HOLEMAN *vs.* THE STATE. (*a.*)

The plaintiff in error having been convicted of larceny, this court awards a new trial, on the grounds that the testimony utterly failed to identify the property charged to have been stolen, or to establish the venue as laid in the indictment.

A new trial will not be granted on the ground of newly discovered testimony, where it appears that the testimony was known to the party long before the trial, and no sufficient excuse is shown for not procuring it—or where it appears that the evidence would be incompetent if procured.

Where a female is convicted of a Penitentiary offense, her *pregnanacy* is no cause *for a new trial.*

Writ of Error to White Circuit Court.

Nathaniel Holeman and his wife, Polly, were indicted, at the October term, 1848, of the White circuit court, for stealing three pieces of calico and seventeen hanks of spun cotton, the property of Marion Carmack.

The larceny was alleged to have been committed on the 27th of March, 1848, in White county.

The defendants pleaded not guilty, severed, and Polly Holeman, the wife, was put on her trial first.

Marion Carmack, testified that, in the morning of some day in March, 1848, he and his wife left home to go over White River, but being unable to cross the river, on account of high water, they returned home, about one o'clock of the same day, and found their dwelling, an old log cabin, on fire and nearly consumed, In some fifteen minutes after they reached home, Polly Holeman, who lived a few hundred yards off, came to the burning house. She said she had been out *skinning a cow,* and seeing the smoke, started over immediately. There was in the house a piece of calico mostly of red color, and another piece of blue, with yellow strips in it—about eight yards in each piece. The

NOTE (*a.*)—This case was decided at January Term, 1849.

calico was in a trunk, and in the same trunk was some bleached factory cotton. There was some spun cotton hanks hanging on the wall. Witness and defendants were on friendly terms. In the month of May following, witness caused the house of defendants to be searched, and found in a bed spread some calico which he believed to be his—it was like his, but the colors had been changed by dyeing, he supposed. He also found, in the bottom of a box, some spun cotton, which he took to be his— it resembled his, though he was not certain it was his.

Mrs. Carmack testified substantially to the same facts stated by her husband—and, in addition thereto, that some time after the house was burned, she saw Polly Holeman at a burial, and she had on a *petticoat* that looked like it was made of the bleached cotton that was in the trunk with the calico. She also saw *Margaret Webb* working up some calico, which she took to be part of that that was in the house, except that its color had been changed, as she supposed, by dyeing. When the house of Holeman was searched, witness was present, and saw some towels which she thought was made of the bleached cotton that was in the trunk with the calico.

Seeing the resemblance in the petticoat that Polly Holeman had on at the burial, and the bleached cotton goods that was in the house before it was burned, awakened her suspicions, and led to the search of Holeman's house.

When the search was made, Mrs. Holeman concealed nothing, but freely exhibited her household goods for inspection. On the day the house was burned, witness and her husband dined at Holeman's—they then saw nothing about the house of Holeman that was in their house before it was burned.

Several other witnesses, on the part of the State, testified that the calico in Mrs. Holeman's bed-spread resembled some that they had seen at Carmack's house before it was burned, but they thought the colors had been changed.

Marcus Holeman, the son of Polly Holeman, testified that, on the forenoon of the day that Carmack's house was burned, he went out with his mother to skin the cow. When she had fin-

ished skinning the cow, they went back to the house, when he saw smoke arising from Carmack's house, he called his mother's attention to it, and they went immediately to it. He was with his mother all that morning—that his mother bought the calico, found at her house on the search, of *Margaret Webb*. His mother had the spun cotton found in the box before she moved to the neighborhood—and his father brought from the mouth of Black River, the bleached cotton goods that was made up into towels, the *petticoat,* &c.

Hardy Holeman also testified that Nathaniel Holeman purchased at the mouth of Black River, some white sheeting, and brought it home a short time after Carmack's house was burned. He was with him on the trip. Margaret Webb had left the neighborhood before the trial.

Unity Reed testified that she had seen the calico found at Holeman's house, in the possession of *Margaret Webb;* and that the spun cotton found there was purchased by Nathaniel Holeman, at Jacksonport, before he moved to the neighborhood. Some of it was given to *Granny Cane* for nursing Mrs. Holeman when she was sick—and Mrs. Holeman made part of it into cloth—witness spun the filling for her. She was sister to Nathaniel Holeman.

The State made an attempt to impeach the character of Hardy Holeman for truth and veracity, and several witnesses swore that they "would not like to believe him on oath." The above is the substance of the evidence deemed material.

The court instructed the jury "that in this case, larceny consisted in stealing, taking and carrying away the personal goods of Marion Carmack, the person named in the indictment, with the intention of depriving him of them, or converting them to the use of the defendant. That it must be proven to the jury that the goods alleged in the indictment, or a portion of them, were the property of, and in the possession of Marion Carmack at the time of the larceny, and that the defendant stole them. That much of the evidence being circumstantial, they should consider the whole with a view of ascertaining what the truth of

the matter really was, and if, under all the circumstances, they were satisfied as reasonable men, that she was guilty, they should so pronounce by their verdict. That circumstantial evidence in some cases might be stronger than the direct swearing of witnesses to particular facts, as witnesses might swear falsely. That evidence did not consist wholly in the swearing of witnesses, but of such things as convinced the jury of the truth of the statements made. That they were the judges of the credibility of all persons sworn before them as witnesses. That if a witness was discredited by others, the evidence of such witness of itself should not be regarded by the jury. If upon careful examination of all the testimony, they were doubtful of the *truth* of the guilt of the defendant, they were bound to acquit. That in case of doubt, the prisoner is entitled to the benefit of such doubt. If, on the contrary, they were satisfied of the defendant's guilt, they should so declare by their verdict, and assess the punishment from one to five years in the Penitentiary, as they think right."

The jury found *Polly Holeman* guilty, and fixed her punishment at one year's imprisonment in the Penitentiary.

Her counsel filed a motion for a new trial, on the grounds that the verdict was contrary to law and evidence; that the jury were misled by the instructions of the court; that defendant had discovered new evidence material to her defence since the trial, and a new trial was also asked for other causes which would appear by affidavits filed.

In support of the motion for a new trial, Polly Holeman's affidavit was filed, stating that after she was arrested and put in jail, on the charge of larceny, her counsel, *Mr. Jordan,* visited her. She told him she could prove by Margaret Webb that she never saw the calico found in her possession until she bought it of said Margaret. That she was told by her counsel that he would order a subpœna for her, but he had failed to do so, and that her attendance could be procured by the next term, if a new trial was granted. That since the trial she had ascertained that she could prove by Augustin Bridges that he heard Margaret Webb say, since the trial before the magistrate, that she got the calico

from a man by the name of Keath, who lived at Batesville. That Keath's evidence could be procured by the next term. That she had also learned that she could prove by Rachel Roden that Mrs. Carmack, wife of Marion Carmack, had said that she did not believe that defendant and her husband burned the house, but she knew who was guilty of it. [Mrs. Carmack testified on behalf of the State on the trial.]

Mr. Jordan also filed his affidavit, corroborating that of defendant and also stating that he had been informed that the jury had disregarded the testimony of *Marcus Holeman*, in making up their verdict, and stating some circumstances which tended to establish his credibility.

The affidavit of Augustin Bridges was also filed, stating that he had heard Margaret Webb say that she had got the calico from a man by the name of Keath, and that she had stated that she got it from Mrs. Holeman before the magistrate, under the influence of a threat of Carmack, to kill her if she did not so state.

The court overruled the motion for a new trial.

Mr. Jordan, the counsel of prisoner, then filed a motion to suspend the sentence on the ground that defendant was pregnant, and would be confined in two months and a half from that time, according to the ordinary course of nature, and was therefore not in a situation to be sent to the Penitentiary. This he offered to prove by exhibiting the defendant in court, or by such other mode as the court might appoint. The court overruled the motion.

P. JORDAN and WHITELEY, for the plaintiff, contended that the court below should have granted a new trial, because the verdict was contrary to law and evidence; the identity of the property was not proven, (2 *Russ. on Crimes* 124, 2 *Stark. Ev.* 615,) and the possession by the accused was sufficiently accounted for. 2 *Stark.* 614. 1 *Greenl. Ev.* 40, *note* 1. 2 *Russ. on Cr.*, 124. *The State v. Adams*, 1 *Hayw. Rep.* 463. *Arch. Cr. Pl.* 115. There was no evidence that the offence, if any, was committed in White county.

Joe Sullivant v. The State, 3 *Eng.* 400. *McCoy v. The State,* 3 *Eng.* 451. The instruction of the court was too general, in that it left the jury at liberty to disregard the evidence of a witness pronounced competent by the court.

The court should have granted a new trial on the ground of newly discovered testimony, as the affidavits showed such testimony to be material.

WATKINS, *Att'y Gen.,* contra.

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

The verdict of the jury is unsupported by the evidence adduced on the part of the prosecution. The circumstances, upon which the State relied and upon which the finding was based, were of the most flimsy and unsatisfactory character, and could not by any rational rule of construction, warrant a verdict of guilty. The property alleged to have been stolen was not identified with that degree of legal certainty which was necessary to fix and fasten guilt upon the accused, but on the contrary, she fully and effectually rebutted every possible presumption raised against her. To test the verdict by the case made by the State, it is wholly unsupported, but when the rebutting testimony is thrown into the scale, the innocence of the accused is so manifest as to bring it most clearly within the rule so repeatedly laid down by this court in respect to such as at first blush are calculated to shock our sense of justice and right.

There is an utter failure in the proof as to the place where the supposed offence was committed. This would of itself constitute a fatal objection to the judgment, as without such proof there is a manifest defect of jurisdiction.

The instructions of the court, upon general principles, are well enough, and perhaps would not be liable to any well defined, legal objection; yet, when taken as a whole, there is room to doubt whether, from their general character they were not calculated, in some degree, to mislead the jury. The court ruled correctly in refusing a new trial upon the grounds of newly dis-

covered evidence. The testimony of Margaret Webb was not newly discovered, but was known to both the accused and her counsel long before the trial, and no sufficient excuse is given why it was not obtained and used in her behalf. The testimony of Bridges would have been ruled out in case he had been personally present at the trial, as it consisted of nothing more than mere hearsay, and consequently was not the best of which the case would admit. That of Rachel Roden is also incompetent for the same reason, and as such could not be used in behalf of the accused. The testimony of Keath is not alleged to have been newly discovered.

The plea of pregnancy is inadmissible, as that fact has no necessary connection with the question of guilt or innocence. This matter was brought to the notice of the court for the first time after the whole merits of the case had been passed upon and determined. It was not in issue upon the trial, nor could it form any part of the subject matter of investigation in case that a new trial had been awarded. This, therefore, was no ground for a new trial, and as such it is not important to decide whether the court erred or not in refusing to allow it.

We are therefore clear that, although numerous errors are complained of which do not exist, yet there are sufficient to entitle the plaintiff in error to a new trial. The judgment of the White circuit court herein rendered, is therefore for the errors aforesaid reversed, annulled and set aside with costs; and it is further ordered that the cause be remanded, with instructions to be proceeded in according to law, and not inconsistent with this opinion. (*a.*)

NOTE (*a.*)—Mrs. Holeman was the first female ever sent to the Penitentiary of this State, and she was pardoned by Gov. DREW, before the judgment of the court below was reversed. REPORTER.