry of the empanneling and swearing of the jury is as follows:

“The parties having announced their readiness for trial, and the venire being called, came; from whom were selected the following jury, to wit: Calvin Hawk, &c., &c., twelve good and lawful men, of the county of Poinsett, who were severally tried and sworn to try and a true deliverance make between the State of Arkansas and the said Tindrell Burrow.”

Burrow was convicted, and sentenced to the Penitentiary for five years. The evidence was not put upon record. He brought error, on the grounds that the indictment was bad in substance, and the jury not properly sworn, &c.

E. E. ENGLISH, for plaintiff in error.

The jury were not sworn to try the case according to law or

evidence. *Patterson vs. The State*, 2 Eng. 59. *Smith Bell vs. The State*, 5 Eng. 536. *Sandford vs. The State*, 6 Eng. —.

The false pretences charged in the indictment, are not negatived by positive and specific averment, and therefore the indictment is bad. *R. vs. Perralt*, 2 M. & S. 379, 386. *Arch. Cr. Plead.*, marg. p. 293. *King vs. Airey*, 2 East 30. 3 *Chit. Crim. Law* 762, 999. 2 *ib.* 163, 311. *The People vs. The State*, 9 *Wend.* 191. *The People vs. Haynes*, 11 *Wend.* 564.

The indictment does not set out the false pretences with sufficient certainty—no time, place or person is stated. The indictment must charge in specific terms the false pretences. (1 *Chit. Cr. Law* 140. *Arch. Cr. Law* 289. *People vs. Gates*, 13 *Wend.* 322.) And the false pretence must be of such a character as calculated to mislead a person of ordinary prudence and caution. *The People vs. Williams*, 4 *Hill (N. Y.) R.* 9.

CLENDENIN, *Att. Gen.*, contra, contended that though the oath administered to the jury was defective in form; it was sufficient in substance, and within the rule laid down in *Patterson vs. The State*, (2 Eng. 60;) and could not be taken advantage of. (*Dig.* 402, sec. 98.) And that the first, second, and third counts are formal and technical (*Arch. Crim. Law* 346, 347) to warrant a conviction under sec. 1, art. 8, ch. 51, *Dig.*

Mr. Chief Justice JOHNSON delivered the opinion of the Court.

The fourth and last count of the indictment avers that, by means of divers false, fraudulent and unlawful pretences, the accused obtained the property, &c. It is not sufficient to charge false pretences in general terms, but it is necessary to set them out specifically and with strict certainty. (See *R. v. Mason*, 2 *T. R.* 581. *Moffitt vs. The State*, 6 Eng. 171, 174.) That count is therefore clearly bad.

The representations contained in the second and third counts, had reference to transactions that had not then taken place, and consequently could not amount to a false pretence within the meaning of the statute. (See *McKenzie vs. The State*, decided at

January term, 1851.) The first count charges that the accused represented to Hodge that divers persons had conspired and agreed to seize a certain negro boy slave named Bill, of the value of five hundred dollars, of the property of him the said Richard S. Hodge, by which he, the said Richard S. Hodge, would unjustly and unlawfully be deprived of the said negro boy Bill, he, the said Tindrell Burrow, well knowing, at the time, that no such conspiracy or agreement was in existence, by means of which said representations he, the said Tindrell Burrow, induced him, the said Richard S. Hodge, to convey to him, the said Tindrell Burrow, the said negro boy Bill, &c. This count, it is conceded, is not liable to the objection made against the second and third, yet it is believed to be equally defective upon other and different grounds. It is admitted that it represents a conspiracy as having been actually formed for the purpose of seizing upon the property, and thereby depriving Hodge of it; but the question is, whether the representation complained of is of so definite and plausible a character as to drive from his propriety a man of ordinary capacity, and to induce him to divest himself of his property. The appeal here is not to the cupidity, but it is aimed directly at the fears of the party charged to have been defrauded. Can it be supposed that a man of ordinary prudence and capacity would credit, for one moment, so vague and indefinite a statement? We think not. He was not informed who they were that conspired against him, for what offence he was about to be prosecuted, or of any thing else sufficiently specific to operate upon the fears of any sane individual. (See 4 Hill 12, *The People vs. Williams*.) It was not the intention of the statute to convert every fraud which might fall within the cognizance of a court of Equity into a criminal offence, and to protect every individual from the consequences of his own credulity, imprudence or folly; but it was designed to extend no further than to embrace such representations as were accompanied with circumstances fitted to deceive a person of common sagacity and exercising ordinary caution. We feel satisfied that the representation complained of in the first count, was not such an one as ought to have influenced the conduct or excited the fears of any

man in the exercise of his reason, and that therefore it does not fall within the operation of the act. See 14 *Wend., the People vs. Haynes*, at pages 572-73, and *The State vs. McKenzie*, decided by this court at January term, 1851.

Another ground of objection to the judgment of the court below, relates to the manner of swearing the jury who sat upon the trial. They were "severally tried and sworn to try and true deliverance make between the State of Arkansas and said Tindrell Burrow." This swearing was not in accordance with the law as it has been repeatedly decided by this act. See *Patterson vs. The State*, 2 *Eng. R.* 59. *Smith Bell vs. The State*, 5 *Eng. R.* 536. *Sandford vs. The State*, 6 *Eng.*

We are clear, therefore, that the judgment of the court below is erroneous, and ought to be reversed. Let the judgment of the Poinsett Circuit Court, herein rendered, be reversed, and the cause remanded, to be proceeded in according to law.
