## JOE SULLIVANT, A SLAVE, *vs.* THE STATE.

In an indictment for rape, it seems that the words *"feloniously"* did *"ravish"* and *"carnally know, forcibly and against the will"* of the female, are necessary.

In an indictment for an assault with intent to commit rape, the words did *"assault,"* &c., with an *"intent,"* &c., *"feloniously"* to *"ravish"* and *"carnally know, forcibly against the will,"* &c., are necessary.

So an indictment charging that defendant *"did feloniously attempt to commit a rape on one E. C.,"* &c., without the other necessary technical words, is bad.

On the trial for an assault with intent to commit rape, the prosecutrix deposed that "she awoke in the night and on extending her hand felt some person over her *in the act of committing a rape*—when she touched him he sprang from the bed," &c., &c. Held that this testimony did not establish the *corpus delecti*: that the witness swore to a *conclusion*, whereas she should have stated the facts and circumstances, leaving the *conclusion* to the jury.

In criminal cases, the venue must be proved as laid.

### *Writ of Error to Dallas Circuit Court.*

Indictment for an attempt to commit rape, determined in the Dallas Circuit Court, at the September term, 1847, before CHRISTOPHER C. SCOTT, then one of the Circuit Judges.

INDICTMENT:

"The Grand Jurors of the State of Arkansas, duly elected, empannelled, sworn and charged to inquire in and for the county of Dallas, upon their oath present that Joe Sullivant, a negro boy, late of said county of Dallas, on the twentieth day of June, in the year of our Lord one thousand eight hundred and forty-seven, with force and arms, in the said county of Dallas then and there being, did feloniously attempt to commit a rape on one Emeranda Clemens, a white woman, contrary to the form of the Statute in such case made and provided, and against the peace and dignity of the State of Arkansas."

"And the jurors aforesaid upon their oath aforesaid, do further present that the said Joe Sullivant, a negro boy, (a slave, the property of Eccanah Sullivant), late of said county of Dallas, on the twentieth

day of June, in the year of our Lord one thousand eight hundred and forty-seven, with force and arms, in the said county of Dallas then and there being, did feloniously attempt to commit a rape on the body of one Emeranda Clemens, a white woman; contrary to the form of the Statute in such case made and provided, and against the peace and dignity of the State of Arkansas."

Defendant was arraigned, pleaded not guilty, tried, found guilty and condemned to be hung. His counsel moved for a new trial, on the ground that the court improperly admitted evidence offered by the State, and excluded evidence offered for defendant; and that the verdict was contrary to law and evidence.

His counsel also moved in arrest of judgment, on the grounds: "1st. That the indictment is uncertain, defective and insufficient in law: 2d. There is no Statute in this State creating or punishing any such offence, the same having been repealed: 3d. The law inflicting the punishment, and prescribing the judgment to be pronounced in this case, is unconstitutional," &c.

The court overruled both motions, and defendant's counsel excepted, and took a bill of exceptions, setting out the evidence, &c., from which it appears:

On the trial, the State introduced Emeranda Clemens as a witness, who deposed as follows: "About the 11th hour of the night of the 12th day of June, 1847, I awoke, and upon extending my hand felt some person over me in the act of committing a *rape*. I first thought it was my husband; but felt his shirt was very coarse, and a knife scabbard suspended at his side. When I touched him, he sprang from the bed: I lay still about half a minute. I laid my hand out, and felt him in the act of getting back in the bed. I was so alarmed I scarcely knew what I was doing. I ran to the door and opened it, and the person ran out at the other door. I went round to the corner of the house, and heard him run through the cotton, and the dog after him. I did not speak until I returned into the house. I then awoke my step-daughter, who was sleeping in the same room, and told her that Trout had been in my bed, but, on reflection, recollected that Trout, a white man, was sick. I then did not know who to charge with the offence. On the next day after dinner, two young Kellums and

young Evans came to my house: I had found a scabbard of a knife in the house, and stuck it up over the door: when I found it had been removed, I charged the young men with the offence. I afterwards found the knife. On Monday the defendant, Joe, was brought to my house. I told him that was the shirt I felt. He said he always liked me, and that he was not guilty. He was then taken to the two tracks in the field, in the direction the person I felt in my bed had run, which I had covered up. I saw his foot placed in the track—he *crimped* up his toes—his master told him to place his foot in the tracks—his foot fitted the tracks exactly. He was then whipped by my husband, and then confessed he was there. I saw the feet of the young Kellums and Evans placed in the tracks on Sunday—there was no other negroe's foot tried in the track. Joe, the defendant, had been frequently hired by my husband: he had worked there for a week at a time—had worked there on Sundays—had not been there for three months, and then I was not at home. My husband had loaned the defendant his gun to hunt with—his master had also permitted him to hunt with his gun. Defendant did not claim the knife scabbard—the knife fitted the scabbard. There was no man on the premises—the nearest house was half a mile—my husband owned no slaves."

A. J. Kellum deposed that he was at the house of Clemens on Sunday, the 13th June, 1847—was there also when defendant was brought there—his foot was put into the track, and fitted very well.

Clemens deposed that defendant's foot fitted the track very well.

Lightfoot testified that, on Monday, the 14th June, 1847, he saw defendant returning from Clemens' after he was whipped. He was alone, and in a fine humor. Witness asked him how he came out? He said all parties were satisfied—that they had whipped him. Witness then asked him if he was at Clemens' on Saturday night? He said he was, and that Collier was with him.

To the testimony of Lightfoot, defendant's counsel objected, and moved to exclude it, but the court overruled the objection.

Barnes testified that a paper, of which the following is a copy, was a correct statement of an examination had before him, as a justice of the peace, at the house of Clemens, husband of prosecutrix; that at

the time it was taken he instructed defendant that he was not bound to answer—he was then before the court and not in the custody of interested parties. Examination:

"Question 1st. By the court to Joe. Was you here on last Saturday night?

Answer. I was.

Quest. 2d. Did you come into the house?

Answer. I did.

Quest. 3d. How long did you stay in the house?

Answer. About one hour.

Quest. 4th. Did you come here alone, or was some one with you?

Answer. Mr. Collier was with me.

Quest. 5th. Did any one tell you to come here that night?

Answer. Yes, Mr. Collier told me that Mrs. Clemens sent for me."

To the reading of this examination as evidence, the defendant's counsel objected, but the court overruled the objection.

Sugart deposed, that he was one of the guard that conducted defendant to prison after his arraignment—was about to lock the door when defendant said to the guard: "I want to talk to you—how ought I to have acted in court? Ought I to have pleaded guilty or not guilty?" Witness told him if he was guilty he ought to have pleaded guilty, and if he was not guilty he ought to have pleaded not guilty. Witness then asked him if he was guilty, and he said he was, but that he had pleaded not guilty.

Owens deposed that he was with Sugart, and heard the same.

Another witness deposed that he heard defendant tell several persons, who were interrogating him on the subject, that he went to Clemens' to *steal a little*.

The above was all the evidence given on the trial. Defendant brought error.

CURRAN, for plaintiff.

WATKINS, Attorney General.

JOHNSON, C. J. The 4th art. of the 44th chapter of the Revised

Code, declares and defines several offences which are made punishable with death, and amongst others is enumerated the crime of rape. The concluding section of the same article declares that "If any negro or mulatto shall commit any of the before enumerated offences, which are punished with death, he shall be punished in like manner; and if such negro or mulatto shall attempt to commit any of such offences, although he may not succeed, on a white woman, he shall suffer death on conviction thereof." The defendant below after the jury had returned a verdict of guilty against him, filed his two several motions; the one in arrest of the judgment, and the other for a new trial. The court overruled both motions; to each of which opinions he excepted, and has brought the cause into this court for reversal.

The motion in arrest directly brings in review the legal sufficiency of the indictment, and that is the question first to be adjudicated by this court. In order to subject a party to the punishment consequent upon an attempt to commit a rape, it is necessary that the facts and circumstances surrounding the transaction should be such as to constitute the crime of rape in case he had succeeded and carried his intent into full effect. Rape is the carnal knowledge of a female forcibly and against her will. 3 *Inst.* 64. 4 *Bla. Com.* 210.

The indictment must charge the offence to have been feloniously committed, and must contain the technical word "ravished." 1 *Hale* 632. But it does not seem so clear whether the averment that the defendant "carnally knew" is necessary to be added. It is urged that the word "ravished" includes the charge of carnal knowledge. *Hawk. ch.* 1, *C.* 25, *A.* 36. 11 *H.* 4, 14. *Co. Lit.* 133. 2 *Inst.* 180. *Standf.* 81. But as Lord Hale and Lord Coke say, that "rapuit" and "carnalitur cognovit" ought both to be inserted, it would be very unsafe to omit the latter. 1 *Hale* 632, 8, 9. 3 *Inst.* 60. It is of the very essence of the crime of rape that it be done forcibly and against the will of the female on whom it is committed. Every crime consists of certain facts and circumstances, and it is not sufficient to allege in general terms that the offence, by name, has been committed; but it is necessary to charge those facts and circumstances with requisite certainty, in order that the accused may be apprised of what it is, that he is called upon to answer. The indictment under

consideration not only fails to charge that the defendant assaulted Emeranda Clemens, and attempted to ravish and carnally know her forcibly and against her will, but it utterly fails to charge any assault whatever. These are facts that enter into the very essence and definition of the crime, and an indictment in which they are not alleged is consequently a mere nullity. It might be conceded that every fact charged in the indictment is strictly true, and yet it discloses no offence known to the law. If the indictment exhibited no offence, it follows as a necessary consequence that no valid judgment could be founded upon it. The judgment ought, therefore, to have been arrested, and the Circuit Court in refusing to do so necessarily erred. The next question to be decided relates to the propriety of the decision of the Circuit Court in overruling the motion for a new trial. This, as a matter of course, will depend entirely upon the testimony. Emeranda Clemens, the party against whom the crime is alleged to have been committed, states that about the eleventh hour of the night of the twelfth of June, 1847, she awoke, and upon extending her hand she felt some person over her in the act of committing a rape; that when she touched him he sprang from the bed; that she lay still about half a minute, and that she then laid out her hand and felt him in the act of getting back into the bed. She further stated that she then ran to the door and opened it, and that the person ran out at the other; that she went around the corner of the house and heard him run through the corn, and the dog after him. She also stated that the feet of the defendant exactly fitted the tracks, and that after being whipped by her husband, he confessed that he was there. Other witnesses were also introduced on the part of the State, who testified as to his declarations and admissions, the most of which were made under circumstances calculated to give them but little weight or consideration, in view of the case as made out by the testimony of Mrs. Clemens. This testimony, loose and unsatisfactory as it was, might have been entitled to more or less consideration in the judgment and sound discretion of the jury in case the crime itself had been established, and it had become necessary to identify the individual who perpetrated it. True it is, that she testified that the party, whoever he was, attempted to commit a rape upon her. She did not

detail the facts, but simply stated a conclusion of law. It would be very difficult to conceive what notions she might have entertained as to what acts were requisite to constitute the offence concerning which she testified. It is for the witness to state facts, and it is the province of the jury, under the direction of the court, to say whether those facts constitute the offence laid to the charge of the party accused. The testimony was wholly insufficient in another essential particular. It was not shown by any witness that the offence, if committed at all, was committed within the territorial limits of Dallas county. This was a material allegation in the indictment, and a failure to sustain it by competent proof, would, under any state of case, have proved fatal to the prosecution. It is perfectly manifest, therefore, that the court below erred in refusing a new trial. Judgment reversed.