of $162.83." It was silent as to the lien. Thereupon the court rendered a personal judgment against defendant for the debt as per the verdict.

This was in November, 1930. In May following the plaintiff filed a motion to amend the judgment nunc pro tunc "according to the evidence had at the hearing of said cause," so as to declare a lien as per the complaint. On the hearing of such motion, the plaintiff offered all the testimony taken on the trial.

The court entered an amended judgment declaring a lien on the property and condemning same to sale for the satisfaction of debt and costs. From this amended judgment defendant appeals.

[1] To enforce a materialman's lien, the complaint must allege the facts which entitle plaintiff to a lien and the enforcement thereof. These facts include the existence of the debt and of the special facts giving a materialman's lien on the property as security for the debt, facts showing a lien has attached, and has been preserved by the statement required by law to be filed in the office of the judge of probate.

[2] When put in issue, the burden is on plaintiff to prove all the facts essential to the existence and enforcement of his lien. Sanitary Plumbing Co. v. Simpson, 200 Ala. 590, 76 So. 948.

By statute, the defendant, by appropriate plea, may put in issue the existence of the debt, or the existence of the lien, or both. Code, § 8848.

[3] The general issue traverses all the material averments of the complaint, and casts on plaintiff the burden of proof as to the existence of the debt and also of the lien.

[4] When, as here, a jury is demanded, all these issues are for the jury. If, under the evidence, the jury found the issue of indebtedness for the plaintiff, but failed to find the existence of a lien, the statute declares a judgment should go for the amount thereof.

Such was the verdict here.

[5, 6] If the verdict does not respond to all the issues, as per instructions, the court should decline to receive the verdict and have the jury return a verdict covering the issues presented.

It is error for the court then, or at any other time, to proceed to determine the issues upon the evidence, and render a judgment accordingly. From our earliest judicial history, such course has been held an invasion of the province of the jury. Goldstein v. Leake, 138 Ala. 573, 36 So. 458; Lee v. Campbell's Heirs, 4 Port. 198; Sewall v. Glidden, 1 Ala. 52; 2 Thompson on Trials, § 2651.

The case of Bedsole v. Peters, 79 Ala. 133, decided in 1885, arose under section 3449, Code of 1876. That decision probably led to the entire recasting of the statute in the Code of 1886, § 3034, now section 8848 of the Code of 1923.

There is no occasion to deal with the general doctrine of amendment nunc pro tunc. The court was in error in entering a judgment not supported by the verdict at any time.

Judgment reversed and one here rendered denying the motion to amend.

Reversed and rendered.

ANDERSON, C. J., and GARDNER and FOSTER, JJ., concur.

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141 So. 215

WEEMS et al. v. STATE.

8 Div. 321.

Supreme Court of Alabama.

March 24, 1932.

Rehearing Denied April 9, 1932.

1. Indictment and information ⚷19.

Rape indictment in statutory form *held* sufficient. (Code 1923, § 4556, form 88).

2. Rape ⚷38(1).

In rape prosecution, cross-examination whether alleged victim left her husband at named town *held* properly excluded as immaterial.

3. Rape ⚷38(1).

In rape prosecution, cross-examination of alleged victim as to how long she knew husband before she married him *held* properly excluded as calling for immaterial testimony.

4. Witnesses ⚷275(2).

Cross-examination question put to alleged victim in rape prosecution as to whether she was ever in jail before *held* improper as calling for immaterial testimony.

5. Criminal law ⚷473.

In rape prosecution, opinion of medical expert that six men, one right after another, could have had sexual intercourse with alleged victim without lacerations, *held* competent.

6. Rape ⚷40(3).

Cross-examination of state's medical expert as to whether alleged victims admitted having had sexual intercourse previous to alleged offense *held* properly denied.

Cross-examination was properly denied, since there was no evidence tending to show that the defendants had sexual intercourse by and with the consent of the state's witnesses, and therefore the evidence was not material.

7. Rape ⚷40(3).

In rape prosecution, cross-examination of state's medical expert as to whether alleged victims had gonorrhea or syphilis *held* objectionable as calling for immaterial evidence.

8. Rape ⚷40(3).

In rape prosecution, cross-examination of state's witness whether alleged victims told witness that they had had sexual intercourse *held* objectionable as calling for immaterial evidence.

9. Witnesses ⚷331½.

In rape prosecution, testimony of state's witness whether another witness was not mistaken if he testified that alleged victim was not unconscious when taken from train on which offense allegedly occurred *held* properly excluded, since it was province of jury, not witness, to say which version was true.

10. Rape ⚷48(1).

Permitting state's solicitor to question witness as to whether he heard prosecutrix complain, when taken from train on which alleged offense occurred, of treatment received at hands of defendants, *held* not error.

11. Rape ⚷40(3).

In rape prosecution, cross-examination as to whether victim told doctor that she had had intercourse before *held* properly excluded.

12. Criminal law ⚷449(1).

Cross-examination of state's witness whether persons allegedly committing rape could not have put another off train on which offense took place as others were put off, and whether there was any reason for not putting such person off, *held* objectionable as calling for conclusion.

13. Rape ⚷51(1).

Evidence supported conviction for rape.

ANDERSON, C. J., dissenting.

Appeal from Circuit Court, Jackson County; A. E. Hawkins, Judge.

Charlie Weems and Clarence Norris, alias Morris, were convicted of rape, and they appeal.

Affirmed.

George W. Chamlee, Sr., and George W. Chamlee, Jr., both of Chattanooga, Tenn., and Joseph R. Brodsky, Irving Schwab, Allan Taub, Elias M. Schwartzbart, Joseph Tauber and Sidney Schreiber, all of New York City, for appellants.

The denial of the motion for a change of venue by the trial court was reversible error. Seams v. State, 84 Ala. 410, 4 So. 521; Thompson v. State, 117 Ala. 67, 23 So. 676; Downer v. Dunaway (U. S. C. C. A. 1931) 53 F.(2d) 586; State v. Greer, 22 W. Va. 800; Moore v. Dempsey, 261 U. S. 86, 43 S. Ct. 265, 67 L. Ed. 543; People v. Arthur, 314 Ill. 296, 145 N. E. 413; Richmond v. State, 16 Neb. 388, 20 N. W. 282; Vaughn v. State, 18 Ala. App. 511, 93 So. 256; People v. Yoakum, 53 Cal. 566; Fountain v. State, 135 Md. 77, 107 A. 554, 5 A. L. R. 908; Brown v. Miss., 83 Miss. 645, 36 So. 73; Hussey v. State, 87 Ala. 121, 6 So. 420; Code 1923, §§ 3579, 5580; U. S. Const. Amend. 14; Ala. Const. § 6. It was an abuse of discretion to deny a special venire for trial of this case. The indictment did not apprise the defendant of the charge against him with the certainty required by the Constitution. Rosen v. U. S., 161 U. S. 29, 16 S. Ct. 434, 480, 40 L. Ed. 606; Hodgson v. Vermont, 168 U. S. 262, 18 S. Ct. 80, 42 L. Ed. 461. The trial court erred in permitting the prosecuting attorney to lead the witnesses. Jones on Evi. (2d Ed.) § 2324. The defendant was denied an opportunity to be properly represented by counsel. Ala. Const. § 6; Code 1923, § 5567. The trial court abused its discretion in forcing the defendant to trial without preparation, witnesses, or other assistance. Graham v. State, 23 Ala. App. 553, 129 So. 295; Rogers v. Ala., 192 U. S. 226, 24 S. Ct. 257, 48 L. Ed. 417; Amer. Ry. Ex. Co. v. Levee, 263 U. S. 19, 44 S. Ct. 11, 68 L. Ed. 140. The arbitrary severence of the trials of defendants was prejudicial to defendants. It was error to permit Ruby Bates to testify as to criminal acts upon her. Boyd v. U. S., 142 U. S. 450, 12 S. Ct. 292, 35 L. Ed. 1077; Wickard v. State, 109 Ala. 45, 19 So. 491; People v. Buffom, 214 N. Y. 53, 108 N. E. 184, Ann. Cas. 1916D, 962. The jury was not interrogated as to whether or not they bore any race prejudice to the defendant. Aldridge v. U. S., 283 U. S. 308, 51 S. Ct. 470, 75 L. Ed. 1054, 73 A. L. R. 1203. Mob spirit and hysteria dominated the trial, terrorised the judge, jury, and counsel, and denied to the defendant due process of law. Frank v. Mangum, 237 U. S. 309, 35 S. Ct. 582, 59 L. Ed. 969; Seay v. State, 207 Ala. 453, 93 So. 403; Holladay v. State, 20 Ala. App. 76, 101 So. 86; Clayton v. State, 23 Ala. App. 150, 123 So. 250; Collum v. State, 21 Ala. App. 220, 107 So. 35; Bradley v. State, 21 Ala. App. 539, 110 So. 157; Id., 215 Ala. 140, 110 So. 162; Collier v. State, 115 Ga. 803, 42 S. E. 226; State v. Wilcox, 131 N. C. 707, 42 S. E. 536;

⚷For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

Hamilton v. State, 36 Tex. Cr. R. 372, 37 S. W. 431; Vaughan v. State, 57 Ark. 1, 20 S. W. 588; Douglass v. State, 152 Ga. 379, 110 S. E. 168; Lignon v. State, 82 Tex. Cr. R. 514, 200 S. W. 530; State v. Weldon, 91 S. C. 29, 74 S. E. 43, 39 L. R. A. (N. S.) 667, Ann. Cas. 1913E, 801; Com. v. Fisher, 226 Pa. 189, 75 A. 204, 26 L. R. A. (N. S.) 1009, 134 Am. St. Rep. 1027; People v. Wolf, 183 N. Y. 472, 76 N. E. 592; People v. Fleming, 166 Cal. 357, 136 P. 291, Ann. Cas. 1915B, 881; Shaw v. State, 83 Ga. 92, 9 S. E. 768; Ex parte Riggins (C. C.) 134 F. 404; Ellerbe v. State, 75 Miss. 522, 22 So. 950, 41 L. R. A. 569; U. S. Const. Amend. 14; Ala. Const. § 6. The verdict of the jury was not sustained by the great preponderance of the evidence, and the guilt of defendant was not proved beyond a reasonable doubt. Black v. State, 24 Ala. App. 433, 136 So. 425; Alberty v. U. S., 162 U. S. 499, 16 S. Ct. 864, 40 L. Ed. 1051. Material evidence newly discovered which the defendant could not have procured and presented at the trial should move this court to grant a new trial. Ala. Code 1928, §§ 9518, 6088; Inman v. State, 22 Ala. App. 344, 115 So. 704; Huff v. State, 24 Ala. App. 508, 137 So. 457; Story v. State, 178 Ala. 98, 59 So. 480; Fields v. State, 47 Ala. 603, 11 Am. Rep. 771; People v. Pantages (Cal. Sup.) 297 P. 890; Houston v. State, 208 Ala. 261, 82 So. 503. Exclusion of negroes from the jury denied to defendant equal protection of the law. U. S. Const. Amend. 14; Rogers v. Ala., supra; Carter v. Texas, 177 U. S. 442, 20 S. Ct. 687, 44 L. Ed. 839; Strauder v. W. Va., 100 U. S. 303, 25 L. Ed. 664; Neal v. Delaware, 103 U. S. 370, 26 L. Ed. 567; Gibson v. Miss., 162 U. S. 565, 16 S. Ct. 904, 40 L. Ed. 1075; Martin v. Texas, 200 U. S. 316, 26 S. Ct. 338, 50 L. Ed. 497; Plessy v. Ferguson, 163 U. S. 537, 16 S. Ct. 1138, 41 L. Ed. 256; Bush v. Ky., 107 U. S. 110, 1 S. Ct. 625, 27 L. Ed. 354; Ex parte Virginia, 100 U. S. 313, 25 L. Ed. 667; Green v. State, 73 Ala. 26; Roberson v. State, 18 Ala. App. 634, 94 So. 132; State v. Peoples, 131 N. C. 784, 42 S. E. 814; Bonaparte v. State, 65 Fla. 287, 61 So. 633; Montgomery v. State, 55 Fla. 97, 45 So. 879.

Thos. E. Knight, Jr., Atty. Gen., and Thos. Seay Lawson, Asst. Atty. Gen., for the State.

The indictment is in Code form, and is sufficient. It is not necessary to aver, in an indictment for rape, that the carnal knowledge of the female was against her will. Leoni v. State, 44 Ala. 110. The mere fact that certain newspaper stories were published about the case does not, of itself, entitle defendant to a change of venue. He must show that the people of that county have been prejudiced thereby. Malloy v. State, 209 Ala. 219, 96 So. 57; Godau v. State, 179 Ala. 27, 60 So. 908; McClain v. State, 182 Ala. 67, 62 So. 241, 242; Hawes v. State, 88 Ala. 37, 7 So. 302; Riley v. State, 209 Ala. 505, 96 So. 599. Where two or more capital felonies are set for trial on the same day, the trial judge may draw one jury or venire facias for the trial of all such cases. Code 1923, § 8649. There is no evidence of a demonstration in the trial court occasioned by the verdict in a companion case, except that of the defendants. No action of the trial court was invoked on this point, and the denial of motion for new trial was not an abuse of discretion. Dempsey v. State, 15 Ala. App. 199, 72 So. 773; Hendry v. State, 215 Ala. 635, 112 So. 212. An application for a continuance is addressed to the trial court's discretion. Owens v. State, 215 Ala. 42, 109 So. 109. No point was raised as to exclusion of negroes from the jury. The statute does not exclude negroes from serving on juries. A state can fix qualification of jurors. Code 1923, § 8603; Gen. Acts 1931, p. 59, § 14; Thomas v. Texas, 212 U. S. 278, 29 S. Ct. 393, 53 L. Ed. 512; Ex parte Virginia, 100 U. S. 313, 25 L. Ed. 667; Ragland v. State, 187 Ala. 5, 65 So. 776; McIntosh v. State, 8 Okl. Cr. 469, 128 P. 735. There was no error in denying the motion for a new trial on the ground of newly discovered evidence. Evidence of a woman's unchastity is not admissible for the purpose of affecting her credibility as a witness. Story v. State, supra; Houston v. State, 208 Ala. 600, 95 So. 145. To justify a new trial on ground of newly discovered evidence, it must be shown that due diligence was used before the trial to discover such evidence. Lowery v. State, 98 Ala. 45, 13 So. 498; Hamilton v. State, 17 Ala. App. 109, 82 So. 557. A new trial will not be granted for newly discovered evidence which would merely impeach or discredit a witness. 16 C. J. 1202. Application for a continuance is a prerequisite to the right to complain of lack of preparation as a ground for a new trial. The record does not disclose a motion for a continuance. Thomas v. State, 89 Ga. 479, 15 S. E. 537; Manning v. State, 11 Ga. App. 766, 76 S. E. 70; Tobin v. People, 101 Ill. 121; State v. Benton, 65 Iowa, 482, 22 N. W. 639; Jones v. State, 77 Tex. Cr. R. 203, 177 S. W. 971. Where there is sufficient evidence, if believed, to sustain the verdict, there is no error in overruling motion for new trial. Martin v. State, 17 Ala. App. 73, 81 So. 851; Johnson v. State, 201 Ala. 427, 78 So. 805. There was no error in sustaining objections of the state to questions by defendants on cross-examination of Victoria Price, asking whether she left her husband at Huntsville, how long she had known her husband before she married him, whether she was ever in jail before, and as to whether she and Ruby Bates had had sexual intercourse before. Supreme Court Rule 45; Lee v. State, 20 Ala. App. 334, 101 So. 907; Story v. State, 178 Ala. 98, 59 So. 480. A woman's reputation for chastity is admissible in a rape case as bearing on her consent; but this is not the case where the defendant does not allege consent, and when the evidence shows clearly that the crime was committed by force or not at all. The evidence contained in affidavits in support of the motion for new trial, to the effect that the two girls attacked were familiar with negro men, was immaterial. People v. Maruyama, 19 Cal. App. 290, 125 P. 924. It was within the discretion of the trial court to permit closing argument for the state, notwithstanding defendants' attorney declined to make an argument. Sheppard v. State, 172 Ala. 363, 55 So. 514.

THOMAS, J.

The record in this case, No. 2402 in the circuit court, shows that on the 31st day of March, 1931, the defendants, appellants here, appeared in person and by their counsel, and were duly arraigned, and entered a plea of not guilty; that the case was thereupon set for trial along with case No. 2404, State of Alabama v. Haywood Patterson, who was also jointly indicted with the appellants in this case; was set to be tried on Monday, April 6th; that the court ordered that the venire for the trial should consist of one hundred jurors, including the regular jurors drawn for the week in which this case was set for trial, and twenty-five jurors specially drawn from the jury box in open court in the presence of the defendants and their counsel; that all of said jurors be summoned by the sheriff, and a list thereof be made, and, together with a copy of the indictment, be served on each of the defendants. The record further shows that this order was complied with, and that such list, together with a copy of the indictment, was served on each of the defendants. This was in strict compliance with the statutes. Code 1923, §§ 8644, 8649. See Patterson v. State (Ala. Sup.) 141 So. 195,[1] and Powell et al. v. State (Ala. Sup.) 141 So. 201,[2] as to venire and setting of the causes for trial. Whitehead v. State, 206 Ala. 288, 90 So. 351.

The motion for change of venue made in this case, and the evidence in support thereof, are identical with the motion and evidence made in the case of State v. Haywood Patterson, No. 2404, which has been fully considered in Patterson's appeal, argued and submitted along with this appeal, and what was said in that case will not be repeated here, as we are in accord with Justices Brown's and Knight's opinions of the facts on this motion and under the authorities cited and adverted to in the opinions in Patterson v. State and Powell et al. v. State, supra. The motion was denied without error. Patterson v. State (Ala. Sup.) 141 So. 195;[1] Malloy v. State, 209 Ala. 219, 96 So. 57; Riley v. State, 209 Ala. 505, 96 So. 599; Godau v. State, 179 Ala. 27, 60 So. 908.

[1] The indictment was in the form prescribed by the statute (Code 1923, § 4556, form 88), and under the repeated decisions of this court, was sufficient to advise the appellants of the nature and cause of the accusation, and appellants had a copy thereof. This met the requirements of the Constitution. Malloy v. State, supra; Schwartz v. State, 37 Ala. 460; Doss v. State, 220 Ala. 30, 32, 123 So. 231, 68 A. L. R. 712; Jinright v. State, 220 Ala. 268, 125 So. 606; Myers et al. v. State, 84 Ala. 11, 4 So. 291; McQuirk v. State, 84 Ala. 435, 4 So. 775, 5 Am. St. Rep. 381. The many authorities on this point are collected in 69 A. L. R. 1392, note.

The evidence of the state's witness Victoria Price, to state its substance, goes to show that on the 25th day of March, 1931, she was riding on a freight train through Jackson county with her girl companion, Ruby Bates; that they were riding in a "gondola car" loaded with chert or gravel; that just after the train passed Stevenson in Jackson county, Ala., the appellants, Charlie Weems and Clarence Norris, with the aid of other negroes, forcibly stripped off her outer garment, a pair of overalls, tore off her under garments, and forcibly ravished her; that there were twelve in the party of negroes who came upon the car and forced six of seven white boys to leave the train while it was in fast motion, by assaulting said white boys; that, after said white boys were forced to leave the train, some of the negroes raped her companion, Ruby Bates, and the others raped her—six in number—and that some of them held the girls while the others accomplished their purpose; that Weems held a knife against the throat of witness, while some of the others, including Norris, forcibly had sexual intercourse with her.

[2-4] On cross-examination, after this witness testified that she was married, and had not been divorced, she was asked by defendants' counsel: "Did you leave him (her husband) at Huntsville?" The court sustained the solicitor's objection to the question, and defendants excepted. This question called for immaterial testimony, and the objection was properly sustained. She was also asked by defendants' counsel: "How long had you known your husband before you married him?" And due objection was sustained. This likewise called for immaterial testimony, and the objection was properly sustained. The same is true as to the question, "Were you ever in jail before?"

[5] Dr. Bridges, whose qualification as a medical witness was conceded by the defendants' counsel, testified that he, with Dr. Lynch, the county health officer, made a physical examination of the witnesses Victoria Price and Ruby Bates on the afternoon of the alleged rape, and found bruises and

[1] Post, p. 531.
[2] Post, p. 540.

scratches on their persons, but no lacerations or tears of the sexual organs, and testified to the presence in the vaginas of the two witnesses of the male germ, going to show penetration; and expressed his judgment, as a physician, that "six men, one right after the other, could have had intercourse with her (Victoria Price) without lacerations. That is possible." This opinion evidence was competent.

[6] On cross-examination of this witness, the defendants' counsel asked him: "Both of these girls admitted to you they had had sexual intercourse previous to this, didn't they?" Due objection was made to this question, which was sustained. There was no evidence showing or tending to show that the defendants had sexual intercourse by and with the consent of the state's witnesses. The evidence sought was not material. Patterson v. State, 141 So. 195;[1] Powell et al. v. State, 141 So. 201;[2] Griffin v. State, 155 Ala. 88, 46 So. 481; Rice v. State of Florida, 35 Fla. 236, 17 So. 286, 48 Am. St. Rep. 245; Story v. State, 178 Ala. 98, 59 So. 480. See, also, Bailey v. Com., 82 Va. 107, 3 Am. St. Rep. 87; 22 R. C. L. p. 1208, § 42; 52 C. J. 1079, § 109.

[7, 8] The same is true as to the following questions to this witness: "Both of them told you they had had sexual intercourse, one told you she had been married and the other told you she had been—" "* * * From your examination could you tell whether or not they were subject to intercourse? Were they virgins? * * *" "That you find anything in the vagina that indicated to you these girls had had or might have had gonorrhea or syphilis?" And other questions of like import. The latter question was not pertinent as to identity or the corpus delicti of the immediate offense, as was the case in Williams v. State, ante, p. 6, 138 So. 291. These inquiries were beyond the controverted issues of fact being tried.

[9] Tom Taylor Rousseau testified as a witness for the state, identified the appellants as being among those taken from the train at Paint Rock—from the gondola car—also testified that he did not see the girls when they got off the train, and further testified: "I saw Victoria Price a little later. When I saw her at that time they were coming around the depot with her in a chair. She had her eyes closed and was lying over this way and they were bringing her from the depot up to town to the doctor's office. That was Victoria Price. I saw her later one time from where I was. She was still in the chair." This witness testified on cross-examination, among other things, that: "One of the girls was not in condition to walk. I did not help carry her off. There was an officer toted (carried) the girl up there. They toted (carried) her off the train, a fellow named M. A. Mize. He had to carry her away from the train, unconscious. I don't know about what the doctor said about her being unconscious at that time. I was not there. I was there at the time the girl was taken off."

At this juncture, defendants' counsel asked the witness: "And if he (the doctor) testified immediately after their arrival here or at Paint Rock she was not unconscious, he is mistaken about it?" The objection to this question was properly sustained. It was the province of the jury, not the witness, to say which of the two versions was true. Moreover, the question related, not only to the condition of Mrs. Price at Paint Rock, but also at Scottsboro, and this witness had not testified to her condition at Scottsboro.

Jim Broadway testified, as a witness for the state, that he was present at Paint Rock when Victoria Price and her companion left the train, and further: "I saw Victoria Price there. We got her off the freight train. She was on one of these gravel cars. That is known as a gondola car. There was another woman with her, the Bates girl. The Bates girl seemed to be in fairly good shape, but the other could not hardly talk and couldn't walk."

[10] The state's solicitor here asked the witness: "Did you hear them make any complaint there, either one of these girls, of the treatment they had received at the hands of these negroes?" The defendants severally objected to this question on the ground that it called for incompetent, irrelevant, immaterial, and illegal testimony, and for hearsay testimony. The court ruled that the answer be limited to Victoria Price, the person named in the indictment as the victim, and the defendants again objected on the same ground. The objection being overruled, the witness answered: "I did not hear Victoria Price make any complaint, either to me or anybody else there, about the treatment she had received at the hands of these defendants over there. We sent and got a chair for Victoria Price and carried her to the doctor's office at Paint Rock."

The courts are unanimous in holding on a trial for rape and assault with intent to ravish, that it is permissible to show that the alleged victim made complaint of the outrage soon after its commission, as a circumstance to corroborate her testimony. Barnes v. State, 88 Ala. 204, 7 So. 38, 16 Am. St. Rep. 48, and note; 22 R. C. L. 1212, § 47. The defendants' objection was, therefore, overruled without error.

Ruby Bates, the companion of Victoria Price, over defendants' objection, was allowed by the court to testify that the de-

[1] Post, p. 531.
[2] Post, p. 540.

fendants were among those on the train; that they, with the others, came over the box car in a body and into the gondola car where the witness and her woman companion were riding, armed with pistols and knives, and assaulted the white boys and forced them to leave the train, and then seized the witness and her companion and threw them down in the car.

[11] On cross-examination this witness testified: "I have never been married. I had a conversation with the doctor about having sexual intercourse. I am talking about the doctor after I arrived at Scottsboro, I do not remember his name. * * * I just told him to examine me and see if he could find anything wrong with me. I told him about those negroes." Counsel for the defendants thereupon asked the witness: "No, not about the negroes, but did you tell him you had had intercourse before?" The court sustained the solicitor's objection to this question, and, for reasons heretofore stated, this ruling was not error.

[12] This witness further testified on cross-examination: "I had not said a word to these white boys when I saw the negroes coming over. Nothing had been said between either me or my companion to the white boys. They were in one end of the car and we were in the other, sitting perfectly quiet, no sort of conversation, just sat there looking at each other. When I saw the negroes coming one of these white boys looked up over the car and said: 'Look coming yonder,' and we all looked up then, and they told the white boys to unload and the white boys still hadn't said nothing to us. There was one white boy out of seven left on the train. I do not (know) the names of any of the white boys. I could not tell you why they left this one. He stayed on in that gondola car. The negroes hit him but they did not put him off." Defendants' counsel then asked the witness: "They could have put him off just like they did the rest of them; there wasn't any reason for not putting him off, was there?"

This question called for a conclusion, and, if it was at all material, the jury, under the facts developed, could draw the conclusion or inference.

The further testimony of this witness fully corroborated the witness Victoria Price, going to show that these girls were forcibly ravished.

Luther Morris, who was, at the time the train passed, between Scottsboro and Stevenson, at his home, testified, in behalf of the state, that he observed the freight train passing. "I saw a bunch of negroes put off five white men and take charge of two girls. I saw between eight and ten negroes, and they put five white men off the train, made them get off the train. They did not throw them off; they just overpowered them and made them get off. * * * I did not hear any pistol shots. The train was making so much racket I could not hear. I figure that the train was making between thirty-five and forty miles an hour. I saw those white men get off or fall off the train. I guess I observed that and could see that train there for about four hundred yards. I was there in thirty yards of the track. The kind of car on the train they were getting off was a coal car, or gravel car, you might call it."

On cross-examination this witness testified: "I saw two women in the gondola, two white girls. The two white girls were doing their best to jump, and the negroes caught these two white girls and they were pulled back down in the car. I was standing above this train so I could get a good view. I saw all of this going on. * * * I went out to where these boys were, the two that got knocked in the head, but they were hurting so bad they could not talk. They just said: 'I am dying.' I certainly did notice wounds or bruises about them."

The state offered two more witnesses, who observed the train as it passed and saw some of the crowd on the train, and afterwards saw the white boys after they were forced off the train.

The defendant Weems testified, inter alia: "My name is Charley Weems. I was on this freight train running between Stevenson and Paint Rock on March 25th. There were twelve of us negro boys on that train. There were seven white boys on there. I first seen the white boys when we left Chattanooga. I did not see the girls on the train till we got to Paint Rock. I got on the side of a box car at Chattanooga and crawled over to an oil tank. When the train slowed up at Main Street I came across the box car to the oil tank. When we got up to that next little town above Chattanooga, I left the oil tank and went to the gondola. I don't know what town it was. I had been out of Chattanooga about an hour or a little over. The fight between the white boys and the negroes started down here at Stevenson, after we left Stevenson. The white boys were in the gondola. The negroes got in the gondola directly after we left Stevenson. Haywood Patterson and that long yellow boy back there first went in the gondola. Three of us went over in the gondola. What prompted me to go in the gondola, Haywood Patterson had a pistol and he said 'Come on and help me get the white boys off; if you don't I am going to shoot you off.' I don't know whether any of the negroes had been quarreling. They were not on the train where I was. I was one of the three boys that went in the gondola first. I was behind Haywood Patterson. Haywood Patterson just walked up and hit this white