Bailey
v.
Alabama
219 U.S. 219

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1909

No. 300

ALONZO BAILEY, *Plaintiff in Error,*

—VS.—

THE STATE OF ALABAMA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ALABAMA

BRIEF AND ARGUMENT OF FRED S. BALL, FOR PLAINTIFF IN ERROR

FRED S. BALL,
For Plaintiff in Error.

STATEMENT OF THE CASE.

The validity of the "Labor Contract Law" of Alabama is the only question here involved.

It is raised by motions to strike, and demurrers to, the indictment and by exceptions to the giving and the refusing of charges to the jury.

Alonzo Bailey was indicted July 25, 1908, in the following language:

"The State of Alabama,
Montgomery County:

City Court of Montgomery, July Term, A. D. 1908.

"The Grand Jury of said County charge, that before the finding of this indictment Alonzo Bailey with intent to injure or defraud his employer, The Riverside Company, a corporation, entered into a written contract to perform labor or services for The Riverside Company, a corporation, and obtained thereby the sum of Fifteen Dollars from the said, The Riverside Company, and afterwards with like intent, and without just cause, failed or refused to perform such labor or services or to refund such money, against the peace and dignity of the State of Alabama."

"S. H. DENT, JR.,
" Solicitor for the County of Montgomery.

(Record, page 1.)

On the trial the defendant pleaded "Not Guilty." The testimony showed that he is a negro; that he contracted in writing with The Riverside Company to work for it one year, and presently obtained from it fifteen dollars; that without just cause and without refunding the money, he ceased to work after about thirty-five days, and, without just cause, refused to return the money, (Record, page 12.)

Upon this evidence, under the charge of the court that the refusal to perform the work or to refund the money was *prima facie* evidence of the intent to defraud the employer, he was convicted and sentenced; all of which was affirmed by the Alabama Supreme Court.

ASSIGNMENTS OF ERROR.

1. The said Supreme Court of Alabama erred in affirming the judgment of the Court below.

2. The said Supreme Court of Alabama erred in not reversing the judgment of the Court below, and remanding said cause to the City Court of Montgomery for further proceedings.

3. The said Supreme Court of Alabama erred in not reversing the judgment of the Court below and directing the discharge of plaintiff-in-error.

4. The said Supreme Court of Alabama erred in affirming the action of the lower court in overruling the motions of plaintiff-in-error to quash the indictment against him.

5. The said Supreme Court of Alabama erred in affirming the action of the lower court in overruling the demurrers of plaintiff-in-error to the indictment against him.

6. The said Supreme Court of Alabama erred in affirming the action of the lower court in overruling the

demurrer of plaintiff-in-error to the indictment against him on ground No. II. (Record, page 5.)

7. The said Supreme Court of Alabama erred in affirming the action of the lower court in overruling the demurrer of plaintiff-in-error to the indictment against him on ground No. II. (Record, page 5.)

8. Said Supreme Court of Alabama erred in affirming the action of the lower court giving to the jury that portion of said general charge which is numbered (1) and which was excepted to by the plaintiff-in-error. (Record, pages 12, 28, 38.)

9. Said Supreme Court of Alabama erred in affirming the action of the lower court giving to the jury that portion of said general charge which is numbered (2) and which was excepted to by the plaintiff-in-error. (Record, pages 13, 28, 38.)

10. Said Supreme Court of Alabama erred in affirming the action of the lower court giving to the jury that portion of said general charge which is numbered (3) and which was excepted to by the plaintiff-in-error. (Record, pages 13, 28, 39.)

11. The said Supreme Court of Alabama erred in affirming the action of the lower court in refusing to give to the jury the charge requested in writing by the plaintiff-in-error, called Charge No. 1. (Record, pages 13, 29.)

12. The said Supreme Court of Alabama erred in affirming the action of the lower court in refusing to give to the jury the charge requested in writing by the plaintiff-in-error called Charge No. 2. (Record, pages 13, 29.)

13. The said Supreme Court of Alabama erred in affirming the action of the lower court in refusing to give to the jury the charge requested in writing by the plaintiff-in-error called Charge No. 3. (Record, pages 14, 29.)

14. The said Supreme Court of Alabama erred in affirming the action of the lower court in refusing to give to the jury the charge requested in writing by the plaintiff-in-error called Charge No. 4. (Record, pages 14, 30.)

15. The said Supreme Court of Alabama erred in affirming the action of the lower court in refusing to give to the jury the charge requested in writing by the plaintiff-in-error called Charge No. 5. (Record, pages 14, 30.)

16. The said Supreme Court of Alabama erred in affirming the action of the lower court in refusing to give to the jury the charge requested in writing by the plaintiff-in-error called Charge No. 6. (Record, pages 14, 30.)

17. The said Supreme Court of Alabama erred in affirming the action of the lower court in refusing to give to the jury the charge requested in writing by the plaintiff-in-error called Charge No. 7. (Record, pages 14, 30.)

THE STATUTE—ITS HISTORY.

In 1885, an act was passed by the Alabama Legislature which became section 3812 of the Code of 1886 and section 4730 of the Code of 1896, as follows:

> "4730 (3812) Obtaining property by false pretenses under contract for performance of act or service.—Any person who, with intent to injure or defraud his employer, enters into a contract in writing for the performance of any act or service, and thereby obtains money or other personal property from such employer, and, with like intent, and without just cause, and without refunding such money, or paying for such property, refuses to perform such act or service, must, on conviction, be punished as if he had stolen it."

In 1903, this statute was amended, (as shown by italics) to read as follows:

> "Any person, who, with intent to injure or defraud his employer, enters into a contract in writing for the performance of any act or service, and thereby obtains money or other personal property from such employer, and with like intent, and without just cause, and without refunding such money, or paying for such property, refuses *or fails* to perform such act or service, must on conviction be punished as if he had stolen it. *And the refusal or failure of any person who enters into such contract, to perform such act or service, or refund such money, or pay for such property, without just cause, shall be prima facie evidence of the intent to injure or defraud his employer.*"

In 1907, it was again amended (as shown by italics) to read as follows:

> "Any person, who, with intent to injure or defraud his employer, enters into a contract in writing for the performance of any act or service, and thereby obtains money or other personal property from such employer, and with like intent, and without just cause, and without refunding such money, or paying for such property, refuses or fails to perform such act or service, must on conviction be punished *by a fine in double the damage suffered by the injured party, but not more than* $300.00, *one-half of said fine to go to the county and one-half to the party injured; and any person, who, with intent to injure or defraud his landlord, enters into any contract in writing for the rent of land, and thereby obtains money or other personal property from such landlord, and with like intent, without just cause,*

and without refunding such money, or paying for such property, refuses or fails to cultivate such land, or to comply with his contract relative thereto, must on conviction be punished by fine in double the damage suffered by the injured party, but not for more than $300.00, *one-half of said fine to go to the county and one-half to the injured party.* And the refusal or failure of any person, who enters into such contract, to perform such act or service *or to cultivate such land,* or refund such money, or pay for such property without just cause shall be prima facie evidence of the intent to injure *his employer or landlord or to defraud him. That all laws and parts of laws in conflict with the provisions hereof be and the same are hereby repealed."*

The indictment is drawn under this statute as amended. (Pamphlet General Acts of Alabama, 1907, p. 536.)

There was before the inception of this statute, and still is, an Alabama statute reading:

> "Any person, who, by fraud or false pretense or token, and with intent to injure or defraud, obtains from another any money, or other personal property, must, on conviction, be punished as if he had stolen it."
>
> Code 1886, Sec. 3811. Code 1896, Sec. 4729. Code 1907, Sec. 6920.

This statute was deemed inadequate to cover offenses against labor contracts. So it was held in Colly v. State, 55 Ala. 85, where the indictment charged that the defendant obtained goods from his employer by falsely pretending, with intent to defraud, that he would

work for him the entire year, and that four days thereafter refused to work longer. Of this indictment, Mr. Justice Stone, one of Alabama's greatest jurists, said: "It charges no more than the making of a promise, to be performed in the future, which the defendant failed to observe and keep. This falls short of the requirements of Section 3714, (same as section 3811 above quoted) of the Revised Code. 'A false pretense is a false representation, which may be in mere oral words, or it may be in writing, or by signs, or the like, relating to some existing or past fact; and, to be indictable otherwise than as an attempt, it must actually mislead, and so produce such a particular cheat as falls within the words of the statute. *A promise, not meant to be kept, is not a false pretense.*' Bishop Stat. Crimes, Section 451."

Ten years later the statute involved in this case first appeared; and in 1891 it was first presented to the Supreme Court of Alabama in Ex parte Riley, 94 Ala. 82. The accused therein was discharged on *habeas corpus*.

This statute is radically different from the " false pretense statute," as we shall point out under the caption "The Statute Void."

It was briefly considered in Copeland v. State, 97 Ala. 30, which doubtless led to the insertion of the words "or fails" by the amendment of 1903.

Again in Dorsey v. State, 111 Ala. 40;—an excellent illustration of the uses made of the statute to enforce involuntary labor.

In McIntosh v. State, 117 Ala. 128, it received further consideration.

Its application is again considered in Gill v. State, 124 Ala. 83.

The foregoing cases were under the statute before amendment, and it may be significant that in each case the ruling of the Supreme Court was in favor of the ac-

cused. The last was decided in 1899, and we find no more appeals touching the questions here involved until 1906, after the amendment of 1903. By that amendment the words "or fails" were inserted (doubtless to meet the Copeland case, 97 Ala. 30) and the following were added: *"And the refusal or failure of any person, who enters into such contract, to perform such act or service, or refund such money, or pay for such property, without just cause, shall be prima facie evidence of the intent to injure or defraud his employer."*

In Bailey v. State, 158 Ala. 25, it is said: "It is no doubt true that the difficulty in proving the intent, made patent by that decision (Ex parte Riley, 94 Ala. 82) suggested the amendment of 1903," etc., as to *prima facie* evidence.

In State v. Thomas, 144 Ala. 77, by the approval of that amendment, which was again upheld in State v. Vann, 150 Ala. 66, the doom of every defendant in such prosecutions was sealed unless this court condemns those decisions by reversing the case at bar.

Not yet satiated, the State of Alabama, through its legislature, amended the statute in 1907 in three particulars:

(1) by making the penalty a fine in double the damage suffered by the injured party;

(2) by giving one-half of the fine to the injured party;

(3) by extending its scope to tenants and landlords.

The case at bar was the first to reach the Supreme Court of Alabama after the last amendment. It was considered in Bailey v. State, 158 Ala. 18, and 161 Ala. 75, and on *habeas corpus* was before this court in Bailey v. State of Alabama, 211 U. S. 452.

CONSTRUCTION BY ALABAMA SUPREME COURT.

Whether the expressions of the Alabama Supreme Court have always been clear and consistent may be questioned.

In Carlisle v. State, 76 Ala. 75 (under section 3811, supra) "injure" was held to mean the same as "defraud."

In its original form the statute was first construed in Ex parte Riley, 94 Ala. 82. Its validity was not then questioned, but it was construed in this language.

> "The effect of this statute is to provide for the punishment criminally of a certain class of frauds which are perpetrated by means of promises not meant to be kept. These frauds closely resemble those perpetrated by means of false pretense or tokens, but are not punishable under the statute on that subject, as a false pretense is a false representation relating to some existing or past fact, and does not include a promise of something to be done in the future.—Colly v. State, 55 Ala. 85.
>
> "The ingredients of this statutory offense are:
>
> "(1) A contract in writing by the accused for the performance of any act or service;
>
> "(2) An intent on the part of the accused, *when he entered into the contract,* to injure or defraud his employer;
>
> "(3) The obtaining by the accused of money or other personal property from such employer by means of such contract entered into with such intent;
>
> "(4) The refusal of the accused, with like intent, and without cause, and without refunding such money, or

paying for such property, to perform such act or service.

"This statute by no means provides that a person who has entered into a written contract for the performance of services . . . is punishable . . . upon his refusal to perform the contract. . . . A mere breach of a contract is not by the statute made a crime. The criminal feature of the transaction is wanting unless the accused *entered into the contract with intent* to injure or defraud his employer, and unless his refusal to perform was with like intent and without just cause. That there was an intent to injure or defraud the employer, *both when the contract was entered into and when the accused refused performance,* are facts which must be shown by the evidence. As the intent is the design, purpose, resolve or determination in the mind of the accused, it can rarely be proved by direct evidence, but must be ascertained by means of inference from the facts and circumstances developed by the proof. In the absence, however, of evidence from which such inferences may be drawn, the jury are not justified in indulging in mere unsupported conjectures, speculations or suspicions as to intentions which were not disclosed by any visible or tangible act, expression or circumstance."

This construction is adopted in
McIntosh v. State, 117 Ala. 129.
State v. Vann, 150 Ala. 66.

In McIntosh v. State, 117 Ala. 130, Mr. Chief Justice Brickell said:

"*Refunding the money,* or restoring other property, with which the employer, by reason of the contract was induced to part, *is a principal purpose* the statute is intended to enforce. . . . The rendition of service

by the defendant for a period more than sufficient to have repaid the money advanced to him, takes away an essential ingredient of the offense."

In the Vann case it is said that the defendant "cannot be convicted without the fraudulent intent, whether he does or does not repay the money. The gist of the crime is to fraudulently get the money, or property of another, and the statute merely condones the offense by permitting the defendant to repay or refund, and requires the state to negative this fact."

In Harris v. State, 156 Ala. 158, (June, 1908), a divided court held that where the employe undertook other things in addition to the performance of personal services, the contract is not within the statute. One Justice, concurring, said further that the accused might exculpate himself by refunding the money at any time before trial (perhaps at any time before conviction).

In Bailey v. State, 158 Ala. 24, it is said to be within legislative competency to enact a law penalizing the entering into a contract with the intent to perpetrate a fraud, and obtaining money or other personal property through such agency. "This is all that is effectuated by the legislation in question. On its face, the purpose is to punish fraudulent practices, not the mere failure to pay a debt. Thus considered, it is constitutional."

As to "just cause" there are two views expressed. In the opinion in this case (161 Ala. 79) it is said: "It seems to us that if the Legislature had attempted this (to define "without just cause") the result would have been more restrictive upon the defendant than was the leaving of this question *to court and jury;* for just cause is defensive matter brought forward by the facts of each case," etc., but in Toney v. State, 141 Ala. 125, a prosecution under a statute (Pamphlet Acts 1900-1, page 1208) which used the words "without sufficient excuse,

to be adjudged by the court," Mr. Justice Sharp said, "The existence of an excuse for the abandonment to be adjudged by the court, could never be *known* to be available except at the risk of, and at the end of, a criminal prosecution."

POSSIBLE APPLICATIONS OF THE STATUTE.

The following illustrations show the practical effect of the statute:

(1) 'A' contracts with 'B' to perform labor for twelve months for wages payable at the end of the term, and thereby obtains money from 'B.' He enters upon and continues service for six months, when his wife becomes sick and he takes her away for treatment and fails to perform the rest of the services or to refund the money obtained. The statute makes these facts *prima facie* evidence of the fraudulent intent of 'A,' both when he obtained the money and when he quit the service.

(2) After working for 'B' under such contract for six months, 'A' is sued by a third party and his wages due from 'B' are seized by garnishment. Being without means of sustenance for himself or family, he quits 'B's' service to work for 'X,' not able, of course, to refund the money obtained from 'B.' The statute makes these facts *prima facie* evidence of the two fraudulent intents.

(3) 'A' contracts in like manner with 'B' and after six months' service is arrested and imprisoned for an offense committed after the date of the contract and thereby prevented from completing the service, and he has not refunded the money obtained. The statute makes these facts *prima facie* evidence of the two fraudulent intents.

(4) 'A,' an alien, entering upon his contract in like manner with 'B,' is deported by the government before the service is complete and without his refunding the

money obtained. The statute makes these facts *prima facie* evidence of the two fraudulent intents.

(5) Six months after entering into the contract and entering upon the service, 'A' is offered a position paying so much more that he can afford, rather than lose the position, to pay whatever damages the employer may recover in a civil action on the breach and for the money obtained, but, being unable presently to repay the money, and determining in his own mind to repay it out of his first wages earned in the new employment, (which he cannot testify), and even promising so to pay his employer, quits the service. The statute makes these *prima facie* evidence of the two fraudulent intents.

(6) 'C,' a woman, contracts with 'B' in like manner and after six months service meets 'D' for the first time, shortly thereafer marries him and goes to 'D's' home in another state without refunding the money originally obtained or completing the service. The statute makes these facts *prima facie* evidence of the two fraudulent intents.

(7) An interesting situation is found in the Dorsey case, 111 Ala. 40. While 'D' was under contract with 'X' to work for a term, he was convicted of a petty offense and fined. To obtain money to pay the fine he contracted in writing with 'C' to work for him a term. 'D' returned to work for 'X'; whereupon 'C' had him arrested for violation of this statute, and, of course, he was convicted. The fact that 'D' was already legally obligated to 'X,' and obtained money from 'C' to avoid imprisonment or labor for the county, which would make performance of 'X's' contract impossible, was not considered to be "just cause" for his failure to work at the same time for 'C,' and it was said that 'X' had no remedy except an action for breach of his contract. We wonder what would have happened if 'D's' contract with 'X' had been in writing and for a consideration, as the statute contemplates!

PRINCIPALS GOVERNING FEDERAL JURISDICTION.

This statute will be considered according to its real purpose and effect rather than its mere language. This principle was recognized and made effective in the case of Dan Rogers v. State of Alabama, 192 U. S. 226, 48 L. Ed. 417, wherein Mr. Justice Holmes says: "It is a necessary and well settled rule that the exercise of jurisdiction by this court to protect constitutional rights cannot be declined when it is plain that the fair result of a decision is to deny the rights. It is well known that this court will decide for itself whether a contract was made as well as whether the obligation of the contract has been impaired."

In Henderson v. Mayor, 92 U. S. 259, 23 L. Ed. 543, Mr. Justice Miller says: "In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect." And after discussing the effect of the statute then under consideration—"It is said that the purpose of the Act is to protect the State against the consequences of the flood of pauperism immigrating from Europe, and first landing in that city, (New York). But it is a strange mode of doing this to tax every passenger alike who comes from abroad. * * * Whenever the statute of a State invades the domain of legislation which belongs exclusively to the Congress of the United States, it is void, no matter under what class of powers it may fall, or how closely allied to powers conceded to belong to the State." —going to show that on constitutional questions this court will look to the substance and not the shadow, to the meat and not the shell.

In Cummings v. Missouri, 4 Wall. 325, 18 L. Ed. 363, Mr. Justice Field says:

"The Constitution deals with substance, not shadows. Its inhibition was leveled at the thing, not the name. It intended that the rights of the citizen should be secure against deprivation for past conduct (the point there involved), by legislative enactment, under any form, however disguised. If the inhibition can be evaded by the form of the enactment, its insertion in the fundamental law was a vain and futile proceeding.'"

This Court will not ordinarily on writ of error to a State Court declare a State law void on account of collision with the State constitution, and yet it has said, in Jackson v. Lamphire, 3 Peters, 280, 7 L. Ed. 683, that "cases may occur where the provisions of a law on those subjects (statutes of priority of deeds and of limitations) may be so unreasonable as to amount to a denial of a right, and call for the interposition of the court."

Kuhn v. Fairmount Coal Co., 215 U. S. 349.

CONSTITUTIONAL QUESTIONS IN ALABAMA SUPREME COURT.

The Alabama Supreme Court has considered the constitutionality of the statute as amended in

State v. Thomas, 144 Ala. 77;
State v. Vann, 150 Ala. 66;
Alonzo Bailey v. State, 158 Ala. 18;
Alonzo Bailey v. State, 161 Ala. 75.

No brief was filed for the appellee in State v. Thomas, and it seems to have been considered on the sole proposition that the legislature may declare what shall be *prima facie* evidence. This point was disposed of in the Vann case with the statement: "The amendment (as to the *prima facie* evidence) is a mere rule of

evidence, and has been upheld by this court in the case of State v. Thomas, the soundness of which is not challenged by counsel."

In the case at bar it was again raised and the conclusion reached in the Thomas case affirmed. (Record, pages 18, 19.)

The other constitutional question raised in the Vann case, whether the statute authorized imprisonment for debt contrary to the Alabama Constitution, was disposed of on the first appeal in the simple statement of the Court that the statute is intended to prevent fraud, and not to imprison for debt. It is conceded therein that the offense is dependent upon the failure of the accused to refund the money obtained by entering into the contract, but decided that this is merely beneficial to the accused and not a condition of which he can complain because the State is thus compelled to assume the burden of proving the failure to refund. "He cannot be convicted," says the Court, "without the fraudulent intent, whether he does or does not repay the money. The gist of the crime is to fraudulently get the money, or property of another, and the statute merely condones the offense by permitting the defendant to repay or refund, and requires the State to negative this fact."

On the last appeal herein, this question is disposed of by a recital of the substance of the statute in the Carr case, 106 Ala. 35, coupled with the suggestion that but a casual reading of that opinion would differentiate that case from this, as it was differentiated in Chancey v. State, 130 Ala. 71. (Record, pages 20, 21.)

In the case at bar all of the constitutional questions raised by this record were decided by the trial judge and by the Alabama Supreme Court against plaintiff in error. (Record, pages, 18-22.)

THE REAL EFFECT AND OBJECT OF THE STATUTE.

What is the real object of the statute? It must be either to compel the repayment of the money, or to compel the employe to remain in service, or both. Was it meant either to prevent employes from making fraudulent contracts, or to prevent them from obtaining money by promising service? Surely not. The advancing of the money by the employer to the employe is not to be considered as merely a lending transaction. If so, the security would be a mere promise of one of a class well known to be generally without means to pay, and loans to them without acceptable security are seldom made.

If such employes are so notoriously irresponsible and unreliable, employers would not be so anxious to lend them money if there was not some ulterior motive and object. The statute is not meant to give a lender security for his loan. That would be contrary to common sense and business practices. What, then, is the motive of the employer? If he does not advance the money to obtain interest thereon, it must be to secure the services of the employe. He could generally get a contract for the services without the advance money, but then the employe might quit before the end of the term, which is the thing the employer would prevent. He wants the continuous service of the employe for a definite period. To do this he uses a trap, sanctioned by the legislature and not detected by the Alabama Supreme Court, to compel the service.

He advances the money, not as an interest-yielding investment, relying upon the statute to influence repayment, but to bring the employe within the statute which

enables the employer to *compel the service* as the price of freedom from prosecution.

The real object of the statute, we submit, is to enable the employer to keep the employe in involuntary servitude by the overhanging menace of prosecution which he knows must be successful on account of the artificial presumption or rule of evidence making the quitting prima facie evidence of the crime, which is practically conclusive because the defendant cannot testify in his own behalf as to his unexpressed intent.

We do not forget that the Alabama Supreme Court has said that the effect (and, presumably, the object) of the statute is to punish fraud; that a mere breach of a contract is not made a crime. But is also says that "refunding the money * * * is a principal purpose the statute is intended to enforce," and that "when the money is refunded * * * the employer is saved from injury or loss." It also says, "the rendition of service * * * sufficient to have repaid the money advanced to him takes away the essential ingredient of the offense." It also says that "the statute purges the offense if the money is repaid. * * * He cannot be convicted without the fraudulent intent whether he does or does not repay." It also says that "to come within the statute, the sole consideration moving from the employe to the employe must be the performance of personal service." It also says "an essential element of the offense * * * was that the employed person abandoned the service *without first repaying such money.*"

From these excerpts from the opinions in the various cases cited above, can we tell whether the object of the statute is to force the employe to continue in service or compel him to repay the money? If he quits without paying he is condemned! If he serves to the end of the term without paying, he has committed no offense! If he quits without paying but pays before trial (possi-

bly before conviction) the offense is condoned or purged! Ergo, if he so pays, he has committed no offence; otherwise he is pardoned for that offense by the judge or jury upon showing that he committed it and has repaid the money! How would it sound for a thief to plead "not guilty by reason of having been caught and restored the property stolen"?

But, be it remembered, the employe has for the money advanced sold his *freedom for the term,* forfeited his *right to quit* the service, while for the agreed wages he has sold his *services.* He cannot redeem that freedom before the end of the term except by repaying the money advanced—he becomes free by serving the full term even without repayment. He is compelled to pay the money he obtained or to perform service sufficient to cancel the debt. See McIntosh case, 117 Ala. 128, at page 130, holding that the employer could retain the wages to satisfy the debt. (Doubtless the contract in the case at bar was drawn to meet that ruling—the money advanced herein being made payable (by indirection) $1.25 per month. But Bailey had not, when he quit, earned as much as the loan to him: if he had, it does not appear that the wages had not been paid to him less the $1.25 then due on the loan).

If the real object is to prevent such frauds, why was the statute originally aimed at employes, and no one else? Are they an infamous class? Are they less honest than other men—employers, forsooth? And then, why did the amendment extend to no one but tenants of farms? Are they less willing to pay their rent than the occupiers of dwellings or store houses? Why does it not include that innumerable horde who infest store-houses daily and buy goods for which they do not intend to pay? Does not their failure or refusal to pay at the promised time prove their intent to defraud as much as does the act of the employe or tenant which is made *prima facie* evidence of his guilt?

It is all too plain. The purchaser of goods promises *no services*—the employe and the farm tenant promise substantially *nothing but service.* The merchant wants pay for his merchandise, but not service: the employer (hence his designation) *wants the service,* and not the money advanced: it is for the service he pays the *wages,* but for the *right* to that service for a definite term that he makes the *advance.*

Then, what is the real object and effect of the statute? Is it to compel *payment* or to enforce *service?* If *either,* is it valid?

The genuine object and purpose of these statutes may be found in the language of Judge Brawley in United States v. Clement, 171 Fed. 974: "There is a public sentiment in some parts of the South which finds expression in labor contract laws, that there is special need of legislation to compel the negroes to the performance of their contracts by imposing penalties for their violation."

WHY THE AMENDMENT AS TO PRIMA FACIE EVIDENCE.

As considered in the Riley case, the statute provided punishment for obtaining money or other personal property by a promise not meant to be kept. To convict it was necessary to prove a mental status, the existence of the intent not to fulfill the contract. This is a question of fact for determination by the jury.

PROOF OF MENTAL STATUS.

"In this state, although differing from the rule declared in some other states, we refuse to allow parties, when testifying in their own causes, to give evidence of their own uncommunicated motives or intentions. * * * The result is, that, with us, motive and intent remain as they were at common law—inferences to be drawn from surrounding facts and circumstances."

Ala. Fer. Co. v. Reynolds & Lee, 79 Ala. 500;
Burke v. The State, 71 Ala. 377;
Whizenant v. The State, 71 Ala. 383;
Brown v. The State, 79 Ala. 51;
Ex parte Riley, 94 Ala. 83.

While the statute is akin to those against obtaining goods by false pretenses, it is radically different in the difficulty of proof. In the former, proof of the existence *vel non* of the pretense is not inherently difficult—in the latter, proof of the intent of the employe is practically impossible. Before the amendment, shielded by the presumption of innocence, not compelled to incriminate himself, nor permitted to testify to his uncommunicated intent, the accused was in little danger of conviction, whether guilty or not. This is shown by the results of the cases appealed to the Alabama Supreme Court from convictions under the statute before amendment.

The amendment as to *prima facie* evidence was unquestionably meant to change this condition of things. We need no better statement of this than the words of Mr. Justice Denson in the case at bar on first appeal: "It is no doubt true that the difficulty in proving the intent, made patent by that decision (Riley case) suggested the amendment of 1903 to the statute, which provides that the refusal or failure of a person who enters

into such contract, to perform such act or service * * * shall be *prima facie* evidence of the intent to injure or defraud his employer." Bailey v. State, 158 Ala. 25.

By indirection and evasion, under authority of the inaccurate and inapplicable statement that "the legislature may declare what shall be *prima facie* evidence" —facts which constitute the mere breach of a civil contract *which the Alabama Supreme Court says is not a crime*, are made *prima facie evidence of a criminal offense.*

If the object was not to draw by statute a conclusion different from that the jury would otherwise draw, what possible object could the Legislature have? If the effect is not to force such conclusion, it has no effect.

Are not the right of trial by jury, the presumption of innocence, the equal protection of the laws, the essentials of due process of law, and the prohibitions against imprisonment for debt and against involuntary servitude except for crime, brushed aside by the omnipotent devices of a State Legislature!

Two questions arise: (1) Is the legislature authorized to make rules of evidence violative of constitutional rights, and (2) is this a mere rule of evidence?

THE STATUTE DENIES DUE PROCESS OF LAW.

The Federal Constitution provides that no State shall "deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Alabama Constitution provides that the right of trial by jury shall remain inviolate.

The denial of any one of the essential elements of a jury trial is a denial of the *right* of jury trial. The uni-

versal presumption of the innocence of the accused is an element of jury trial and casts upon the State the burden of proving guilt beyond a reasonable doubt. Any legislation infringing, or authorizing the court to infringe, upon the function of the jury is a violation of the right of trial by jury. 24 Cyc. 191, G. If the real effect of a statute in Alabama is to deprive the accused of any essential element of a jury trial, it is in violation of the Federal Constitution.

This statute denies to plaintiff-in-error his right to trial by jury because it arbitrarily overcomes the presumption of his innocence and gives him no fair opportunity to rebut the prima facie evidence of his guilt.

Wildering v. Corbin Banking Co., 126 Ala. 279.
Wilbern v. McColley, 63 Ala. 436.

The Thomas cause, *supra,* upholds the provision as to *prima facie* evidence on the authority of the text in 8 Cyc. 820, as follows: "The legislature has power to give greater effect to evidence than it possesses at common law, and in both civil and criminal proceedings, it may declare what shall be *prima facie* evidence." Like all statements of general rules, this is subject to limitations and restrictions. So, in 8 Cyc. 1090, treating of "Due Process of Law," under the specific head of "Deprivation of Life and Liberty," the rule is more accurately stated—"A state may establish and alter rules of evidence as to what constitutes proof of an offense, *provided the accused is given a fair opportunity to explain and contest the charge, and the rule is not arbitrary in character.*"

Commonwealth v. Wallace, 7 Gray, 222.
Adams v. New York, 192 U. S. 585.

Again the rule is stated in 24 Cyc. 192, "the legislature may provide that proof of certain facts shall be sufficient to establish a *prima facie* case in either criminal or civil cases, *for a prima facie case* does not overcome the presumption of innocence or change the burden of proof, or require the jury to convict unless they are satisfied from all the evidence of the guilt of the accused beyond a reasonable doubt. *This rule, however, is subject to the limitation that the fact relied on as establishing the prima facie case must have some fair relation to or connection with the main fact and that the accused must have an opportunity to make his defense and submit the whole case to the jury; and it is not competent for the legislature to create presumptions of guilt from facts which are not only consistent with innocence, but which are not even a constituent part of the crime of which the defendant is accused.*"

How inadequate, then, is the announcement of the Alabama Supreme Court that the "amendment is a mere rule of evidence," especially when it is admitted in the same opinion that the legislature "cannot prescribe what shall be conclusive evidence, as this would be an invasion of the province of the judiciary."

Doubtless the State will urge in support of the statute the Fong case, 149 U. S. 729, holding that the provision (of the Act of Congress) which puts the burden of proof upon him (the Chinaman), of rebutting the presumption arising from his having no certificate, as well as the requirement of proof by at least one credible white witness that he was a resident of the United States at the time of the passage of this Act "is *within* the acknowledged power of every legislature to prescribe the evidence which shall be received, and the effect of that evidence, in the courts of its own government." But it is pointed out in that case that that proceeding was in no sense a trial and sentence for a crime

but the enforcement of a valid regulation of the entrance of aliens into this country, and that *Fong was not therefore, deprived of life, liberty or property without due process of law.* Fong was an alien. He was seeking to claim the benefits of a privilege, not a right. These requirements were reasonable and not arbitrary. There was no mental status involved. It was always possible for the alien to meet the requirements and if entitled to remain in this country, he had all due opportunity to overcome the *prima facie* or presumptive evidence. Being a Chinaman, the presumption would be that he was not entitled to remain, and yet he is afforded the means of overcoming the presumption against him. We think the case has no application here, and the statement of the "acknowledged power of every legislature to prescribe rules of evidence" was not meant to be an accurate or final declaration of a rule in criminal cases. Three members of this Honorable Court dissented on this very point.

But we say the statute is invalid because:

(1) Though *nominally* it declares a *prima facie* rule, it *really* fixes a *conclusive* rule, and

(2) If it is only a *prima facie* rule, it is bad because it is arbitrary. The facts made *prima facie* evidence of the intent with which the contract was made has no relation to that intent, these facts are perfectly consistent with his innocence, and the defendant it not afforded a fair opportunity to submit his whole case to the jury.

Let us test the statute by these principles and illustrate it by the case at bar.

By agreeing to work twelve months, Bailey obtained $15, to be repaid by the withholding of $1.25 from his wages each month. If he then and there intended to defraud the Company he violated the statute. That intent was a mental status, which no one could know except himself. Testimony that he had stated at any

time that he *did not* intend to perform the service would support a conviction. But testimony that he stated at any time that he *did* intend to perform the service would be incompetent. He is presumed, in the beginning to be innocent. But after a month and four days work, for reasons not disclosed by the record, but admitted to be without just cause, and without refunding the money he had obtained, he ceased to work. Instantly, in spite of the continuing presumption of innocence, there is *created* by this legislative rule, *prima facie* evidence that he intended to defraud his employer, not only when he ceased to work, but when he made the contract and obtained the money. By an act which occurred more than a month afterward, the original transaction, then apparently, and, perhaps actually, legal and moral, is converted into an illegal, immoral and criminal act. The intent with which the original transaction was made is thus ascertained or determined by an act occurring a month later, an act not in itself criminal, and having no logical connection with that intent. Without the statute there is no evidence even tending to show fraud; with the statute the evidence is conclusive of fraud, because defendant's lips are sealed by the law of Alabama and there is no way to overcome the *prima facie* evidence.

If he had worked six months the effect would have been the same. How an act not related by cause and effect or in any other logical manner, can be made *prima facie* evidence of the character of an intent existing six months before, (the defendant having no opportunity to declare his intent) without violating the right of trial by jury is beyond our comprehension. The Riley and McIntosh cases show that the Alabama Supreme Court considered such evidence would not support a conviction, when unaided by the *prima facie* evidence created by the statute.

For the manifest purpose of making convictions possible, easy, even certain, the legislature arbitrarily undertook to give the facts a weight they did not naturally, inherently or judicially possess. It made them conclusive for all practical purposes.

In Alabama it is said "If any question of fact or liability be conclusively presumed against him, this is not due process of law."

Zeigler v. S. & N. A. R. R. Co., 58 Ala. 599.

It must have intended to make them conclusive, for it would have been a vain thing to make them merely *prima facie,* unless this would secure convictions. If the *prima facie* evidence would not overcome the presumption of innocence, it would not relieve the condition, but if it did, and the defendant could not rebut that evidence (as he cannot in Alabama because he cannot testify to his intent) the result would be inevitable —the defendant would be convicted.

This defendant was convicted because the *prima facie* evidence was held to overcome the presumption of innocence.

Mr. Justice White, in Coffin v. United States, 156 U. S. 453, says: "The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law. * * *The presumption is an instrument of proof created by the law in favor of one accused, whereby his innocence is established until sufficient evidence is introduced to overcome the proof which the law has created."

But this statute singles out a fact not of itself tending to show fraud and makes it the instrument to overcome this fundamental presumption which is itself proof of

innocence until the jury is satisfied beyond reasonable doubt of his guilt. Tested by the rule laid down in the Riley case, there was no evidence of Bailey's intent to defraud except the *prima facie* evidence created by this statute. If that was not sufficient to support a conviction, charge 6 (Record, p. 41) should have been given and the defendant discharged. The Alabama Supreme Court has impliedly held in this case, that a conviction is supported by the *prima facie* evidence, without more.

In the case at bar as well as in the Thomas and Vann cases, the *prima facie* evidence was treated as overcoming the presumption of innocence and supporting conviction.

In Kelly v. Jackson, 6 Peters 622, 8 L. Ed. 523, it is said that *prima facie* evidence "is such as, in judgment of law, is sufficient to establish the fact; and, if not rebutted, remains sufficient for the purpose. * * * In a legal sense, then, such *prima facie* evidence in the absence of all controlling evidence, or discrediting circumstances, becomes *conclusive of the fact.*"

Statutes have been held valid which make the possession of stolen goods, burglars' tools, gambling paraphernalia, policy slips and intoxicating liquors in certain cases, *prima facie* evidence of crime, because there is a logical connection between these things and the offense, and evidence is possible and admissible to rebut the *prima facie* case. Adam's case, 192 U. S. 585. A mental status is not the issue, and the defendant may explain his possession of the articles, by his own testimony, though he may not declare his specific intent in reference thereto.

If the failure or refusal to perform a contract or to refund money obtained thereunder is no crime, how can it be made such evidence of crime as to support a conviction? There is no general or natural presump-

tion arising out of a subsequent breach of contract, that the intent to breach existed when the contract was made long before.

It may be that the statute would declare a valid rule if limited to cases where the defendant made a contract for *immediate* service and immediately refused to enter upon it, for *that* refusal might support an inference as to the specific intent, the time of making the contract and the time of refusal being practically the same, showing conclusively that the intent to defraud existed when the contract was made.

It was held in Commonwealth v. Rubin, 165 Mass. 453 that where the intent is material to conviction of larceny, if the conversion followed hard upon the receipt of the property, it is not unnatural that the felonious intent existed from the beginning;—a question left to the jury. But to make that case of weight for defendant in error, it must have shown that the failure to surrender the property was *made prima facie* evidence that such intent existed at the time of the receipt of the property.

We cannot see how Morgan v. State, 117 Ind. 569, can have any weight, as it is not analogous and the points here involved were not there considered.

If there are no limitations on the power of the legislatures to fix rules of evidence, they may emasculate all constitutional rights. For what more arbitrary rule of evidence could be made than that involved here?

But it may be said that the Alabama Supreme Court has held that the statute does secure the right of trial by jury, and this Court is bound by its decision. See Jackson v. Lamphire, 3 Peters, 280, quoted on page 17 hereof.

But, be it so:—then, what shall be said when it appears that no other class of offenders in Alabama is deprived of the benefit of the presumption of innocence,

equivalent to one witness in behalf of the defendant, by an artificial rule of evidence, by which an inconsequential act is arbitrarily made to prove (in effect) his guilt? Then all we have said under this head finds a fitting place under the discussion of "equal protection of the laws."

B. & P. S. Co. v. Randolph, 119 Ala. 510-11.
Yick Wo v. Hopkins, 118 U. S. 356, 374.

THE STATUTE UNCERTAIN.

Three times in the statute appear the words "and without just cause." What do they mean? To what word are they grammatically related? Does the phrase refer to the repayment, refunding or restoration of property, or to the refusal or failure to perform the stipulated service? No just causes for non-payment occur to us except payment or satisfaction by counter-claim, equivalent to payment. It can hardly mean that. Does it refer to the refusal or failure to perform the service? The only just causes for refusing to perform the service are those things done by one of the parties recognized by the law of contracts as authorizing a termination by the other. If these are meant, the statute may be sufficiently certain in its terms to be valid.

But if the phrase is meant to leave it to the court or to the jury to decide what facts or circumstances are just cause for the refusal or failure of the accused to repay the money or to perform the service, the statute is void for violating a cardinal requirement of criminal statutes—that of certainty.

The legislature may not delegate to judge or jury the power to supply an essential element to the statute where it has fixed no rule or guide therefor.

In the case at bar Mr. Justice Denson said it was a question for the court and jury (Record, p. 19). The statute does not say so. In Toney v. State, 141 Ala. 120, it is said to be for the judge or court as the statute prescribed. In the McIntosh Case (117 Ala. 128) it seems that payment before conviction is equal to "just cause." In Toney v. State, 141 Ala. 120, where "without sufficient excuse" is used in a statute as "without just cause" is used in this, Mr. Justice Sharp said "The existence of an excuse for the abandonment to be judged of by the court could never be known to be available except at the risk of, and at the end of, a criminal prosecution."

"A statute (creating an offense not existing at common law) must be sufficiently certain to show what the legislature intended to prohibit and punish, otherwise it will be void for uncertainty."—12 Cyc. 142.

United States v. Reese, 92 U. S. 214.

If the statute is not void for uncertainty, these words "without just cause" still work its destruction for reasons which are discussed herein under the head of "Involuntary Servitude." If it is void, conviction there under must be without due process of law, and the statute subject to the consideration of this Court.

THE ORIGINAL STATUTE VOID.

Independent of the vices of the amendment, we submit that the original statute is invalid. In its last analysis it declares that it is a crime for one to make a contract which he intends not to perform. It differs very radically from the "false pretense" statutes, in which not only the intent to injure or defraud must ex-

ist, but some false representation, misleading the injured party, must be made. Mr. Justice Stone made this emphatic statement in Colly v. State, 55 Ala. 85; speaking of an indictment "It charges no more than the making of a promise, to be performed in the future, which the defendant failed to observe and keep. * * * A false pretense is a false representation * * * relating to some existing or past fact; and, to be indictable * * * it must actually mislead. * * * A promise, not meant to be kept, is not a false pretense. Bishop Stat. Crimes, § 451.

But here the mere unexpressed intent not to perform a contract, without any false representation, is made the essence of the crime. Reprehensible as such dishonesty may be, it cannot, under our constitutional limitations be punished as crime.

If the statute had contained the words "by any false pretense or token" it would have been good, and it would have meant nothing more or less than the "false pretense" statute (Code of Alabama, 1907, § 6920 quoted above), which did not accomplish the object desired. But if it had so read and, in this case, Bailey had simply made the contract, obtained the money thereby and made no sort of representation, what false pretense could exist misleading to the employer? If he had falsely said that he had means or that he was a skilled employe, the false pretense would have existed. But, it would seem that the only thing about which the employer could be misled under this statute is the *existence of the intent not to perform the contract.* If when he contracted, Bailey had in his mind the fixed intent not to perform the contract, and yet gave no expression as to whether that intent existed or not, there was no false pretense and no criminal fraud. If such intent not to perform did so exist, and he had said to his employer that it did not exist, and the employer had

thus been misled, Bailey would have made a false pretense.

If this statute is valid, then others will be, such as: "Any person, who, with intent to injure or defraud his banker, gives him a promissory note, and thereby obtains money, and with like intent and without just cause and without refunding the money borrowed, fails or refuses to pay such promissory note, must on conviction be punished, etc.," and to complete the illustration, "and the failure or refusal to pay said note or to refund said money, without just cause, shall be *prima facie* evidence of the intent to injure or defraud."

Carried to its ultimate length, the statute means that *one may be criminally punished for making any contract which he secretly intends not to perform.*

In Peonage Cases 123 Fed. 671, 690, Judge Jones of the Middle District of Alabama, in his instructions to the grand jury says that the original act is constitutional, but it is evident that the statement was made only for that occasion and indulging all presumptions in favor of the statute so far as the grand jury was concerned.

EQUAL PROTECTION OF THE LAWS.

Does the statute not deny to plaintiff in error the equal protection of the laws? The contract between him and the Riverside Company imposes on the employe the obligation to work for the employer and to repay the money advanced to him, and on the employer the obligation to pay the employe his wages each month. Where farm tenants are concerned, the landlord frequently obligates himself also to furnish "rations," fertilizers, live stock, peaceable possession and other things. For breaches of those obligations the law affords ample rem-

edy to each. By appropriate actions the employe may collect his wages, and the employer his advances and damages for the failure of the employe to perform the services. The legislature of Alabama was evidently not content with this equality before the law.

But in such cases there can be no decree for specific performance and no civil action to compel the actual personal services of the employe.

Does not the statute give to the employer an advantage which is denied the employe? While it does not expressly authorize punishment of the employe for not performing the service, it does provide that he may be punished if he made the contract and obtained the advance money with intent not to perform the service. There is no corresponding provision for punishing the employer if he entered into the contract and thereby secured the services of the employe with intent not to pay therefor. This might be a theoretical matter under the statute as it stood before amendment, for conviction was then well-nigh impossible. But aided by the amendment prescribing the *prima facie* evidence, it gives the employer an unconscionable advantage. It enables him to resort to, or hold over the employe the menace of, a criminal prosecution (which both know must be successful), thus coercing the employe to perform the service or to refund the money advanced. It does not give the employe a corresponding remedy to compel the employer to pay the wages. As to the farm tenant and landlord, in the same way it enables the landlord to force the tenant to cultivate the land and perform the service contracted for, without giving the tenant an equal remedy to compel the landlord to comply with his lease contract which may contain many stipulations—such as furnishing rations, seed, fertilizers, live stock, peaceable possession to the end of the term, etc.

These burdens are placed upon and limited to classes contracting to perform service. In Harris case, 47 So. Rep. 340, the Alabama Supreme Court expressly states that "this is a criminal statute, *aimed solely at those who enter into contracts to perform personal service.*" If equal and exact justice—"the equal protection of the laws"—was the aim of the legislature, why did it not lay the corresponding burdens on the employer and the landlord? Where is the equal protection of the laws in this condition of things?

Why, too, are employes singled out from all the numerous persons who borrow money and made subject to such penalties?

In the Peonage Cases, 123 Fed. 671, is a very able and exhaustive treatment of this subject, by Judge Thomas G. Jones, District Judge for the Middle District of Alabama. Any attempt on our part to discuss it would be only a mutilation of most persuasive language. We should say, however, that, in charging the grand jury he evidently assumed the validity of the original statute involved in this Case because the statute was not before him for construction.

The Alabama Labor Contract Statute of Mar. 1, 1901, (Acts 1900-1, p. 1208) was held to be unconstitutional as violative of the right to equal protection of the laws, in an able opinion by Mr. Justice Sharp, (Toney v. The State, 141 Ala. 120). He cites and quotes from some of the leading decisions of this court. Therein he thus refers to the words "without sufficient excuse" as used in that statute as the words "without just cause" are used in that under consideration herein, "the existence of an excuse for the abandonment to be judged of by the court could never be known to be available except at the risk of, and at the end of, a criminal prosecution."

Joseph v. Randolph, 71 Ala. 499.

INVOLUNTARY SERVITUDE.

The statute plainly and flagrantly violates the Thirteenth Amendment to the Federal Constitution.

We stop to quote two expressions used by the Alabama Supreme Court in considering this statute. In the McIntosh case, 117 Ala. 128, Mr. Chief Justice Brickell said, "*Refunding the money* * * * is a principal purpose the statute is intended to enforce." In the Vann case, 43 So. Rep. 357, Mr. Justice Anderson said, "The gist of the crime is to fraudulently get the money or property of another, and the statute merely *condones the offense of permitting the defendant to repay or refund.*"

The penalty is a fine in double the amount of damage suffered by the injured party, not to exceed $300. If the limit may be placed at $300, why can it not, in principle, be placed at $3,000, or any other sum, not unreasonable?

The Alabama Supreme Court has condemned a statute prescribing a punishment of this kind, in the case of Carr v. The State, 106 Ala. 35, holding that it authorized imprisonment for debt. While we cannot object to the statute under consideration on that specific ground, in terms, yet if it sanctions imprisonment for debt it authorizes a form of involuntary servitude and is obnoxious to the Federal Constitution.

Mr. Justice McClellan said in that case: "This statute cannot be read without conviction that its purpose is to impose imprisonment for debt, and to coerce the payment of a debt by the duress it authorizes. Its requirement that the fine shall be paid only in money, that it shall be double the amount of the deposit, and that one-half of it, that is, a sum equal to the amount deposited, shall go to the person who made the deposit, tends at least, to show that coercion of payment

of the debt which the depositary owed the depositor—for the transaction created the relation of debtor and creditor between them—by means of the restraint which the imposition of the fine itself immediately put upon the defendant—not to speak here of his imprisonment preliminary to the trial—and, that failing to enforce payment, by means of imprisonment at hard labor for the payment of the fine and costs, was the moving purpose and efficient cause of the enactment of the statute. And what doubts on this point might have been left, had the statute stopped here, are removed beyond peradventure by its further provision that payment to the depositor at any time before conviction, "shall be a good and lawful defense to any prosecution under this act." There cannot be two opinions as to the intent and meaning, or the effect upon the whole enactment, of this last and most remarkable provision. It is a declaration of the baldest and most direct character to one party to a transaction whereby he has incurred a debt to the other, in the name of the State, that unless he pays that debt, he shall be arrested, held to trial, tried, convicted, fined and imprisoned at hard labor, and this obviously not for any taint of criminality in the transaction out of which the debt arose, but purely and simply for the non-payment of the debt. For this default, and until it is purged either by simply paying the debt and accrued costs before conviction or by working out double the debt and the costs, the debtor may be imprisoned for an indefinite time before trial, merely and only because he does not pay the debt and the expenses of putting this coercion upon him, there being no pretense even of ultimately punishing him for taking the deposit, if the preliminary imprisonment shall have the desired effect of extorting the money he owes the depositor out of him, and if, as is the case here, the compulsion of preliminary imprisonment fails

of its intended effect, he may, under the guise of punishing an act which was not criminal before this statute, and which upon the statutory definition does not necessarily involve abstract criminality or the taint of moral turpitude, and which might up to the very moment of conviction have been shorn of even its factitious criminality by the payment of the debt, be held to hard labor until his services at the statutory rate shall yield the amount of the debt, and for an equally long time to work out a like sum imposed upon him as an additional penalty for his failure to pay the debt before conviction. There can, in our opinion, be no sort of doubt that this enactment is violative of the constitutional provision, and therefore void."

There can be no imprisonment for debt in Alabama, even though it originated in fraud. In this respect its Constitution differs from many others.

Ex parte Hardy, 68 Ala. 303.

While the contract involved in the case at bar may not be void for uncertainty, if the statute enables the employer to enforce involuntary servitude by the employe, the statute is invalid and there can be no conviction under it.

"Involuntary servitude" includes all forms of compulsory service for the benefit or pleasure of others.

Slaughter House Cases, 16 Wall. 36.
Civil Rights Case, 109 U. S. 3.
Clyatt v. United States, 197 U. S. 207.
Robertson v. Baldwin, 165 U. S. 275.

By this statute the employe is made to perform compulsory or involuntary service from the moment he desires to quit the service and is deterred therefrom by the menaces of the statute. What are the menaces of

the statute? The first is the certainty of conviction because of the rule making the quitting *prima facie* evidence of crime. The second is the prospect of imprisonment before trial even if he have a "just cause." for quitting the service, because the "just cause" of the statute is a vague and indefinite thing and he must take the risk of a correct prediction as to whether what he thinks a just cause will be held to be so by the judge and jury. For fear of making a mistake as to his "just cause" for quitting, he remains in the service under duress. The statute does not define the "just cause" and no one can foretell what conclusion may be reached by different judges or juries from the same state of facts. Mr. Justice Sharp, in Toney v. The State, 141 Ala. 125, says "the existence of an excuse for the abandonment to be judged of by the court could never be known to be available, except at the risk of, and at the end of, a criminal prosecution."

> Central, &c., Ry. Co. v. R. R. Com. 161 Fed. 925.
> See Ex parte Young, 209, U. S, 123,

Every man has the legal right to quit a personal service contract if he is willing to pay the civil penalties. Criminal penalties may not be lawfully added to secure the service, for, as stated by Judge Cooley in his work on Torts, "It is the part of every man's civil rights that he be left at liberty to refuse business relations with any person whomsoever, whether the refusal rests upon reason, or is the result of whim, caprice, prejudice or malice."

In Ex parte Drayton, 153 Fed. 986, is an able opinion by Judge Brawley to which we ask careful consideration. The Alabama statute is quoted on page 993 of the opinion as it stood when the Riley case was decided, and before any of the amendments discussed herein were added to the statute.

State v. Murray, 116 La. 655 although upholding a similar statute, contains the significant statement of the Chief Justice that if it were "an attempt on the part of the employer because of his laborer's indebtedness to compel him to continue to perform his daily task the result would in all probability be different."

On cases of involuntary servitude, see, also,

In re Thompson, 117 Mo. 83;
In re Turner, 24 Fed. No. 14247; 1 Abb. 84;
In re Clark, 1 Blackf. (Ind.) 122.
Webb v. Webb, 140 Ala. 268.
Murray v. Murray, 84 Ala. 365.
United States v. Clement, 171 Fed. 974.

In South Carolina, war has been waged over these labor statutes. At first they were upheld, but both State and Federal courts have finally in masterful opinions, annulled them.

Ex parte Hollman and collated authorities and note, 21 L. R. A. (N. S.) 242.
Ex parte Clement, 171 Fed. 974.

Freeman v. United States, No. 14 U. S. S. Ct. Advance Sheets, p. 592, may be used as authority by defendant in error, but we think it hardly necessary to say more than that that case originated in the Philippine Islands, and that the original taking of the money in that case was felonious, while in this the defendant obtained the money by contract and without a taint of criminality.

CONCLUDING CONSIDERATIONS.

In addition to the statute under consideration, and in spite of the declared invalidity of the Act of 1901 referred to above in Toney v. The State, 141 Ala. 120, the present Code of Alabama contains the following statutes:—

"And person who knowingly interferes with, hires, employs, entices away, or induces to leave the service of another, or attempts to hire, employ, entice away, or induce to leave the service of another, any laborer or servant, renter, or share-cropper, who has contracted in writing to serve such other person for any given time, not to exceed one year, before the expiration of the time so contracted for, or who knowingly interferes with, hires, entices away, or induces any minor to leave the service of any person to whom such service is lawfully due, without the consent of the party employing, or to whom such service is due, given in writing, or in presence of some credible person must, on conviction, be fined not less than fifty nor more than five hundred dollars, at the discretion of the jury, *and in no case less than double the damages sustained by the party whom such laborer or servant was induced to leave; one-half to the party sustaining such damage,* and the other half to the county."

"When any laborer or servant, renter, or share-cropper, having contracted as provided in the preceding section, is afterwards found in the service or employment of another before the termination of such contract, that fact is prima facie evidence that such person is guilty of a violation of that section, if he fail and refuse to forthwith discharge such laborer or servant, after having been notified and informed of such former contract or employment."

"Any person who employs any immigrant, or otherwise entices him from his employer, in violation of the contract of such immigrant, must, on conviction, *be fined in a sum not less than the amount of wages for the unexpired term of the contract,* and may be imprisoned in the county jail, or sentenced to hard labor for the county, at the discretion of the jury, for not more than three months."

Code of Alabama, 6850, 6851, 6854.

The Court takes judicial knowledge of the official report of the United States census. That shows a population in Alabama in 1900 of 1,828, 697 of whom 827,307 were colored. 1,304,703 were over ten years old. Of these over 500,000 were engaged in agricultural service, out of a total of about 750,000 in all gainful occupations.

All of these statutes may well be viewed as a system meant to give to a dominant class undue and unequal powers over a great army of less fortunate citizens who eat their daily bread in the sweat of their face, and who by reason of their weak and defenseless condition should rather be the especial objects of the law's protection. Negro slavery has passed away, but if a system of peonage of white and black shall arise in its stead, the last estate shall be worse than the first, for the only limitation upon the masters will be their want of wealth and power, both of which will be augmented by the system they support.

In Clarke's case, 1 Blackford 122, 12 Amer. Dec. 213, we read:—

"Deplorable indeed, would be the state of society, if the obligee in every contract had a right to seize the person of the obligor, and force him to comply with his undertaking. In contracts for personal service the exer-

cise of such a right would be most alarming in its consequences. If a man contracting to labor for another *a day, a month, a year, or a series of years,* were liable to be taken by his adversary and compelled to perform the labor, it would either put a stop to all such contracts, or produce in their performance a state of domination in the one party,and abject humiliation in the other. We may, therefore, unhesitatingly conclude that when the law will not directly coerce a specific performance, it will not leave a party to exercise the law of the strong and coerce it in his own behalf. A state of servitude thus produced, either by direct or permissive coercion, would not be considered voluntary in fact or in law."

In the words of an apt quotation used by Judge Cooley:—"Not only he who *feels,* but he who is *exposed to,* tyranny, is without freedom."

To the commercial argument so often offered in favor of this class of statutes that they are necessary to enable the planter to make his crop, which is vital to the welfare of the South, Mr. Justice Jones of the South Carolina Supreme Court gives a complete answer in the few words, "Liberty is better than prosperity." Ex parte Hollman, 79 S. C. 9.

The age of these statutes is no reason, of course, for their continuance, if invalid. It will be remembered that Chief Justice Holt was the first to lay down a doctrine that required fifty years to fully establish in England in the case of Somersett by Lord Mansfield. Holt, C. J., had said: "Trover does not lie for a black more than for a white man. By the common law no man can have a property in another man, except in special cases, as a *villien,* or a captive taken in war, but in England there is no such thing as a slave, and a human being never was considered a chattel to be sold for a price, and, when wrongfully seized, to have a value put upon him in *damages by a jury* like an ox or an ass."

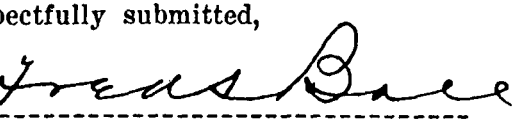
3 Keble, 685;
1 Lord Raym. 146;
2 Lord Raym. 1275;
Salk, 666.

When Somersett, the slave from Jamaica confined on board ship in the river Thames, made his claim for freedom by *habeas corpus* to Lord Mansfield, the Chief Justice said: "I care not for the supposed *dicta* of Judges, however eminent, if they be contrary to all principle (he was referring to the opinions of Lord Talbot and Lord Hardwick cited by counsel). At any rate villeinage has ceased in England and it cannot be revived. The air of England has long been too pure for a slave, and every man is free who breathes it. Every man who comes into England is entitled to the protection of have suffered, and whatever may be the color of his skin. *Quamvis ille niger, quamvis tu condidus esses.* English law, whatever oppression he may heretofore Let the negro be discharged."

See 20 St. Tr. 1-82.
The Lives of Chief Justices of Eng. III. 156, IV. p. 134.

If the statute here assailed be upheld, will not the practical effect be to legalize and establish a condition of involuntary servitude and virtual peonage—a condition that world-wide civilization and enlightenment has condemned as utterly destructive of the best elements of manhood in both servant and master?

Respectfully submitted,



For Plaintiff in Error.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1909

No. 300

ALONZO BAILEY, *Plaintiff in Error,*

—VS.—

THE STATE OF ALABAMA.

BRIEF OF EDWARD S. WATTS, FOR PLAINTIFF IN ERROR

DANIEL W. TROY,
Montgomery, Alabama
Of Counsel.

Supreme Court of the United States.

October Term, 1909.

No. 564.

ALONZO BAILEY, *Plaintiff in Error.*

vs.

THE STATE OF ALABAMA.

Brief for Plaintiff in Error.

STATEMENT OF THE CASE.

This is a writ of error at the instance of Alonzo Bailey to reverse a judgment of the Supreme Court of Alabama affirming a judgment of the City Court of Montgomery under which he was convicted of violating section 4730, Code of Alabama, 1896, as amended and now shown as Section 6845, Code of Alabama, 1907, and generally called the "Labor Contract Laws." Bailey was arrested on April 14, 1908. By a writ of *habeas corpus* he sought his liberty, first through the Judge of the City Court of Montgomery, then by appeal to the Supreme Court of Alabama, and later by writ of error in this court. (Record No. 538, filed Sept. 1, 1908.) In December, 1908, this Court, with Messrs. Justice Harlan and Day dissenting, declined to pass

upon the merits of the case. (211 U. S. 452.) Afterwards, being tried and convicted by the City Court of Montgomery under an indictment, the validity of which was unsuccessfully challenged by a motion to quash and by a demurrer, and at which trial the general affirmative charge was given in favor of the State and a like charge refused in his favor, he appealed to the Supreme Court of Alabama. His conviction being affirmed, Bailey then sued out this writ of error. (Record No. 564, filed Aug. 4, 1909).

The motion to quash, the demurrer, exceptions to charges and the charges requested raised the constitutionality of said Section 4730, as amended. Record p. 2, 4, 12, 13, 28 and 38).

The said section 4730 was amended by the General Acts of 1903, page 345, so as to read as follows: (Amendment shown in italics.)

> "Section 4730. Any person, who, with intent to injure or defraud his employer, enters into a contract in writing for the performance of any act or service; and thereby obtains money or other personal property from such employer, and with like intent, and without just cause, and without refunding such money, or paying for such property, refuses *or fails* to perform such act or service, must on conviction be punished as if he had stolen it. *And the refusal or failure of any person, who enters into such contract, to perform such act or service, or refund such money, or pay for such property, without just cause, shall be prima facie evidence of the intent to injure or defraud his employer.*"

The said amended statute was further amended by the General Acts of 1907, page 636, so as to read as follows:

"Section 4730. Any person, who, with intent to injure or defraud his employer, enters into a contract in writing for the performance of any act or service, and thereby obtains money or other personal propery from such employer, and with like intent, and without just cause, and without refunding such money, or paying for such property, refuses or fails to perform such act or service, must on conviction be punished *by a fine in double the damage suffered by the injured party, but not more than* $300, *one-half of said fine to go to the county and one-half to the party injured; and any person, who, with intent to injure or defraud his landlord, enters into any contract in writing for the rent of land, and thereby obtains money or other personal property from such landlord, and with like intent, without just cause, and without refunding such money, or paying for such property, refuses or fails to cultivate such land, or to comply with his contract relative thereto, must on conviction be punished by fine in double the damage suffered by the injured party, but not for more than* $300.00, *one half of said fine to go to the county and one-half to the injured party.* And the refusal or failure of any person, who enters into such contract, to perform such act or service or *to cultivate such land*, or to refund such money, or pay for such property without just cause shall be prima facie evidence of the intent to injure *his employer or landlord or to defraud him. That all laws and parts of laws in conflict with the provisions hereof be and the same are hereby repealed.*"

On the trial, H. C. Borden, the only witness, testified that on December 26, 1907, he was manager of the Riverside Company; that on such day defendant entered into a contract in writing with the Company agreeing

to perform personal services for the year 1908; that at the time of the execution of said contract defendant obtained from the Company the sum of $15 in money; that on or about January 1, 1908, defendant began to work under the contract and continued to do so for a month and three or four days; that the defendant then, without *"just cause"* and without refunding the money, ceased to work for said Riverside Company; that since that time he performed no services for said Company in accordance with or under said contract and refused and failed to perform any further service thereunder, and without *"just cause"* refused and failed to refund said $15.00; that said Alonzo Bailey is a negro; that no other person was present at the execution of the said contract except the witness and the defendant. The witness did not testify as to any bad faith on the part of the defendant. Record, p. 11).

SPECIFICATIONS OF ERROR.

1. The said Supreme Court of Alabama erred in affirming the judgment of the Court below.
2. The said Supreme Court of Alabama erred in not reversing the judgment of the Court below, and remanding said cause to the City Court of Montgomery for further proceedings.
3. The said Supreme Court of Alabama errer in not reversing the judgment of the Court below and directing the discharge of plaintiff-in-error.
4. The said Supreme Court of Alabama erred in affirming the action of the lower court in overruling the motions of plaintiff-in-error to quash the indictment against him.
5. The said Supreme Court of Alabama erred in affirming the action of the lower court in overruling the demurrers filed by the plaintiff-in-error to the indictment against him.

6. The said Supreme Court of Alabama erred in affirming the action of the lower court in overruling the demurrers of plaintiff-in-error to the indictment against him on ground No. 1. Record, page 5.)

7. The said Supreme Court of Alabama erred in affirming the action of the lower court in overruling the demurrers of plaintiff-in-error to the indictment against him on ground No. II. Record, page 5.)

8. Said Supreme Court of Alabama erred in affirming the action of the lower court giving to the jury that portion of said general charge which is numbered (1) and which was excepted to by the plaintiff-in-error. (Record, pages 12, 28, 38.)

9. Said Supreme Court of Alabama erred in affirming the action of the lower court giving to the jury that portion of said general charge which is numbered (2) and which was excepted to by the plaintiff-in-error. (Record, pages 13, 28, 38.)

10. Said Supreme Court of Alabama erred in affirming the action of the lower court giving to the jury that portion of said general charge which is numbered (3) and which was excepted to by the plaintiff-in-error. (Record, pages 13, 28, 39.)

11. The said Supreme Court of Alabama erred in affirming the action of the lower court in refusing to give to the jury the charge requested in writing by the plaintiff-in-error, called Charge No. 1. Record, pages 13, 29.)

12. The said Supreme Court of Alabama erred in affirming the action of the lower court in refusing to give to the jury the charge requested in writing by the plaintiff-in-error called Charge No. 2. (Record, pages 13, 29.)

13. The said Supreme Court of Alabama erred in affirming the action of the lower court in refusing to give to the jury the charge requested in writing by the plain-

tiff-in-error called Charge No. 3. (Record, pages 14, 29.)

14. The said Supreme Court of Alabama erred in affirming the action of the lower court in refusing to give to the jury the charge requested in writing by the plaintiff-in-error called Charge No. 4. (Record, pages 14. 30.)

15. The said Supreme Court of Alabama erred in affirming the action of the lower court in refusing to give to the jury the charge requested in writing by the plaintiff-in-error called Charge No. 5. (Record, pages 14, 30.)

16. The said Supreme Court of Alabama erred in affirming the action of the lower court in refusing to give to the jury the charge requested in writing by the plaintiff-in-error called Charge No. 6. (Record, pages 14 30.)

17. The said Supreme Court of Alabama erred in affirming the action of the lower court in refusing to give to the jury the charge requested in writing by the plaintiff-in-error called Charge No. 7. (Record, pages 14, 30.)

INTRODUCTION.

This case represents a question which involves the liberty and rights of thousands of citizens.

The act appears to have been adopted solely for the benefit of the employer and landlord. The employe and tenant are singled out with burdens imposed upon no other class of individuals. They cannot go to the court with equal right and equal protections. Even peonage did not go so far as to subject only the peon, but bore on the master also.

While this act in appearance is general in effect it applies only to that form of service rendered by the commonest laborer or the poorest tenant of farmlands. It contemplates contracts where the amount involved is $150.00 or less. It contemplates advancements of money or personal property to laborers and poor tenants. As a matter of common knowledge in Alabama, such laborers and such tenants are, as a class, negroes —Alabama ranks third in negro population. As a rule they rely solely for support upon the advances, and are dependent upon and practically at the mercy of the employer. The statute has been befriended on the theory that the laborer is without financial responsibility and cannot be reached by ordinary remedies of judgment and execution for breach of civil contract. The natural and reasonable effect of this statute is bad, being nothing more than to clothe the master or employer with a coercive weapon by which he may send to jail or the chain gang an employe who fails to perform the services required by the contract or to refund the advances. The law provides no means for determining the justice of the excuse for failure to perform or refund, until the employe first risks the penalty of hard labor by quitting the contract. The Legislature has not defined "just cause."

In many instances, the employe, in the beginning, has been convicted of a misdemeanor by a Justice of Peace. A labor employer anxious to get laborers whom he can compel to remain, is advised of the conviction. The laborer is glad to have someone pay his fine. He enters into a contract, in consideration of the payment of the fine, to work for a definite time and until the fine is refunded to his employer. If he quits work under the contract without refunding the advance a warrant is sworn out against him. He is captured, and if he refuses to return to work (provided the employer is willing) or refuses to refund the advances the failure to pay or to perform the services is proved and a conviction follows. The fine is collected by the State and the employer is paid the amount of the indebtedness. This not only includes the original advancement, but also any other advancement or any damage which may be suffered by the employer.

Sections 6848-7, Code 1907, provide that a defendant being convicted of a misdemeanor, who procures another to act as his surety on a confession of judgment for the fine and costs, and who, in consideration therefor, agrees to do any act or service for such person, and who, after being released on such confession fails or refuses without good and sufficient excuse, to perform such service, must on conviction be fined not less than the amount of the damages suffered by the surety, but not more than $500.00. The next several sections provide against interfering with hiring, employing or enticing away any apprentice, laborer, servant, renter or share-cropper, who has contracted in writing to serve another, without the consent of the employer, and a *prima facie rule* of evidence of guilt is created against any person who, after the execution of such contract, employs any such laborer, servant, renter or share-cropper, and fails or refuses to forthwith discharge

such employe after having been notified of such former employment. With such facilties for getting in debt is the laborer provided.

The labor contract is usually short and contains few stipulations. The employer often promises verbally a good house, good food and other conveniences and necessities. His failure to keep these verbal promises cannot be an excuse for the employe's refusing to perform the written contract, as its terms cannot be varied by parol.

Mr. Chas. W. Russell, Assistant Attorney General, in his Report on Peonage, said:

> "I have no doubt, from my investigations and experiences, that the chief support of peonage is the peculiar system of State laws prevailing in the South, intended evidently to compel service on the part of the workingman.
>
> "From the usual condition of the great mass of laboring men where these laws are in force to peonage is but a step at most. In fact, it is difficult to draw a distinction between the condition of a man who remains in service against his will, because the State has passed a certain law under which he can be arrested and returned to work, and the condition of a man on a near-by farm who is actually made to stay at work by arrest and actual threats of force under the same law."

As said by Justice Jones, in Peonage Cases, supra, of the forerunner of Section 4730—equally apt to the present statute:

> "The evils of the system not only degraded those who were subject to the system, but exercised a baleful influence upon all other classes which, in innumerable ways fought against the industrial

> prosperity and moral advancement of the people among whom 'the system' was enforced."
>
> 30 Cyc. p. 1384.

The purpose and effect of the first section of the Fourteenth Amendment to the Constitution of the United States, as stated in United States vs. Harris, 106 U. S. 629, was clearly defined in United States vs. Cruikshank, 1 Wood 316, as follows:

> "It is a guaranty of protection against the acts of the State Government iself. *It is a guaranty against the exertion of arbitrary and tyranical power on the part of the government and legislature of a state.*" It furnishes an "additional guaranty against any encroachment by the State upon the fundamental rights which belong to every citizen as a member of society."
>
> United States vs. Cruikshank, 92 U. S. 542.
> United States vs. Lee, 106 U. S. 196.

DUE PROCESS OF LAW.

The act as amended is unconstitutional and void in that it violates that part of the Fourteenth Amendment of the Constitution of the United States which provides that no state shall make or enforce any law which shall deprive any person of life, liberty or property "without due process of law."

In the case of Darmouth College vs. Woodward, 4 Wheaton U. S. 518-581, which has been relied upon, probably more than any other authority, to throw light upon and to explain the rights and protection derived from the grant of the Government, Webster, in his

argument, quoted from Lord Cope's Explanation of the 29th Chap. of Magna Charta:

> " 'No man shall be disseized, etc., unless it be by the lawful judgment, that is, verdict of equals, or by the law of the land, that is (to speak it once for all), *by the due course and process of law.*' "

He then said:

> "By the law of the land is most clearly intended the general law; *a law which hears before it condemns;* which proceeds upon inquiry, and renders judgment only after trial. The meaning is, that every citizen shall hold his life, liberty, property, and immunities, under the protection of the general rules which govern society. *Everything which may pass under the form of an enactment, is not, therefore, to be considered the law of the land.*"
>
> "Such a strange construction would render constitutional provisions of the highest importance completely inoperative and void. It would tend directly to establish the union of all powers in the legislature. There would be no general permanent law for courts to administer, or for man to live under. The administration of justice would be an empty form, an idle ceremony. Judges would sit to execute legislative judgments and decrees; not to declare the law, or to administer the justice of the country."

In Wright vs. Cradlebaugh, 3 L. Ed. 341, it was held that "due process of law" requires that a party shall be properly brought into court, and when there, shall have a right to set up any lawful defense.

In Hubey vs. Reiley, 53 Pa. (3 P. F. Smith) 112, it was held that "due process of law" includes an opportunity to answer.

Clark vs. Mitchell, 64 Mo. 564, said "due process of law" means a law which hears before it condemns.

Both as a matter of law and fact, every person is presumed to be innocent until his guilt is proved beyond a reasonable doubt and it is the high and solemn duty of the court to see that all elements of the crime are proved or that testimony is adduced which justifies the jury in finding these elements.

Clyatt vs. United States, 197 U. S. 207-222.

On account of a rule of evidence in Alabama which prevents a person from testifying as to his uncommunicated motives, purposes or intent, plaintiff-in-error was unable to show by his own testimony that he entered into the contract in good faith and that he rescinded the contract for reasons other than those constituting a crime.

In McCormick vs. Joseph, 77 Ala. 236-240 it is said:

> "It is well settled in this State, whatever the rule may be elsewhere, that witnesses are not permitted to testify to their motive, belief or intention, when secret or uncommunicated; such mental status when relevant, being a matter of inference to be determined from the circumstances of the case by the jury."

Holmes vs. State, 136 Ala. 80-84.
Bailey vs. State, 49 So. (Ala.) 886.
Johnson vs. State, 102 Ala. 1-16.
Brown vs. State, 79 Ala. 51-54.
Harrison vs. State, 78 Ala. 5-11.
Alexander vs. Alexander, 71 Ala. 295-8.

Burns vs. Campbell, 71 Ala. 271-291.
Burke vs. State, 71 Ala. 377-382.
Wheeless vs. Rhodes, 70 Ala. 419-421.

There was no witness to the execution of the contract by whom plaintiff-in-error could prove his good faith, nor was there any witness to the rescission of the said contract by whom he could prove that he terminated the contract for reasons other than those constituting a crime. Any declaration made by him as to his motives either in entering into the contract or in failing or refusing to perform said contract was inadmissible as evidence in his favor on the trial, for it has been established in Alabama that a defendant cannot thus make evidence for himself.

Harkness vs. State, 129 Ala. 71.

The legislature further denied "due process of law" when it amended said statute so as to authorize the court to convict of fraud on no other evidence than that, of the execution of a contract, the failure to return the consideration therefor, in case of its breach or the failure to perform the services provided for in the said contract.

In State vs. Norman, 14 S. E. (N. C.) 968, the Court said:

> "In order to convict, the State must show to the full satisfaction of the jury, something more than obtaining the advances, a promise to work or pay for the same, and a breach of that promise. Nothing else being shown, these facts would constitute only a breach of contract, and for this the defendant could not be prosecuted criminally."

This case was quoted with approval in State vs. Williams, 63 S. E. (N. C.) 949, a case declaring a labor contract law unconstitutional.

Under Section 4730, Code 1896, (and section 3812, Code 1886), before the amendment, a conviction was had with difficulty, as it was necessary to prove that accused entered into the contract with intention to injure or defraud the employer and refused to perform with like intent and without "just cause," and without evidence from which such inference might be drawn the jury was "not justified in indulging in mere unsupported conjectures, speculations or suspicions as to intentions which were not disclosed by any visible or tangible act, expression or circumstance." The court could "not permit the lack of evidence on a material point to be supplied from the imagination of the jury."

Ex parte Riley, 94 Ala. 82;
Dorsey vs. State, 111 Ala. 40;
McIntosh vs. State, 117 Ala. 128.

Does the execution of the contract in any way tend to prove a crime? Does the failure to return the consideration, in case of breach, tend to prove a crime? Does the failure to perform services under the contract tend to prove a crime? If not, do the three combined any more tend to prove a crime? They have no tendency to prove a crime and could support only a civil action.

The act makes conduct, after the contract has been partly performed, *prima facie* proof of an intent to defraud from the beginning. Is this conduct necessarily inconsistent with good faith? If not, the act is void.

The first amendment to said Section 4730 (ante p. 2.) was first passed upon by Judge William H. Thomas of the City Court. The portion of the statute declaring the rule of evidence was declared unconstitutional. The State appealed to the Supreme Court and at a rehearing, at which the State was represented by the County Solicitor and the Attorney General of the

State, and at which the defendant was not represented, the trial court was reversed.

The authorities upon which the decision was based decided a general proposition of law and should not have been construed to govern the case presented. It is evident that the Supreme Court did not investigate the exceptions.

The first authority presented, 8 Cyc. p. 820, states a rule of evidence which is probably universally upheld.

> "The legislature has the power to give greater effect to evidence than it possesses at common law, and in both civil and criminal proceedings, it may declare what shall be *prima facie* evidence. On the other hand, it cannot prescribe what shall be conclusive evidence, as this would be an invasion of the province of the judiciary."

In State vs. Beach, 147 Ind. 74, the second case cited in the Thomas Case, the act under which the indictment was had is as follows:

> "That if any banker * * * shall receive * * * any money when the bank is insolvent whereby the deposit shall be lost * * * said banker shall be guilty of embezzlement. Involuntary liquidation within thirty days shall be prima facie evidence of an intent to defraud."

In this case, the holding himself out as solvent and as being able to meet all obligations, when in fact he was insolvent and unable to pay his creditors, is wrong and tends to show a fraud. These facts which tend to show a criminal intent were made *prima facie* evidence of an intent to defraud. The defendant had an opportunity to overcome the evidence by the introduction of outside evidence.

In this case there was a conviction of the defendant and the Court in showing that the acceptance of the deposit by the defendant was in no manner construed as *prima facie* of the intent to defraud said:

> "A law which provides that certain facts are conclusive proof of guilt would be unconstitutional as *also would one which makes an act prima facie evidence of a crime which has no relation to a criminal act.*"

The third authority mentioned in the Thomas case was Meadowcraft vs. People, 163 Ill. 56.

This case construed a like statute to the one in the Indiana case. The court took the same view of the law as was taken in the Indiana case.

Fong vs. United States, 149 U. S. 729, the next case cited in the Thomas case, did not authorize the creation of a *prima facie* rule of evidence therein. The Court Said:

> "The reason for requiring Chinese aliens claiming the privilege of remaining in the United States to prove the fact of his residence here, at the time of the passage of the act, 'by at least one credible white witness,'" was on account of the "suspicious nature in many instances, of the testimony offered to establish the residence of the parties, arising from the loose notion entertained by the witnesses of the obligation of an oath."

The next authority in the Thomas case is Wigmore on Evidence, which states about the same general rule of evidence as is given above.

The next and last authority cited in the Thomas case is State vs. Boswick, 13 R. I. 211, which throws no material light on this question.

An investigation of the large number of decisions upholding the rule that "the legislature has the power to give greater effect to evidence than it possessed at common law" will show clearly the exception that "the legislature cannot hold an act *prima facie* evidence of a crime which has no evidence to show a criminal act." In other words, the legislature cannot by its arbitrary will draw from a perfectly innocent act, or one warranted by law and which any one might lawfully do, an unlawful, improper or criminal intent.

The legislature under the guise of enacting a *prima facie* rule of evidence, fixed a conclusive one, and by so doing plaintiff-in-error was denied the opportunity of establishing his case of defense. The act of the legislature creating the rule of evidence denies "due process of law" and is void."

Harvey vs. Elliott, 167 U. S. 409.
Ex parte Well, 107 U. S. 289.
Gaplin vs. Page, 85 U. S. 350.
Dartmouth College vs. Woodward, 4 Wheaton 518.

The said amended statute further denies "due process of law," in that, there is an attempted substitution of the judicial department of the State government for the legislative.

To raise a *prima facie* case (which most invariably esmtablishes the guilt and without which the plaintiff in error could not have been held) it must be shown that the defendant refused or failed to perform the contract "without just cause." What constitutes "just cause"? The legislature, contrary to its duty, has not defined it. No attorney can advise what constitutes it. No man can tell whether or not he is within the limits of the law, as different juries mighmt reach different conclusions under the same state of facts. Whether or not one

should be burdened with a *prima facie* case depends upon the view reached by the jury, which depends upon elements which no man, with certainty, can foresee. There is no criterion laid down by the statute by which one can regulate his actions so as to know that he is abiding by the law.

In United States v. Reese, 92 U. S. 214, cited with approval by Mr. Justice Brewer in James v. Bowman, 190 U. S. 127-140, the Court said:

> "A citizen should not unnecessarily be placed where, by an honest error in the construction of a penal statute, he may be subjected to a prosecution * * * *Every person should be able to know with certainty when he is committing a crime.* * * *
>
> "It would certainly be dangerous if the Legislature could set a net large enough to catch all possible offenders and leave it to the courts to step inside and say who would be rightfully detained and who would be set at large. This would, to some extent, substitute the Judicial for the Legislative Department of the Government."

In James v. Bowman, supra, the court said:

> "A criminal statute should define clearly the offense which it purports to punish."

In Chicago & N. W. Ry. Co. v. Dey, 35 Fed. Rep. 866; 876, it was contended that a statute was unconstitutional which was to punish criminally where an "unreasonable" charge was made. The court said:

> "If this were the construction to be placed upon this act as a whole, it would certainly be obnoxious to complainant's criticism, for no penal law can be sustained unless its mandates are so clearly expressed that any ordinary person can determine in

advance what he may and what he may not do under it."

In Tozer v. United States, 52 Fed. Rep. 917-919, the Court said:

> "In order to constitute a crime, the act must be one which the party is able to know in advance whether it is criminal or not. *The criminality of an act cannot depend upon whether a party may think it reasonable or unreasonable.*"

In L. & N. R. R. Co. v. Commonwealth, 35 S. W. Rep. 129, the Court, in construing a statute punishing criminally "for charging more than a just and reasonable rate." The Court said:

> "That this statute leaves uncertain what shall be deemed a "just and reasonable rate or toll or compensation' cannot be denied; and that different juries might reach different conclusions, on the same testimony, * * * must also be conceded. The criminality * * * depends on the jury's view of the reasonableness of the rate charged. * * * There is no standard whatever fixed * * * by which the carrier may regulate its conduct. And it seems clear to us to be utterly repugnant to our system of laws to punish a person for an act, the criminality of which depends, not on any standard erected by the law which may be known in advance, but on one erected by a jury; and especially so as that standard must be as variable and uncertain as the views of different juries may suggest, and as to which nothing can be known until after the commission of the crime. * * * 'One jury may convict for a charge made on a basis of 4 per cent., while another might acquit an accused who had demanded and received at a rate of 6 per cent.' "

EQUAL PROTECTION OF THE LAWS.

"Equal protection of the laws" prohibits class legislation where unreasonable and where imposing arbitrary, unjust or odious discrimination. For example, laws imposing attorneys' fees upon one party to a suit and not upon the other; Gulf, S. & S. F. R. Co. vs. Ellis, 165 U. S. 150; laws imposing unusual penalties upon one party to a contract but not upon the other; Ex parte Hullman, 60 S. E. (N. C.) 20, Peonage Cases, 123 Fed. 671; Ex parte Brayton, 153 Fed. 986; laws fixing the limit of punishment to be imposed upon one party; to a contract, but fixing no limit as to the other party; State vs. Williams, 32 S. C. 123, and laws excluding laundries from certain localities regardless of location or appliances used; in re Stockton Laundry Co. Cases, 26 Fed. 611; in re Sam. 31 Fed. 681.

If the said statute as amended, approved August 15, 1907, provides for punishment only in cases of fraud, it is repugnant to that part of the Fourteenth Amendment of the Constitution of the United States which provides, that no state shall deny to any person within its jurisdiction the "equal protection of the laws," in that, it applies only to a person who "enter into a contract in writing for the performance of service, and thereby obtains money or other personal property," and who "enters into a contract in writing for the rent of land and thereby obtains any money or other personal property." All others are indulged with the presumption of honesty and fair intentions and nothing else.

> "This is a criminal statute aimed solely at those who enter into contracts to perform personal service."
>
> Harris vs. State, 47 So. (Ala.) 341.

The said act is further repugnant to the said Amendment in that it does not bear equally upon the employe and employer and equally upon the tenant and landlord. The employer could, without "just cause" and without paying the employe the amount, if any, due him, discharge him, and the landlord without "just cause" could fail to comply with his part of the rental contract and would not be imposed with any unusual burdens, while if the employe or tenant fails to comply with his part of the contract, that fact is made *prima facie* evidence of an intent to injure or defraud his employer or landlord.

The said act is further repugnant to the said Amendment, in that it takes a partial , unjust and odious discrimination in favor of the employer and landlord, in that, the employe or tenant is empowered with no unusual recourse against the employer or landlord to aid him in the collection of what, if any, amount is due him under the contract; while the employe or tenant is subject to "imprisonment for debt" (a penalty imposed on no other debtor by the laws of Alabama) if he fails to pay what he owes.

> The said amended act provides, *"The fine is double the damages suffered by the injured party,* but not more than $300.00, one-half of said fine to go to the county and *one-half to the party injured."* (The employer or landlord.)

The Supreme Court of Alabama in Carr vs. State, 106 Ala. 35-37, construing an act which provides that, where any banker received a deposit, knowing of his insolvency, he was guilty of a misdemeanor, which was punishable by a *fine in double the amount of the deposit, one-half of which was to be paid to the depositor;* said:

"The statute, it is insisted for the appellant, is violative of Art. 1, Section 21 of the Constitution of the State, which provides: 'That no person shall be imprisoned for debt.' It is to be observed in the outset that this provision of the organic law is essentially different from the provisions on this subject in many other state constitutions, *in that it contains no exception of 'Cases of Fraud.'* * * * *the elimination of the exception as to frauds was a pregnant omission, which left the guaranty of immunity from imprisonment to the debtor to apply to all cases of debt, whether they involved fraud or not.* * * * *This one* (the act) *cannot be read without conviction that its purpose is to impose imprisonment for debt and to coerce the payment of a debt by the duress it authorizes.* Its requirement that the fine shall be paid only in money, that it shall be *double the amount deposited, and that one-half of it, that is, a sum equal to the amount deposited, shall go to the person who made the deposit,* tends, at least, to show that coercion of payment of the debt which the depositary owed the depositor * * * to enforce payment, by means of imprisonment at hard labor for the payment of the fine and costs, was the moving purpose and efficient cause of the enactment of the statute."

In Harris vs. State, supra, the Supreme Court held that the offense is condoned if the debt is paid or tendered at any time before the trial; that "an essential element of the offense created was that the employed person abandoned the service without first refunding such money." In this case the amount advanced was $3.00. The County Court of Montgomery, using the same reasoning, cases Nos. 1279 and 1290, State vs. Ben Ward and Hub Ward, violating a written contract

(both white men) held that a statement in open court by the employer, who first insisted upon a prosecution, that he then desired no prosecution would purge the offense. Our courts recognize the offense as being against the individual and not against the State; and the sole measure of graveness of the crime is the damage to the master.

It is of interest to note that there is today pending in the Circuit Court of the United States for the Middle District of Alabama a prosecution for peonage against the employer of the Wards, on account of the holding under the labor contracts.

As said in Ex Parte Holman, infra, "the mere receipt of the money or supplies advanced by the employer cannot make the employe anything more than a debtor * * * and, without doubt the repayment of the money on the value of the supplies advanced puts an end to * * * the obligation * * *."

In Peonage Cases, 123 Fed. 671, an act, General Acts Alabama, 1900-1, p. 125, the forerunner of Section 4730 as amended, was declared unconstitutional, which made it a penal offense, where any one who has contracted in writing to labor or serve another, or who has leased or rented lands for any specified time, should without the consent of the other party and without sufficient excuse, to be adjudged by the court, fail to carry out such contract, and take employment of a similar nature without giving notice of the prior contract. On page 688 the Court said:

> *"It is a vicious species of class legislation. Its criminal penalties are grafted only upon contracts between laborers and renters on farm lands, and their hirers or landlords. It is designed solely in the interest of the employer or landlord. The latter may discharge the laborer or renter, or fail to come up to promise to him, without sufficient excuse; yet*

this legislation gives the renter or laborers no unusual recourse against his employer or landlord, while, in effect, though not in name, it pronounces practical outlawry, in favor of the landlord, against laborers or renters, regarding their right to labor and pursue their accustomed vocations, by attaching special and extraordinary penalties to their breaches of contract with landlords and employers."
* * *

'It is manifestly contrary to the first principles of civil liberty and natural justice, and to the spirit of our institutions and laws, that one citizen shall enjoy privileges and advantages which are denied to all others under like circumstances; or that one shall be subject to losses, damages, suits or actions from which others under like circumstances are exempted.' Holden vs. James, 11 Mass. 396, 6 Am Dec. 174."

In Ex parte Brayton, et al., 153 Fed. 986, the Court in construing a North Carolina statute very much in the nature of the Alabama statute construed in 123 Fed. 671, took the same view as was taken in the Peonage Cases.

In William Adair vs. United States, 208 U. S. 161, a statute forbidding the discharge of an employe because of membership in a labor organization, was held unconstitutional. Mr. Justice Harlan, who delivered the opinion, said:

"The general right to make a contract in relation to his business is part of the liberty of the individual, protected by the Fourteenth Amendment of the Federal Constitution. Allgeyer vs. Louisiana, 165 U. S. 578, 41 L. Ed. 832, 17 Sup. Ct. Rep. 427. * * * *"In all such particulars the employer and the employee have equality of right, and any*

legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can legally justify in a free land."

In Gulf, C. & S. F. R. Co. vs. Ellis, 165 U. S. 150, cited with approval in Collins vs. Godard, 183 U.S. 79, and in Connoly vs. Union Sewer Pipe Co., 184 U. S. 540-560, by Mr. Justice Harlan, and in Magoun vs. Illinois Trust Company, 170 U. S. 283-294, by Mr. Justice McKenna, Mr. Justice Brewer in delivering an opinion in reference to "equal protection of the laws" and against the constitutionality of the Texas statute imposing an attorney's fee upon a railroad corporation, in addition to costs, which omitted to pay certain claims within a specifed time, on page 153, said:

"The act singles out a certain class of debtors and punishes them when for like delinquencies it punishes no others. They are not treated as other debtors, or equal with other debtors. They cannot appeal to the courts as other litigants under like conditions and with like protection. If litigation terminates adversely to them, they are mulcted in the attorney's fee of the successful plaintiff; if it terminates in their favor they recover no attorney's fees. It is no sufficient answer to say that they are punished only when adjudged to be in the wrong. *They do not enter the courts upon equal terms. They must pay attorney's fees if wrong; they do not recover any if right; while their adversaries recover if right and pay nothing if wrong. In the suits, therefore, to which they are parties, they are discriminated against, and are not treated as others. They do not stand equal before the law. They do not receive its equal protection."*

Then further, on page 159, said:

> "No language is more worthy of frequent and thoughtful consideration than those words of Mr. Justice Mathews, speaking for this court, in Vick Wo vs. Hopkins, 118 U. S. 356-369 (30; 220; 226): 'When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power.' * * * *No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government.*"

On page 153, Mr. Justice Brewer also said that even "slight approaches or slight deviations from legal modes of procedure" should be checked. "This can only be obviated by adhering to the rule that constitutional provisions for the security of personal property, should be liberally construed."

See, also:

> Chair Co. vs. Runnels, 77 Mich. 105;
> Wilson vs. Railroad Co., 70 Mich. 384.

En parte Hollman, 60 S. E. (S. C.) Report, 20, is a case in which the constitutionality of a South Carolina statute was questioned. The said act provided that any laborer working for a consideration, and who received advances and thereafter willfully and without just cause, failed to perform the services, should be liable to prosecution for a misdemeanor, provided that the con-

tract was witnessed by at least two credidible witnesses. The court held the act to be unconstitutional. The court, in its opinion, said:

> "The farmer makes large expenditures * * * on the faith of the labor contract; and if those whom he engaged act in bad faith, in leading him to depend upon their labor, and make advances to them, with no intention of rendering the service expected, much loss is incurred. So, also, if the dishonest landlord secures the labor of those he employs, with a fraudulent intent no to pay for their work. * * * Hence it seems not unreasonable for the General Assembly to guard against fraud and enforce honesty in such contracts by special sanction. But *even if this statute provides punishment only for fraud in such cases, it violates the Fourteenth Amendment of the Constitution of the United States* and * * * of South Carolina, *in that it does not bear equally on the landlord and laborer.* The parties to a contract are entitled to equal sanction of the law for the protection and enforcement of their rights under it. * * * Equal protection embraces the right of equal exemptions."

The Court, on this point, cited:

> Connoly vs. Pipe Co., 184 U. S. 540, 22 Sup. Ct. 431, 46 L. Ed. 679;
> Barbier vs. Connolly, 113 U. S. 27, 5 Sup. 357, 28 L. E. 923;
> Peonage Cases, 123 Federal, 686.

It is, of course, proper that Bailey should have performed his part of the contract, or should have placed the other party in statu quo. But it is more im-

proper and unjust to have him burdened as the said amended act provides.

Cotting vs. Godard, 183 U. S. 79;
Gulf, C. & S. F. R. Co. vs. Ellis, 165 U. S. 150-159;
Jim Leeper vs. State of Texas, 139 U. S. 462;
Bell's Gap R. Co. vs. Penn., 134 U. S. 232-237;
Vick Wo. vs. Hopkins, 118 U. S. 356-369;
Barbier vs. Connoly, 113 U. S. 27-31.

ERROR OF THE SUPREME COURT OF ALABAMA.

It is insisted that the learned Court erred and denied plaintiff-in-error "due process of law:"

I. In holding that it is "within legislative competency to prescribe, as a rule of evidence, that the refusal or failure of a person, who enters into a contract, such as is contemplated by the statute, to perform the act or service stipulated for, or to pay for the property obtained under such contract, shall be taken as *prima facie* evidence of the intent to defraud." Supra, p. 12 et seq.

II. In not holding that the *prima facie* rule of evidence created by the amendments to said statute denied "due process of law."

Without witnesses and without the right to testify as to uncommunicated purpose or intention, can circumstances be imagined which could be proved, and which would negative the presumption created by the *prima facie* rule. Supra, p. 12 et seq.

III. In holding that the acts made *prima facie* evidence of intent have a relation to a crime.

The learned Court adhered to the erroneous conclusion reached in the Thomas case and discussed, supra, page 14 et seq.

IV. In holding that the failure of the legislature to define "just cause" did not avoid the statute. It is admitted that what is "just cause" is left to the Court and Jury. Supra, p. 17 et seq.

The important point seems to have been overlooked that the employe who enters a contract with the most innocent intention may, by his breach, be immediately burdened with a presumption of fraud from its execution.

The learned Court erred in holding that said section 4730 amended did not deny the "equal protection of the laws:"

I. In holding that although "this is a criminal statute aimed solely at those who enter into contracts to perform personal service" (Harris Case, Supra) it is valid.

II. In holding that although the criminal features of the statute do not apply to the employer, the statute is good.

III. In holding that said section, as amended, did not violate the 20th section of the Bill of Rights which provides that on person shall be imprisoned for debt. It will be noted that this section contains no exceptions of debt contracted by fraud. (Carr case, supra) While there is no provision against imprisonment for debt in the Constitution of the United States, yet, it is submitted that the failure to extend to plaintiff-in-error the protection created by said section denied "equal protection of the laws." In Green vs. State, 73 Ala. 26-37, the same Court said, of violations of the Fourteenth Amendment, "such violation is complete, whenever an injurious discrimination is expressed in a statute, or is shown in an official act of the executive of the State, or before the judicial department of last resort, when the question comes before the one or the other for official and final action."

The Court erred in not holding that the amended statute enforced involuntary servitude not in punishment of a crime, and violated the peonage statutes. If the statute is bad there is nothing to authorize the holding of the plaintiff-in-error, and the holding is involuntary. Infra, p. 31, et seq.

INVOLUNTARY SERVITUDE.

It is further submitted to the Court that the identical result is obtained under said amended statute which was obtained under the "System of Peonage."

In New Mexico, at the time of the passage of the Peonage Statute (Section 1990 and 5526 Revised Statutes) there existed a system of labor inherited from Spain which was commonly known as "Peonage." The system, however, was not known as "Peonage" by the laws of New Mexico but as a relation of master and servant. Peonage was not slavery as formerly existed in this Country. The peon was a free man possessing both civil and political rights. The essentials of the Peonage contract were consent of parties, the thing or service contracted for, the duration of the contract and the consideration therefor. After entering into the contract, the peon became bound to the master "for an indebtedness founded upon an advancement in consideration of service." The Peonage Contract could be rescinded only by mutual consent, by payment of the indebtedness or on account of some grave injustice. If the peon refused to fulfill his part of the contract "the court would compel him to pay the principal and interest to the other, and might order the sheriff to contract the service of the peon to the highest bidder. The same proceedings could be had against the master if he failed to pay what he was ordered."

Peonage sanctioned involuntary servitude as an obligation growing out of a contract; if sanctioned the exercise of a dominion over the person and liberty of the peon by the master to coerce a liquidation of the obligation under the contract. Even if the entering into the peonage system was voluntary, it became involuntary the moment the peon desired to withdraw and was coerced to perform the services against his will.

Peonage Cases, 23 Fed. 673;
Jaremillo vs. Romeo, 1 N. M. 190.
Cyc. Vol. 30, p. 1382, et seq.

The essentials of the Labor Contract under the Alabama Statute are, mutual consent of parties, the services contracted for or the land rented, the duration of the contract and the consideration therefor. After entering into the contract, the employe becomes bound to the employer "for an indebtedness founded upon an advancement in consideration of service." The contract can be rescinded only by mutual consent, by payment of the indebtedness or on account of some injustice on the part of the employer or on account of inability to perform. If the employe fails or refuses to fulfill his part of the contract he is taxed with and forced to overcome a presumption of fraud and in case of his conviction, which invariably happens, the sheriff collects for the employer, from the fine of the employe, the principal and interest due under the contract. The same proceedings cannot be had against the employer if he fails to comply with the terms of his contract.

The Labor Contract sanctions a presumption of intent to defraud as an obligation growing out of the contract and enforces involuntary servitude by virtue of the presumption. The provisions of the amended statute constitutes a coercive weapon which enables the employer or landlord to send to hard labor or jail the employe or tenant who refuses or fails to discharge the obligations under the contract. Legally whatever may be the status, otherwise, the entering into the contract is involuntary since the Peonage statute forbids consent.

Such petty differences should not be tolerated. The statute should be read so as to reach its general and ordinary effect. This statue we submit is one of the class

referred to in 30 Cyc. 1387, as used in various ways to uphold peonage and other kinds of involuntary servitude. Some are vagrancy laws, some contract or employment laws, some fraudulent pretense or false promise laws and there are divers others.

> "'Peonage,' within the meaning of the statute, may be defined as 'the holding of any person to serve for labor for the purpose of paying or liquidating an indebtedness due from the laborer or employe to the employer, when such employe desires to leave or quit the employment before the debt is paid off.' * * * *It forbids* slavery and *involuntary servitude,* however attempted, *whether created by contract,* by criminal individual force, or by municipal ordinance or *state law, and in whatever form, or however named. It is immaterial whether the contract whereby the laborer is to work out an indebtedness due from him to the employer is entered into voluntarily or not.*"
>
> Cyc. Vol. 30, p. 1385.

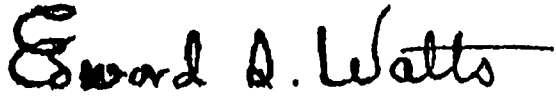
The said amended statute, in violation of the Thirteenth Amendment, enforces involuntary servitude not in punishment to a crime, and is also repugnant to the Peonage Statutes in that said amended statute violates the Fourteenth Amendment and is, therefore, unconstitutional and void and in no manner authorizes the holding of the plaintiff in error.

> Clyatt vs. U. S. 197, U. S. 207;
> Ex parte Hollman, 60 S. E. (S. C.) 20;
> Ex parte Brayton, et al., 153 Fed. 986;
> In re Lewis, 114 Fed. 963.
> Cyc. Vol. 30, p. 1382.

CONCLUSION.

It is respectfully insisted that the amendments to Section 4730 are repugnant to that part of the Fourteenth Amendment to the Constitution of the United States which guarantees "due process of law" and "equal protection of the laws" and it is equally repugnant to the Thirteenth Amendment and to the Peon age Statutes, and that the section as it appeared, prior to the amendment, in the Code of 1896 is likewise bad. The trial court should be reversed and plaintiff-in-error discharged.

Respectfully submitted,



Attorney for Plaintiff-in-Error.

DANIEL W. TROY,
Of Counsel.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1910

No. 300

ALONZO BAILEY, *Plaintiff in Error,*

—VS.—

THE STATE OF ALABAMA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ALABAMA

BRIEF OF ALEXANDER M. GARBER, ATTORNEY GENERAL AND THOMAS W. MARTIN, ASSISTANT ATTORNEY GENERAL, FOR THE DEFENDANT IN ERROR

ALEXANDER M. GARBER,
Attorney General of Alabama.
THOMAS W. MARTIN,
Assistant Attorney General of Alabama.

SYNOPSIS.

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BRIEF OF ALEXANDER M. GARBER, ATTORNEY GENERAL, AND THOMAS W. MARTIN, ASSISTANT ATTORNEY GENERAL, FOR THE DEFENDANT IN ERROR.

Plaintiff in error was indicted by the Grand Jury of the City Court of Montgomery on the charge of obtaining fifteen dollars from The Riverside Company with the intent to injure or defraud this company by entering into a written contract to perform labor or services for the com-

pany; and afterwards, with such intent and without just cause failing or refusing to perform the labor or services or to refund the money. He was convicted on the charge and on appeal the judgment of conviction was affirmed by the Supreme Court of Alabama, (161 Ala. 79), and this judgment is now brought to this court on writ of error.

On the trial in the City Court the plaintiff in error demurred to the indictment on the grounds, in substance, that it violated the Thirteenth and Fourteeth Amendments of the Constitution of the United States, and sections 1990 and 5526 of the Revised Statutes of the United States. All questions were decided against plaintiff in error in an elaborate opinion by Mr. Justice Denson of the Supreme Court of Alabama.

THE STATUTORY OFFENSE.

Prior to 1885 Section 4370 of the Code of 1876 was in the following language:

> "Any person, who, by any false pretense, or token, and with the intent to injure or defraud, obtains from another any money or other personal property, must, on conviction, be punished as if he had stolen it."

The law under which this prosecution was begun had its origin in the act of the General Assembly of Alabama, approved Feb. 17, 1885 (Acts 1884-5, p. 142), being an act to amend said section 4370, so as to read as follows, the new matter being in italics:

> "Any person who by any false pretense or token and with the intent to injure or defraud, obtains from another any money or personal property or *any person who has entered into a written contract with, at the time, the intent to defraud, to do or to perform any act or service and in consideration thereof ob-*

tains from the hirer money or other personal property, and who abandons the service of such hirer without just cause, without first repaying such money or other advances, and with the intent to injure or defraud must, on conviction, be punished as if he had stolen it."

The statute as thus amended was carried into the Code of 1886 as two sections, numbered 3811 and 3812, the former being identical with original Section 4370 of the Code of 1876. The new matter added by the Act of February 17, 1885 constituted Section 3812, and was slightly changed in verbiage to read as follows: "Any person, who, with intent to injure or defraud his employer, enters into a contract in writing for the performance of any act or service, and thereby obtains money or other personal property from such employer, and with like intent, and without just cause, and without refunding such money, or paying for such property, refuses to perform such act or service, must, on conviction, be punished as if he had stolen it." The Section next appeared in the Code of 1896 as Section 4730, without change.

The Act of the Legislature approved October 1, 1903, (General Acts 1903, p. 345) amended said section 4730, of the Code of 1896, so as to read as follows, the new matter being in italics:

"Any person who with intent to injure or defraud his employer, enters into a contract in writing for the performance of any act or service, and thereby obtains money or other personal property from such employer, and with like intent, and without just cause, and without refunding such money, or paying for such property, refuses or fails to perform such act or servce, must, on conviction, be punished as if he had stolen it. *And the refusal or failure of any person, who enters into such contract, to perform such act, or services, or refund such money, or pay for such property, without just cause, shall be prima facie evidence of the intent to injure or defraud his employer.*"

The Act of August 15, 1907 (General Acts 1907, p. 636), further amended said section 4730 so that as amended the same reads as follows, the new matter being in italics:

> "Any person who with intent to injure or defraud his employer, enters into a contract in writing for the performance of any act or service and thereby obtains money or other personal property from such employer, and with like intent, and without just cause, and without refunding such money, or paying for such property, refuses or fails to perform such act or service, must, on conviction, be punished *by fine in double the damage suffered by the injured party, but not more than* $300.00, *one-half of said fine to go to the county and one-half to the party injured; and any person, who with intent to injure or defraud his landlord, enters into any contract in writing for the rent of lands, and thereby obtains any money or other personal property from such landlord, and with like intent, and without just cause, and without refunding such money, or paying for such property, refuses or fails to cultivate such land, or to comply with his contract relative thereto, must, on conviction, be punished by fine in double the damage suffered by the injured party, but not more than* $300.00, *one-half of said fine to go to the county and one-half to the party injured.* And the refusal or failure of any person who enters into such contract, to perform such act or service *or to cultivate such land,* or refund such money, or pay for such property, without just cause shall be prima facie evidence of the intent to injure *his employer or landlord or to defraud him. That all laws and parts of laws in conflict with the provisions hereof be and the same are hereby repealed.*"

This statute now appears as section 6845 of the Code of 1907, but the Code was adopted before the act was passed, and is printed in the Code merely for convenience.

Thus it will be seen that the statute now under attack first appeared in the Act of February 17, 1885, as an amendment to the then existing statute punishing the ob-

taining of money or personal property by a false pretense or token, with the intent to injure or defraud. Shortly prior to the time the original Act became the law one Colly was indicted for obtaining goods by falsely pretending that he would labor on the farm of Bush, but the Supreme Court of Alabama held that the offense was not within the statute, which decision doubtless led to the Amendment of February 17, 1885. (Colly v. State, 55 Ala. 85.)

It is important in the outset to bear in mind the history of this Legislation because it is essential to a comprehension of the matters here arising for decision. This history sheds light upon the additional purpose and meaning of the Legislature, which purpose, as we shall show, was original and at all times continued to be the desire of the Legislature to punish the obtaining of property by such false pretenses.

The plaintiff in error now insists, in substance, that the statute under which he was indicted deprives him of his liberty without due process of law, and that it denies to him the equal protection of the laws and is, therefore, opposed to the Fourteenth Amendment of the Constitution of the United States; that it imposes involuntary servitude upon him in violation of the Thirteenth Amendment, and that it violates the Federal Statute against peonage.

This case being brought to this Court by writ of error to the Supreme Court of Alabama, the jurisdiction of this Court "is limited to the question whether the plaintiff in error has been denied a right in violation of the Constitution, laws, or treaties of the United States. The question whether his imprisonment is illegal, under the Constitution and laws of the State is not open to us."

Yick Wo v. Hopkins, 118 U. S. 360; 30 L. 220;
Barbier v. Connolly, 113 U. S. 27; 28 L. 923.

VALIDITY OF ORIGINAL STATUTE.

The statute as originally passed, did not contain what is termed in the case the *prima facie rule of evidence;* and when this case was first heard on habeas corpus no attack was made upon the validity of this statute; indeed was admitted to be valid (Bailey v. State 158 Ala. 18; 211 U. S. 453); and it is not certain whether the entire statute or merely the rule of evidence is now attacked by the plaintiff in error; but assuming the whole statute to be in question, we consider it from that standpoint.

The power of the State Legislature to define and punish crime is thus stated in 12 Cyc. 136: "The Legislatures of the different States have the inherent power to prohibit and punish any act as a crime provided they do not violate the restrictions of the State and Federal Constitutions; and the courts cannot look further into the propriety of a penal statute than to ascertain whether the Legislature had the power to enact it."

As pointed out above, this statute was designed to punish a certain class of frauds which were then not punished by any statute.

The original and amended statute has been frequently construed by the Supreme Court of Alabama and the court has consistently held that the purpose of the statute was to punish fraudulent practices and not the mere failure to pay a debt.

The offense is but a species of the common law crime of cheating by false pretenses, and if in fact the statute does define and punish a crime, there can be no question here of its validity.

In Riley v. State, 94 Ala. 82, where the statute was first construed at length, the court held that, "The effect of this statute is to provide for the punishment criminally of a certain class of frauds which are perpetrated by means of promises not meant to be kept. These frauds closely

resemble those perpetrated by means of false pretenses or tokens, but are not punishable under the statute on that subject, as a false pretense is a false representation relating to some existing or past fact, and does not include of something to be done in the future. * * **This statute by no means provides that a person who has entered into a written contract for the performance of services, under which he has obtained money or other personal property, is punishable as if he had stolen such money or other personal property, upon his refusal to perform the contract, without refunding the money or paying for the property.* A mere breach of a contract is not by the statute made a crime. The criminal feature of the transaction is wanting *unless the accused entered into the contract with intent to injure or defraud his employer, and unless his refusal to perform was with like intent and without just cause.*"

And in Bailey v. State, 158 Ala. 18, after reviewing the principal cases Judge Denson said: "While it is clear that a mere breach of contract cannot be made the foundation for a criminal offense, and that undue restrictions cannot be placed on the right of an individual to enter into contracts, yet when the individual enters into a contract, *with the intention to perpetrate a fraud,* it is equally obvious that he passes over the constitutional boundary line in respect to the free right to contract; and it is within legislative competency to enact a law penalizing the entering into a contract with such intent, and obtaining money or other personal property through such agency. This is all that is effectuated by the legislation in question."

On the other hand in *Torrey* v. State, 141 Ala. 120, the court considered the statute adopted in 1901, which attempted to declare it a penal offense for one under written contract to labor or serve another or cultivate lands for a given time, who before the expiration of that time abandoned the contract without the consent of the other, and with

out sufficient excuse, and makes a second contract with another person, without giving the latter notice of the existence of the first contract. But the court very properly held, that "Because of the restrictions it purports to place on the right to make contracts for employment, and concerning the use and cultivation of land, this act is wholly invalid."

In the elaborate opinion of Judge Jones in the Peonage Cases he referred to the original statute, and said:

> "It applies to all classes of persons who commit the designated offense, and does not single out any particular class. This statute is constitutional. *Persons duly convicted of violating its provisions and put to labor in consequence, are lawfully undergoing involuntary servitude.*"
>
> 123 Fed. 671, 690.

In ex parte Drayton, 153 Fed. 986, Judge Brawley considered a statute of South Carolina which provided for the punishment of any person who entered into a contract to farm and cultivate lands, and who without just cause or excuse deserted or quit the land; and rightly held that this statute violated the Federal Constitution. In the course of the opinion Judge Brawley referred to the statute declared unconstitutional in Toney v. State, 141 Ala. 120, which was much the same as the statute which he considered; and with respect to the *statute we are now considering* the learned Judge quoted the excerpt from Judge Jones's opinion in the Peonage Cases which we have set out above and then said:

"This Alabama statute, as will be seen, is of a general nature. It applies to all persons who enter into contracts with intent to injure or defraud, and declares that persons who obtain money with such intent shall be punished as if they had stolen it. The essence of this statute is the

obtaining money with fraudulent intent, which in many of the States is declared a criminal offense. The essence of the South Carolina statute is the coercing of personal services in liquidation of a debt." In the later case of United States v. Clement, 171 Fed. 974, no State statute was involved, the case being merely one of violation of the Federal peonage statute. This opinion was also written by Judge Brawley, and is relied upon by opposing counsel but is no authority against the statute under consideration.

In Lamar v. State, 120 Ga. 312, the court said with respect to the statute of that State: "If the Act prescribes a punishment for a simple violation of a contractual obligation, it is beyond the power of the General Assembly. But if its purpose is to punish for fraudulent and deceitful practices, it is valid, even though the fraud or deceit may arise from a failure to comply with a contractual engagement. Fraudulent practices which resulted in one obtaining the money or property of another were in a number of instances denounced as crimes by the common law; and by statute both in England and in this country a number of such practices have been declared to be crimes, although the particular practice was not embraced within the definition of any common law offense. The right of the law making power to declare fraudulent practices a crime does not seem to have ever been seriously questioned."

In State v. Williams, (N. C.) 63 S. E. 949, the court held a statute to be void which punished the mere wilful abandonment of the crop by the tenant; this upon the ground that *"the offense here charged has no element of fraud* and as the statute imposes imprisonment it cannot be sustained."

In ex parte Hollman, 79 S. C. 9; 21 L. R. A. (N. S.) 242, a statute of South Carolina similar to the Alabama statute considered in the Toney case was held to be void.

Throughout the opinion the court recognizes the validity of those statutes which contain the element of fraud—as in the case of the statute we are considering.

On the whole, we say without fear of contradiction, that no case can be found from any jurisdiction in which a statute similar to the one under consideration has been held to be invalid.

THE THIRTEENTH AMENDMENT AND PEONAGE STATUTE.

Counsel insist that the statute violates the Thirteenth Amendment and the Peonage Statute. The basis of this argument is, *not that the rule of evidence* subjects the convicted defendant to a condition of peonage, but that *the original statute* has that effect. Unless, therefore, the court holds the original statute to be invalid, there can be no condition of peonage incident to a conviction thereunder. The rule of evidence does not, of itself, or as an amendment to the original statute, make a condition of peonage.

The statute we are now considering is wholly different from the law held to be obnoxious to the State Constitution, in Toney v. State, 141 Ala. 120; and in the Peonage Cases, 123 Fed. 671. As said by Judge Denson in Bailey v. State, 158 Ala. 18, the *"intent to injure or defraud* marks the line of cleavage between the statute in judgment and the one" held bad in Toney's case, supra.

Again in State v. Vann, 150 Ala. 66, the Court pointed out that "Under the former construction of the statute by this Court, while the essence of the crime is a fraudulent intent, the statute is intended to prevent fraud and not to imprison for debt."

And in Bailey v. State, 158 Ala. 18, the Court, after reviewing the cases, held that:

"It is within legislative competency to enact a law penalizing entering into a contract, with such intent, (to perpetrate a fraud) and obtaining money or other personal property through such agency.

"This is all that is effectuated by the legislation in question. On its face the purpose is to punish fraudulent practices, not the mere failure to pay a debt. Thus considered, it is constitutional."

It is further contended that the statute was not meant either to prevent employees from making fraudulent contracts or to prevent them from obtaining money by promising service. The various excerpts from the decisions of the Alabama Supreme Court which are made use of by counsel, conclusively show that the statute had this purpose. In McIntosh v. State, 117 Ala. 127, Judge Brickell pointed out that "The rendition of service by the defendant for a period more than sufficient to have repaid the money takes away an essential ingredient of the offense." The Legislature saw fit to require several facts to exist before the offense was completed and among which was the non-payment of the money so fraudulently obtained It might or not in its own discretion have been just as competent for the Legislature to provide that the employee should be guilty if he entered into the contract with a fraudulent purpose of obtaining the money—and did obtain the same, without giving him the benefit of a subsequent re-payment. *The offense is merely condoned in the event of such payment.* All of the present argument of counsel goes to the validity *vel non* of the original statute. In fact the greater portion of the argument for plaintiff in error necessarily comes to that question. The Alabama Court has pointed out time and time again that the *essential* ingredient of the offense is fraud in entering into the contract of employment. If ulterior motives and purposes on the part of the Legislature had ex-

isted in fact, it is strange that up to the present period such motives have failed of discovery by the Alabama Court. And yet several of the greatest jurists that the Alabama Supreme Court can claim have passed upon and upheld the original statute. If the present statute is condemned, this Court should go further and destroy every statute which is aimed at the obtaining of goods of another by false pretenses. The victim in all such cases has a civil right of action against the party who thus obtains his money. But the fact of the existence of such civil right has never until this day been considered as depriving the State of its inherent right to punish the criminal act involved in that transaction. The fraudulent *violation* of the contract of employment was not and could not be made punishable criminally.

The Alabama Supreme Court has held that the basal fact is fraud and that the statute does not violate the provision of the State Constitution against imprisonment for debt. This construction of the State Constitution is conclusive on this court; (Yick v. Hopkins, 118 U. S. 360; Noble v. Mitchell, 164 U. S. 367) and the only question left for determination is whether the statute *as thus construed* violates the Thirteenth Amendment or the Peonage Statute. (Mo. Co. v. McCann, 174 U. S. 575; Am. Steel & Wire Co. v. Speed, 192 U. S. 523). This Court cannot hold the law to be violative either of that amendment or of the Peonage Statute except on the theory that it imprisons for a debt.

In Clyatt v. United States, 197 U. S. 207, Mr. Justice Brewer said, with respect to peonage:

> "The basal fact is indebtedness. As said by Judge Benedict, delivering the opinion in Jaremillo v. Romero, 1 N. M. 190, 194: 'One fact existed universally: all were indebted to their masters. This was

> the cord by which they seemed bound to their masters' service.' Upon this is based a condition of compulsory service. * * * *That which is contemplated by the statute is compulsory service to secure the payment of a debt.*"

In the case of Freeman v. United States, 217 U. S. 539, this court considered certain articles of the Phillipine Code, and held that the same did not imprison for debt. Freeman was found guilty of embezzlement, and sentenced to imprisonment for one year and nine months, and to restore to the parties injured the amount misappropriated, or in lieu thereof, to suffer subsidiary imprisonment for the period of seven months, and to pay the costs of prosecution. Thus it will be seen that not only was a punishment imposed for the crime committed, but in addition, a subsidiary imprisonment, from which he would be released if he paid the amount embezzled. It was contended that this punishment was in accordance with certain articles of the Philippine Code, and this court held that the same did not violate the provision of the act of Congress of July 1, 1902, that no person should be imprisoned for debt.

> "Statutes relieving from imprisonment for debt," said Mr. Justice Day, "were not intended to take away the right to enforce criminal statutes, and punish wrongful embezzlements or conversions of money. It was not a purpose of this class of legislation to interfere with the enforcement of such penal statutes, although it provides for the payment of money as the penalty of the commission of an offense. Such laws are rather intended to prevent the commitment of debtors to prison for liabilities under their contracts. * * *
>
> "This general principle does not seem to be controverted by the learned counsel for the plaintiff in

> error, and the argument is that inasmuch as the money adjudged is to go to the creditor, and not into the public treasury, imprisonment for the non-payment of such sum is an imprisonment for debt. But we think that an examination of the statutes of the Philippines, and the judgment of the Supreme Court, shows that the imposition of the money penalty was by way of punishment for the offense committed, and not a requirement to satisfy a debt contractual in its nature, or be imprisoned in default of payment."

By reason of the fact that the present statute provides that the offense may be condoned by repayment of the money or advances, it is insisted that this provision shows its purpose to be imprisonment for debt. But the Alabama Supreme Court held with respect to this point that the statute merely condoned the offense by permitting the repayment of the money advanced (State v. Vann, 150 Ala. 66.) And if a provision of the Philippine Code which imposes a subsidiary punishment which is discharged by the payment of money to the creditor is a valid provision, certainly no objection can be raised to the provision now in question, which condones the offense before the judgment of conviction. Indeed, it would have been permissible for the statute to have provided for the discharge of the penalty imposed, upon the repayment of the money or advances after the conviction,—and this provision would have been good, under the authority of the Freeman case. In the language of Mr. Justice Day, "The requirement that there shall be no imprisonment for debt was intended to prevent the resort to that remedy for the collection of contract debts, and not to prevent the state from imposing a sentence which should require the restoration of the sum of money wrongfully converted in violation of a criminal statute. *The nonpayment of the money is a condition upon which the punishment is imposed.*"

We also call attention to the concluding paragraph of the opinion in the Freeman case, in which this court held against the suggestion of plaintiff in error, that the subsidiary imprisonment should be discharged, and the injured party left to his civil action to recover the sum lost for the reason that the imprisonment would satisfy the judgment there rendered to the extent of the amount found by the judgment to have been embezzled, leaving the injured party to his action at law to recover any additional sum arising out of the same cause of action; and it was suggested that this possibility was so wholly unjust that it ought not to be permitted in any state subject to American jurisdiction.

> "But," said the court, "we see no reason why the court may not, for the purpose of the criminal proceedings, find the amount wrongfully converted by the defendant, for the purpose of fixing the sentence in this case, leaving the firm defrauded to recover in a civil action in a sum or sums in excess of that amount which may be found due and remain unpaid to them."

And, for the reasons given in the Freeman case, the provision of the present statute which provides for a fine in double the damage suffered by the injured party, half to go to the county and the other half to such party, is valid.

" * * * the money payment was part of the punishment, and was not imposed as an imprisonment for non-payment of the debt, regardless of the criminal offense committed. The sentence, and each part of it, was imposed *because of the conviction of the defendant of the criminal offense charged.*"

In Re Ebenhack, 17 Kan. 615, which is cited in the Freeman case, Judge Brewer, afterwards Mr. Justice

Brewer, of this court, held that a provision of the Kansas statute which imposed costs in certain cases upon the prosecutor as a penalty, did not "constitute strictly and simply a debt, in the technical sense of the word, any more than the fine imposed upon a party convicted of assault and battery is a debt."

And in the case of Maryland v. Nicholson, 67 Md. 1, which is also cited in the opinion in the Freeman case, the statute provided that if a collector of taxes neglected to pay the same for six months, he should be deemed a defaulter, and upon conviction, punished by imprisonment, unless the amount for which he was convicted as a defaulter was sooner paid. It was contended that the last clause rendered the statute one of imprisonment for debt; but the court said:

> "Nor is it any objection to the statute that it provides, upon the payment of the money for which he is in default, either before or after conviction, such collector shall be dscharged, *for the reason that the Legislature has the right to prescribe the terms and conditions upon which the punishment shall be imposed.*"

In State v. Yardley, 95 Tenn. 546, the court aptly states the rule as follows: "The offense consists not in the creation of a debt, nor in its non-payment, but rather in the fraud through which credit (for board) may be procured or payment evaded. The latter, and not the former, is the thing for which punishment is to be inflicted. As well said by one of the attorneys for the state, the Legislative intent was 'to punish the debtor for his fraud, and not for his debt.'" We earnestly insist that the statute cannot by any canon of construction be held to imprison for debt.

THE FOURTEENTH AMENDMENT.

It is contended that the Act violates the Fourteenth Amendment in that it applies only to persons who enter into contracts for the performance of an act or service or for the rent of land; that it does not bear equally upon the employee and the employer, and that it is applied only against laborers and the colored race.

As we pointed out before, the statute had its origin as an amendment to the statute punishing the obtaining of money or other personal property by false pretenses. Every person within the State of Alabama is subject to punishment for obtaining money by a false pretense and it is not contended that such statute denies to anyone the equal protection of the laws.

The present statute, on its face, likewise applies to every person who with a fraudulent purpose enters into a written contract to perform an act or service for another, and thereby obtains money. So that we come to the question of the right of the Legislature to classify objects of legislation. With respect to this question, Mr. Justice McKenna said in Clark v. Kansas City, 176 U. S. 144, 44 L. 392:

> "It is enough to say that the rule of the Constitution leaves to the discretion and wisdom of the State a wide latitude as far as interference by this Court is concerned. It is not a substitute for municipal law; *it does not invest power in this Court to correct the impolicy and injustice of State laws*, and the quality it prescribes is not for persons merely as such, but according to their relations."

And in Magoun v. Illinois Trust & Savings Bank, 170 U. S. 282, 42 L. 1037, the same Justice said:

> "It (the 14th Amendment) does not prohibit legislation which is limited, either in the objects to which it is directed or by the territory within which it is to operate. It merely requires that all persons subject to such legislation shall be treated alike under like circumstances and conditions, both in the privilege conferred and the liabilities imposed. With these for illustration, it may be safely said that the rule prescribes no rigid equality and permits to the discretion and wisdom of the State a wide latitude so far as interference by this Court is concerned. * * * Nor with the impolicy of a law has it concern. Mr. Justice Field said in Mobile County v. Kimball, 102 U. S. 704, that this Court is not a harbor in which can be found a refuge from ill advised, unequal and oppressive State legislation."

In the case of Moore v. Missouri, 159 U. S. 673, 40 L. 301, Mr. Chief Justice Fuller said with respect to this question:

> "The 14th Amendment means 'that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances.'" * * *

In Powell v. Pennsylvania, 127 U. S. 678, Mr. Justice Harlan said with respect to a statute directed at the manufacture of oleomargarine: "The statute places under the same restrictions, and subject to like penalties and burdens, all who manufacture and sell, or offer for sale, or keep in possession to sell, the articles embraced by the prohibitions; thus recognizing and preserving the principal of equality among those engaged in the same business."

And in So. Ry. Co. v. Greene, 216 U. S. 400, Mr. Justice Day said that, "The equal protection of the laws means subjection to equal laws, applying alike to all in the same situation."

In Halter v. Neb., 205 U. S. 34, this court considered a statute of Nebraska which prohibited the use of the National flag upon articles of merchandise for advertising purposes, with the proviso that it should not apply to newspapers, etc., disconnected from any advertisement. The court, through Mr. Justice Harlan, upheld the statute as against the contention of an arbitrary classification, in this language: "It was for the State of Nebraska to say how far it would go by way of legislation for the protection of the flag against improper use,—taking care in such legislation not to make undue discrimination against a part of its people. * * * All are alike forbidden to use the flag as an advertisement. * * * In any event the classification made by the State cannot be regarded as unreasonable or arbitrary or as bringing the statute under condemnation as denying the equal protection of the laws."

Again in M. K. & T. R. Co. v. May, 194 U. S. 265; and in Lemieux v. Young, 211 U. S. 489, the court sustained the classifications as made by the statutes there involved. In the case last cited the bulk-sales law of Connecticut was considered and upheld. This statute applied only to retail merchants, imposing upon them the duty of notifying their creditors before selling either the whole or a large part of their stock in trade. If the classification of retail merchants is sustained certainly the Legislature may prohibit all employees from obtaining money by falsely pretending that they will work for a given time.

This entire contention is answered by the language of Judge Denson in the instant case: "This point is aside from the mark, for the reason that the crime denounced by the statute is not the mere breach of the promise, or

failure, to perform service according to the terms of the contract; but * * * the criminal feature by the statute reprehended is the entering into a contract with the intent to injure or defraud, or the refusal of the employe to perform the contract, with like intent.

"It may be that the Legislature could have made the fraudulent refusal of the employer to pay the wages of the employee, a crime, (this point we do not decide); but simply because the present statute does not comprehend criminality on the part of the employer, does not argue or demonstrate its invalidity, on the idea of inequality in its operation. The crime denounced is not one against the person or property of the employer, *but one against the dignity of the State,—against the sovereignty.*"

Answering a suggestion of this kind in State v. Chapman, 56 S. C. 420, the court said: "It is clear, therefore, that there is no discriminating feature in the Act of 1887 and we do not see how there could be one, inasmuch as laborers never make advances either in money or supplies to land-holders."

In Dreyer v. Payne, 88 Fed. 978, Judge Showalter used the following language concerning the Illinois Bank Statutes:

> "The law here in question is applicable to any person whose conduct falls within the definition of the offense. How wide or how narrow that definition shall be is a question of the Legislature.* * **I am not able to say that taking money as a deposit by an insolvent banker under pretense of solvency is a right guaranteed by the fourteenth amendment. A law which makes the obtaining of money by false pretense a crime would hardly be invalid on the ground that a person using the same pretenses, but failing to obtain and appropriate money or property thereby, would not be punishable.* The circumstances

> that, by the terms of the statute in question, the repayment on demand must be lost to the depositor in order to make the offense, is not a valid objection. *Nor as long as any person whose conduct falls within the definition of the offense is liable to the penalty prescribed do I see that the equal protection of the laws is denied.* * * * The penalty of the statute here in question, goes without discrimination against any person whose conduct falls within the definition of the offense."

The covert suggestion in brief of counsel for plaintiff in error, that the statute is void, for that it is applied to negro laborers and negro tenants and not to all classes of employees is not borne out by the record. As pointed out by Judge Denson in his opinion in the case at bar: "If this statute referred to a particular class of individuals * * * then we should not hestitate to declare the enactment void. But no such interpretation can be evolved by any canon of construction; nor can it be supported by reason *or by reference to the history of the State.* On the contrary, the statute on its face, is leveled against 'any person who, with intent to injure or defraud his employer,' etc. There is absolutely no qualification as to the persons made amenable to the statute, by reference to race, color or condition; nor is there the remotest hint at such a limitation. * * * The burden of the statute falls with equal weight upon all such persons—that is, upon all persons similarly situated—and it is therefore, not class or discriminative legislation in the sense that would render the statute offensive to the Fourteenth Amendment."

This insistence finds support only in the argument of counsel. If it be admitted that the statute would be invalid if it were enforced only against the particular classes mentioned, yet, there is not a particle of evidence in the record to sustain the contention.

The same insistence was made when this case came to this court on habeas corpus. The court then expressly de-

clined to consider the contention, *on account of the meager facts* on which the case came up. "If the principal case had been tried," said Mr. Justice Holmes, "it is imaginable that it might appear that a certain class in the community was mainly affected, and that the usual course of events, including the consequences in case of inability to pay the fines was such that, in view of its operation and intent, the whole statute ought to be held void. * * * It may be questioned whether we ought to assume that the proceeding is under the statute, although it is admitted on all hands. *But if we do assume it, there is nothing as yet* to show that the section of the Code apart from the amendments is bad."

The principal case has now been tried and it was not suggested on the trial that a certain class in the community was mainly affected by the act nor that any peculiar result followed as a consequence of inabiliy to pay the fines inflicted by the statute. In fact the entire case is now in the identical situation in which it came to this court on habeas corpus. And there is nothing in this record to show that the original statute is void.

In the case of Rogers v. Alabama, 192 U. S. 226, this court held that the equal protection of the law was denied where persons of the African race were excluded solely because of their race or color from serving as grand jurors in the criminal prosecution of a person of the African race.

In Soon Hing v. Crowley, 113 U. S. 703, 28 L. 1145, this court considered an ordinance of the city and county of San Francisco which had to do with public laundries. The principal objection to the ordinance on the part of the petitioner was, as pointed out by Mr. Justice Field, "founded upon the supposed hostile motives of the supervisors in passing it," and that learned jurist then said:

> "There is nothing, however, within the language of the ordinance, or in the record of its enactment, which in any respect tends to sustain this allegation. * * *

> The motive of the legislators, considered as the purposes they had in view, will always be presumed to be, to accomplish that which follows as the natural and reasonable effect of their enactments. * * * And in the present case, even if the motives of the supervisors were as alleged, the ordinance would not be thereby changed from a legitimate police regulation, *unless in its enforcement it is made to operate only against the class mentioned; and of this there is no pretense.*"

And see to the same effect Tinsley v. Anderson, 171 U. S. 101, 43 L. 91.

In the Rogers case, the court reversed the judgment of conviction because, in the enforcement of the jury law, persons of the African race were excluded from serving as grand jurors; and in the Crowley case, this court declined to reverse the judgment, because it did not appear that in the enforcement of the ordinance it was made to operate only against the Chinese race. In the condition of this record, therefore, the contention may be passed without further discussion. It is true, the record shows that plaintiff in error is of the negro race, and so in the Soon Hing case, plaintiff in error was a Chinese; but this coincidence is of no value in the absence of proof that in its enforcement the law was made to operate only against the classes mentioned. On the face of the statute, the clerk in the store or other mercantile business is as much within its terms as the farm laborer, and there is in the statute no discrimination made as to race or color. If such discrimination existed, or exists today in Alabama, the diligent counsel for plaintiff in error have not seen fit to present it to the lower court in any way, and it is manifestly unfair to insist now that it is true. Indeed, the only possible field of operation for this suggestion would be to engender a prejudice against the statute. The declaration of the Alabama Supreme Court in the case at bar, that this contention cannot be "supported by reason or *by reference to the history of the state*," should com-

pletely answer this suggestion. (American Steel & Wire Co. v. Speed, 192 U. S. 500, 523.)

Moreover, as said by Mr. Justice Harlan in Powell v. Pennsylvania, 127 U. S. 678, "And as it does not appear upon the face of the statute, or from any facts of which this court must take judicial cognizance that it infringes rights secured by the fundamental law, the legislative determination of those questions is conclusive upon the courts. It is not a part of their functions to conduct investigations of facts entering into questions of public policy merely, and to sustain or frustrate the legislative will, embodied in statutes, as they may happen to approve or disapprove its determination of such questions."

It could never have been the purpose of the 14th Amendment to require the Legislature to enact a statute punishing every conceivable offense and the fact that no law exists on the point suggested by counsel, namely, against the employer who obtains service with the fraudulent purpose not to pay for the same, is no argument against the validity of the present law. It is of no more value than an analogy that might be drawn from the failure of the Legislature to define and punish any other offense that might be conceived of.

There is in Alabama a statute enacted under the title, "For the protection of landlords, proprietors or keepers of hotels and boarding houses," and punishes anyone who by fraud or misrepresentation obtains board or lodging. Construing this statute, our court has said that "it is no more of a special privilege to the hotel keeper, than the statute against burglary from a store or dwelling, is to the merchant who owns the store, or the owner of the dwelling." Ex parte King, 102 Ala. 182. Statutes on this subject were upheld in re Milecke, ___ Wash. ___; 100 Pac. 743; State v. Yardley, 95 Tenn. 546; Hutcheson v. Davis, 58 Ill. App. 358; State v. Eagle, 156 Ind. 339.

DUE PROCESS OF LAW.

It is contended that the act in question violates the Fourteenth Amendment in that it deprives Bailey of his liberty without due process of law on account of the amendment of 1903 which established the prima facie rule of evidence. But, we do not see how this contention can be worked out on any theory consistent with the construction which this court has long ago affixed to the due process clause of this amendment.

The case of Twining v. New Jersey, 211 U. S. 77, contains one of the most elaborate discussions of this question to be found within the recent decisions of this court. It is important to note the facts of that case and the conclusion of the court thereon. The trial court instructed the jury that they might draw an unfavorable inference against the defendants from their failure to testify where it was within their power, in denial of the evidence which tended to incriminate them. It was contended that the defendant in this manner was forced to give evidence against himself; and that the due process clause of the Fourteenth Amendment exempted him from such self incrimination in the courts of the State. But in a thorough discussion of the question the court reached the conclusion that such practice did not violate the Fourteenth Amendment. "Due process," said Mr. Justice Moody, "requires that the court which assumes to determine the rights of parties shall have jurisdiction * * * and that there shall be notice and opportunity for hearing given the parties. * * * Subject to these two fundamental conditions, which seem to be universally prescribed in all systems of law established by civilized countries, this court has, up to this time, sustained all State laws, statutory or judicially declared, *regulating procedure, evidence,* and methods of trial, and held them to be consistent with due process of law, (citing many cases) * * *

"Among the most notable of these decisions are those sustaining the denial of jury trial both in civil and criminal cases, the substitution of informations for indict-

ments by a grand jury, the enactment that the possession of policy slips raises a presumption of illegality, and the admission of the deposition of an absent witness in a criminal case. The cases proceed upon the theory that, given a court of justice which has jurisdiction, and acts, not arbitrarily, but in conformity with a general law, upon evidence, and after inquiry made with notice to the parties affected and opportunity to be heard, then all the requirements of due process so far as it relates to procedure in court and methods of trial and character and effect of evidence are complied with."

It seems to us that this holding of the court determines the validity of this rule of evidence. The court had jurisdiction by reason of the fact that the statute declared a criminal offense; it acted not arbitrarily but in conformity with the general law under which all others likewise situated were tried; the evidence was offered before the jury and an inquiry made into the guilt of the defendant. Notice was given to the defendant and an opportunity afforded him to be heard; and the mere procedure *and the effect of the evidence* offered are matters of local concern. If a defendant may be required to incriminate himself as was held by the New Jersey Court, without any violation of the Fourteenth Amendment, this court cannot it seems to us, consistently with the reasoning of that opinion, hold the present rule of evidence bad.

"The power of the people of the states," said Mr. Justice Moody in Twining v. New Jersey, supra, "to make and alter their laws at pleasure is the greatest security for liberty and justice this court has said,"

In the case of Dent v. West Virginia, 129 U. S. 128, Mr. Justice Field defined "due process of law" as follows:

> "They (the terms, due process of law) come to us from the law of England, from which country our jurisprudence is to a great extent derived, and their requirement was there designed to secure the subject against the arbitrary action of the Crown and place him under the protection of the law. They were

> deemed to be equivalent to 'the law of the land.' In this country, the requirement is intended to have a similar effect against the legislative power, that is, to secure the citizen against any arbitrary deprivation of his rights, whether relating to his life, his liberty, or his property. Legislation must necessarily vary with the different objects upon which it is designated to operate. It is sufficient, for the purpose of this case, to say that legislation is not open to the charge of depriving one of his rights without due process of law, *if it be general in its operation upon the subjects to which it relates and is enforceable in the usual modes established in the administration of government with respect to kindred matters, that is, by process or proceedings adapted to the nature of the case.* The great purpose of the requirement is to exclude everything that is arbitrary and capricious in legislation affecting the rights of the citizen."

And in Leeper v. Texas, 139 U. S. 462, 35 L. 225, Mr. Chief Justice Fuller said with reference to the power of the State in dealing with crime:

> "That by the Fourteenth Amendment the powers of States in dealing with crime within their borders are not limited, except that no State can deprive particular persons, or classes of persons, of equal and impartial justice under the law; that law in its regular course of administration through courts of justice is due process, and when secured by the law of the State, the constitutional requirement is satisfied; *and that due process is so secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government unrestrained by the established principles of private right and distributive justice."*

POWER TO ESTABLISH PRIMA FACIE RULE OF EVIDENCE.

We think it may be stated as a general proposition of law that the right of the Legislature to establish a prima facie rule of evidence in criminal cases has been recognized by every court, state and federal, in which the question has been presented, and among such cases we cite the following:

Li Sing v. United States, 180 U. S. 485, 45 L. 634;
Adams v. N. Y., 192 U. S. 585, 48 L. 515;
Ah How v. United States, 193 U. S. 65; 48 L. 619;
Fong v. United States, 149 U. S. 697, 719, 37 L. 905, 918;
Commonweath v. Williams, 6 Gray (Mass.) 1;
State v. Beach, 147 Ind. 74;
State v. Buck, 120 Mo. 479, 25 S. W. 573;
State v. Kingsley, 108 Mo. 135, 18 S. W. 994;
Meadowcraft v. People, 163 Ill. 56;
Barker v. State, 54 Wisc. 368;
Robertson v. People, 20 Colo. 279;
Voght v. State, 124 Ind. 358;
People v. Cannon, 139 N. Y. 32;
Board of Commissioners v. Merchant, 105 N. Y. 148;
Re Milecke, (Wash.) 100 Pac. 743.

The validity of this provision of the statute has been considered and upheld in three different cases by the Supreme Court of Alabama:

Bailey v. State, 158 Ala. 18.
State v. Vann, 150 Ala. 66;
State v. Thomas, 144 Ala. 77;
Bailey v. State, 158 Ala. 18.

The question was first presented in State v. Thomas, 144 Ala. 77, supra, and the Court sustained the power of the Legislature to declare a prima facie rule of evidence, using this language:

> "The Amendment of Section 4730, which section simply declares the intent, declares a prima facie rule of evidence in such cases. In 8 Cyc. 820, it is said, 'The Legislature has the power to give greater effect to evidence than it possesses at common law, and in both civil and criminal proceedings it may declare what shall be prima facie evidence. On the other hand, it cannot prescribe what shall be conclusive evidence as this would be an invasion of the province of the judiciary.' This seems to be a rule of well-nigh, if not universal recognition." Citing State v. Beach, 147 Ind. 743, 6 L. R. A. 179; Meadowcraft v. People, 163 Ill. 56, 67; Fong. v. United States, 149 U. S. 697, 759; 37 L. 905.

And again in State v. Vann, 150 Ala. 66, supra, the court held the statute good as against this attack, in this language:

> "The amendment is a mere rule of evidence and has been upheld by this court in the case of State v. Thomas, 40 South. 271, 144 Ala. 77, 2 L. R. A. (N. S.) 1011, the soundness of which is not challenged by counsel."

In Bailey v. State, 158 Ala. 18, the court, in a well considered opinion by Judge Denson, again expressly re-affirmed the former cases and cited, among other authorities, Banks v. State (Ga.), 52 S. E. 74, 2 L. R. A. (N. S.) 1007.

In Banks v. State, supra, the Supreme Court of Georgia considered a statute having the same object as the

Alabama statute under consideration, and upheld that feature, declaring the presumption which should follow from certain facts. In that case the statute provided that proof of the contract of hiring, the procuring thereon of money or other things of value, the failure to perform the service so contracted for or to return the money so advanced with interest thereon to the time the labor was to be performed, without good and sufficient cause, and loss or damage to the hirer, should be presumptive evidence of the fraudulent intent. After reviewing the cases, the Court said:

> "This is not an assumption of judicial functions by the Legislature. It declares a rule of evidence under which certain acts are deemed presumptive evidence of a fraudulent intent in committing them. The Legislature has the power to establish rules of evidence. * * * The power of the Legislature on this subject is not so extensive in regard to criminal cases as in regard to those of a civil character. Thus, to illustrate, in the former the accused must be confronted with the witnesses. But the power to make rules of evidence, where not conflicting with any constitutional provision or right, exists in respect to both classes of cases."

In Fong v. United States, 149 U. S. 697, 729, supra, this Court considered the Act of May 5th, 1892, being an act to prohibit the coming of Chinese persons into the United States. The Act provided that Chinese laborers then in the United States and who were entitled to remain, should, within six months after the passage of the act, obtain a certain certificate; and that if any such laborer neglected, failed or refused to comply with the act, and be found within the jurisdiction of the United States after the time named without such certificate, he should

be deemed and adjudged to be unlawfully within the United States, *unless he should establish clearly to the satisfaction of the judge* "that by reason of accident, sickness or other unavoidable cause he had been unable to procure his certificate, and to the satisfaction of said United States Judge and by at least one credible witness other than Chinese, that he was a resident of the United States on the 5th day of May, eighteen hundred and ninety two." The Court said with respect to this feature of the law:

> "The provision which puts the burden of proof upon him of rebutting the presumption arising from his having no certificate as well as the requirement of proof by at least one credible white witness, that he was a resident of the United States at the time of the passage of this Act, *is within the acknowledged power of every Legislaure to prescribe the evidence which shall be received, and the effect of the evidence in the courts of its own government.*"

In Li Sing v. United States, 180 U. S. 485, supra, this Court, speaking through Mr. Justice Shiras, again upheld this feature of the law quoting the language of the Court in Fong's case.

In Adams v. N. Y., 192 U. S. 585, supra, the Court considered a statute of New York which made the possession of the record of chances or slips in the game of policy or the possession of any paper, print, or writing commonly used in playing or promoting that game, prima facie evidence of "possession thereof knowingly," in violation of the Statute. Mr. Justice Day, speaking for the Court, said:

> "Innocent persons would have no trouble in explaining the possession of these tickets, and in any event the possession is only prima facie evidence and

the party is permitted to produce such testimony as will show the truth concerning the possession of the slips. *Furthermore, it is within the established power of the State to prescribe the evidence which is to be received in the courts of its own government.*"

In the case of Commonwealth v. Williams, 6 Gray (Mass.) 1, supra, the Court held valid a statute which declared that the delivery of spirituous liquors in any place other than a dwelling house should be deemed prima facie evidence of a sale. The Court said:

> "The statute only prescribes, to a certain extent, and under particular circumstances, what legal effect shall be given to a particular species of evidence, *if it stands entirely alone and is left wholly unexplained.* This neither conclusively determines the guilt or innocence of the party who is accused, nor withdraws from the jury the right and duty of passing upon and determining the issue to be tried. The burden of proof remains continually upon the government to establish the accusation which it makes. * * * The only purpose and effect of the particular clause of the statute objected to are, *to give a certain degree of artificial force to a designated fact, until such explanations are afforded* as to show that it is at least doubtful whether the proposed statutory effect ought to be attributed to it; but the fact itself is still to be shown and established by proof sufficient to convince and satisfy the minds of the jurors."

Mr. Justice Thomas dissented in this case and his opinion contains all that can be said against the validity of this kind of legislation. Among other things, he argued with some vigor that the delivery of liquor was an act perfectly innocent,—being an element alike of a gift, bail-

ment and sale. But the court sustained the prima facie presumption which the Legislature sought to give to such act of delivery.

In Board of Commissioners v. Merchant, 103 N. Y. 143, supra, the Court considered and upheld a statute which required an applicant for a liquor license to execute a bond conditioned that he would not sell liquors to be drunk on his premises and that when any person was seen to drink on his premises that fact should be prima facie evidence that the same were sold with the intent that they should be drunk thereon. It was contended by counsel for appellant that the last mentioned provision of the statute violated the constitutional guaranties of due process of law and trial by jury. In a well considered opinion, the court touched upon the power of the Legislature to declare a prima facie rule of evidence and stated the limitations on such power. We quote the same in part:

> "The general power of the Legislature to prescribe rules of evidence and methods of proof is undoubted. While the power has its constitutional limitations, it is not easy to define precisely what they are. A law which would practically shut out the evidence of a party and thus deny him the opportunity for a trial would substantially deprive him of due process of law. It would not be possible to uphold a law which made an act prima facie evidence of crime over which the party charged had no control and with which he had no connection, or which made that prima facie evidence of crime which had no relation to a criminal act and no tendency by itself to prove a criminal act. *But so long as the Legislature, in prescribing rules of evidence in either civil or criminal cases, leaves a party a fair opportunity to make his defense and to submit all the facts to the jury to be weighed by them, upon evidence legiti-*

mately bearing upon them, it is difficult to perceive how its acts can be assailed upon constitutional grounds."

In People v. Cannon, 139 N. Y. 32, supra, the court considered an act to protect owners of bottles. The act provided that such owners should file a description of the name, marks or devices used on the bottles and that after such filing it should be unlawful for any person than the owner to use any such bottle; that the possession thereof, without the written consent of the owner, should be presumptive evidence of the unlawful use, purchase and traffic in and of such bottles. The court sustained the power of the Legislature to declare that the facts mentioned when proven should be prima facie evidence of a violation of the act, in an elaborate opinion by Judge Peckham, afterwards Mr. Justice Peckham of this Court. We have been unable to find any case in which the limitations on this power are more accurately or clearly stated, than in the opinion of Judge Peckham, and we quote the same in part:

"It cannot be disputed that the courts of this and other states are committed to the general principle that even in criminal prosecutions the Legislature may with some limitations enact that when certain facts have been proved they shall be *prima facie* evidence of the existence of the main fact in question. (See cases cited in 103 N. Y., *supra.*) The limitations are that the fact upon which the presumption is to rest must have some fair relation to the main fact because of the existence of the fact actually proved, must not be merely and purely arbitrary, or wholly unreasonable, unnatural or extraordinary, and the accused must have in each case a fair opportunity to make his defense, and to submit the whole case to the jury, to be decided by it after it

> has weighed all the evidence and given such weight to the presumption as to it shall seem proper. A provision of this kind does not take away or impair the right of trial by jury. It does not in reality and finally change the burden of proof. The people must at all times sustain the burden of proving the guilt of the accused beyond a reasonable doubt. It, in substance, enacts that certain facts being proved, the jury may regard them, if believed, as sufficient to convict, in the absence of explanation or contradiction. Even in that case, the court could not legally direct a conviction. It cannot do so in any criminal case. That is solely for the jury and it would have the right, after a survey of the whole case, to refuse to convict unless satisfied beyond a reasonable doubt of the guilt of the accused, even though the statutory prima facie evidence were uncontradicted."

In State v. Beach, 147 Ind. 74, supra, the court considdered a statute which provided that the failure of a banker within thirty days after receiving a deposit, should be prima facie evidence on the part of the banker of an intent to defraud at the time of receiving the deposit. The court said, at p. 83:

> "The statute enables the State to make prima facie proof of the intent to defraud by showing the failure, suspension or involuntary liquidation of the banker, broker, banking company or incorporated bank, as the case may be, within thirty days after the deposit was received."

In an elaborate opinion the court considered the question, citing and quoting from many cases and held the statute to be valid.

In the case of State v. Buck, 120 Mo. 479, 25 S. W. 573; State v. Satterly, 131 Mo. 464; Robinson v. People,

20 Colo. 279; Meadowcraft v. People, 153 Ill. 56; Barker v. State, 54 Wis. 368, the several courts considered banking statutes in terms almost identical with that held good in State v. Beach, supra, and in every instance the same were sustained.

In the case of State v. Kingsley, 108 Mo. 135, supra, the court considered a statute which provided that every person who should obtain board or lodging by means of any trick or deception or false or fraudulent representation and should fail or refuse to pay therefor should be held to have obtained the same with intent to cheat or defraud and that proof of the facts mentioned should be prima facie evidence of the intent.

From this review of the authorities, the general rule seems to be that the Legislature may establish a prima facie rule of evidence and the only limitation on this right to do so is laid down in the case of Board of Commissioners v. Merchant, 103 N. Y. 143, supra.

In the case at bar, every fact and condition which enters into the crime, except the intent, must be proven by the State before the rule of evidence obtains and the presumption of guilt follows. In every case cited and quoted from above, the question of fraud or criminal intent was involved, and under the rules established by the several statutes there considered, such intent was required to follow from certain facts. We will consider briefly in this light the cases involving the banking statutes. Here it is merely the failure of a bank within thirty days after receiving a deposit, which so many of the courts have held will sustain a prima facie rule of evidence from which guilt follows. Considered in and of itself, the failure of a bank within thirty days after receiving a deposit, does not constitute a fraud. In the absence of the rule of evidence established, the State could not succeed in a conviction by merely proving those facts. And so with the case of Commonwealth v. Williams, supra. The mere

fact of delivering the liquors is an innocent act. It is entirely consistent with a gift or a bailment, and yet in one of the best considered opinions to be found on this subject, the Supreme Court of Massachusetts upholds the law. If we consider the case of People v. Commonwealth, supra, we have the same conditions. Here was an act to protect owners of bottles, and the mere possession of a marked bottle was held to constitute prima facie evidence of the guilt of the possessor. The person in possession may have found the bottle, or acquired it in many other ways not inhibited by the statute and yet the New York Court held the statute good against this attack. The case of Commissioners v. Merchant, supra, involved facts as far reaching as any case and yet the rule was sustained by the New York Court. The mere fact that a person was seen to drink on the premises was the fact that made the owner of the premises prima facie guilty.

INABILITY OF DEFENDANT TO PROVE MENTAL STATUS.

It is insisted by counsel for plaintiff in error with apparent seriousness that by reason of the fact that Bailey could not testify to his uncommunicated motive or intention he was, therefore, unable to prove his innocence. Turning to the record we find that the only evidence introduced was that of Borden, the manager of the company, alleged to have been defrauded by Bailey. The defendant rested his case at the conclusion of Borden's testimony and did not offer to testify to his uncommunicated motive or intention, nor did he offer any testimony of any nature in defense of the charge brought against him. Under the laws of Alabama a defendant is a competent witness in his own behalf. (Code of 1907, sec. 7894). Not having offered to testify to his own uncommunicated motive or intention, it is illogical to say that he was injur-

ed by this rule which counsel invoke in his behalf. For aught that appears it may have been Bailey's intention when he entered upon the employment to thereby obtain the money with the fraudulent purpose of not rendering the service (Powell v. Pa., 127 U. S. 678). The present argument of counsel is upon the idea that Bailey would have testified that his intention was not to obtain the money under alleged false pretense; but not having offered to testify this is merely a moot question. *He voluntarily rested his case when the State's witness testified. The State could not force him to give evidence against himself. He had the right to testify under the laws of Alabama, or to refuse to do so, at his own election.* But, as suggested by Judge Denson, "* * * The conclusion of counsel from their stated premises, it seems to us is a *non sequitur*. Because a person may not testify, in so many words, that he did not intend a certain result, or that his motive was not to defraud, by no means cuts him off from proving such a negative by the circumstances attending his utterances, which may give point or color to the same or supply the true intent or motive. And so the accused is not excluded from giving testimony, from offering evidence, from being heard, nor from setting up any lawful defense."

But, assuming that there are no witnesses by whom the making or recission of the contract may be proven, the defendant loses sight of the fact that he is a competent witness in his own behalf and that the jury are the judges of credibility of the evidence as between himself and other witnesses. He has every right and guarantee under the law that any other defendant in any criminal case could have. Furthermore, the plaintiff in error confuses the facts of a particular case with a general principle. The principles on which this case must rest are well founded, it is wholly immaterial what the effect may be in a particular case. The courts cannot look to such

a condition as that nor can principles be upset for the benefit of mere individuals. To permit it to be done would bring about the very condition which the plaintiff in error is suggesting in this case, namely, that he is deprived of the equal protection of the law; not on his own part but on the part of those who would be less favored. The law is not responsible for his inability to prove his innocence by independent evidence.

It is argued that the rule of evidence which excludes the defendant from testifying as to his motives, has the effect of making the rule of evidence prescribed by the statute, a conclusive rule. But if it is in effect a conclusive rule in the case at bar, it is due to the particular facts and not to the statute itself.

Nor can we see the relevancy in this connection of the defendant's contention that by reason of the rule of decision in Alabama preventing him from testifying to his secret and uncommunicated motive and intention, he was deprived of his life or liberty without due process of law. If the effect of this rule is to deprive the plaintiff in error of his liberty without due process of law, *it must likewise have the same effect in any other prosecution.* A case might be assumed wherein the defendant, under indictment for murder by an accidental shooting was the sole witness in his own behalf and yet, under the rule referred to, he would be excluded from testifying to his secret intention. This fact, however, could not destroy the rule which would so prevent his testifying nor could it affect the statute under which he was indicted.

Moreover, if there are no witnesses to the making and recission of the contract, and if the defendant by reason of the rule of decision referred to, cannot overcome the prima facie case made by the State, it does not follow that every subsequent case that may come under the law will be thus affected and the court could not on these facts hold the law invalid.

Adverting again to the statute under consideration, as we have before pointed out, three conditions of fact must be proven before the prima facie rule of evidence is set in operation, namely, a written contract to perform labor, the obtaining of money on the faith of the contract and the refusal by the defendant, without just cause and without refunding the money, to perform the service. Abstractly speaking, is it far fetched to say that from these facts a prima facie presumption of fraud may arise? They are certainly stronger in their effect than the facts on which many of the cases referred to above are based. This rule of evidence does not shut out the testimony of the defendant. He has the opportunity of testifying for himself at and through a trial held in the usual mode. In prescribing the present rule of evidence, the Legislature has left a full and fair opportunity to the defendant to make his defense and submit all the facts to the jury to be weighed by them.

As is well pointed out in 24 Cyc. 192, a prima facie rule of evidence in a criminal case "does not overcome the presumption of innocence or change the burden of proof or require the jury to convict, unless they are satisfied from all the evidence of the guilt of the accused beyond a reasonable doubt." The present statute comes directly within this principle of law on which reliance is placed by plaintiff in error. Proof of the constituent facts of the offense merely calls upon the defendant to explain these facts. Has the Legislature *in any case* the right to say that certain facts shall constitute a crime? If so, it may declare the constituent facts of the crime which shall be prima facie evidence of the criminal intent.

It cannot be truly contended that under the law the defendant had no control over the facts which are the basis of the offense, or that he had no connection with such facts, for the reverse of those conditions is patent on the

record; nor can it in truth be said that several conditions of fact, which the State must first prove, had no relation to a criminal intent. *The statute was designed to punish fraud in entering into a contract of employment and thereby obtaining money.* The facts referred to constitute the offense except the element of fraudulent intent which must follow from the facts. If the offense can exist at all such facts not only have relation to the intent but are immediately connected with it.

Nor does the presumption of innocence attend a defendant throughout the whole trial but only *"until sufficient evidence is introduced to overcome the proof which the law has created."* Coffin vs. United States, 156 U. S. 453.

Moreover, whether the facts are consistent with innocence, is a conclusion for the jury to draw; and they may, notwithstanding the present rule of evidence, find the defendant not guilty. It is the duty of the jury to consider all the evidence in the case, and to find the defendant not guilty if a reasonable doubt arises out of any part of the evidence. As said by Chief Justice Stone, in Hurd v. State, 94 Ala. 100, "It is certainly the duty of the jury in pronouncing on issues submitted to them, to consider and weigh all the testimony in the case. * * *The jury would be derelict, if a segregated part of the testimony were made the basis of a verdict, without at least considering what influence should be accorded to other testimony in the cause. * * *And this rule applies in all issues submitted for decision, without reference to the parties, their pursuits, race or condition in life; for all have equal rights before the law."

And as said by Judge Denson in the case at bar, "It must be borne in mind that the rule of evidence fixed by the statute does not make it the duty of the jury to convict on the evidence referred to in the enactment, if unrebutted, whether satisfied thereby of the guilt of the as-

cused beyond a reasonable doubt or not. On the contrary, with such evidence before them, the jury are still left free to find the accused guilty or not guilty, according as they may be satisfied of his guilt or not, by the whole evidence."

Under an indictment for larceny, certain presumptions arise against the defendant from the recent possession of stolen goods. As said by Judge Brickell, in Martin v. State, 104 Ala. 78, "It is the settled law of this State, that the recent possession of stolen goods, imposes on the possessor the onus of explaining the possession; and, if he fails to make a reasonable explanation, raises a presumption of guilt, which will support a verdict of guilty." To the same effect see, Wilson v. United States, 162 U. S. 613; Considine v. United States, 112 Fed. 342.

At the same time, our Court recognizes the doctrine of the presumption of innocence. See Newson v. State, 107 Ala. 133, 139.

A rule of evidence, whether established by statute or decisions, is entirely consistent with that presumption.

The refusal or failure to perform the act or service is by the statute made prima facie evidence of the intent to injure or defraud the employer. The question may be suggested, what intent to defraud is here referred to? The answer will be found in the opening clause of the statute, namely, the intent to defraud at the time of entering into the contract; and the further and like intent which must exist at the time of the refusal or failure to perform. The offense would have been complete without any reference to the intent that might exist at the time of the failure or refusal to perform. The Legislature has gone further than was necessary in declaring the offense.

The entire contention of a class discrimination "calls on this court to disregard the interpretation given to a state statute by the court of last resort of the State, and, by an adverse construction, to decide that the state law is repugnant to the Constitution of the United States. 'But the elementary rule is that this Court accepts the interpretation of a statute of a state affixed to it by the court of last resort thereof.'" Tullis v. Lake Erie & W. R. Co., 175 U. S. 348, 353; American Steel & Wire Co. v. Speed, 192 U. S. 523.

STATUTE SEPARABLE.

While we are confident that the statute is valid in its entirety, and that the rule of evidence should be upheld, yet if the court should be of opinion that the statute as originally passed was valid, and that the rule of evidence is an improper exercise of legislative power, then we insist that the original statute would remain in force.

> "It is an elementary principle," this court has said, "that the same statute may be in part constitutional and in part unconstitutional, and if the parts are wholly independent of each other, that which is constitutional may stand, while that which is unconstitutional will be rejected."

Field v. Clark, 143 U. S. 649.
Allen v. Louisiana, 103 U. S. 80, 83.
Baldwin v. Franks, 120 U. S. 678.
Kimmish v. Ball, 129 U. S. 217.
Noble v. Mitchell, 164 U. S. 367.

"The amendments are separable," said Mr. Justice Holmes on the former writ of error, "as is sufficiently shown by the fact that the rest of the enactment originally stood without them."

Bailey v. Alabama, 211 U. S. 453.

STATUTE NOT VOID FOR UNCERTAINTY.

The statutory words, "without just cause," are clear and definite. They refer to the refusal or failure to perform the service. It is left to the court or the jury in each case to determine the justness of the cause for quitting. Under some conditions the court might decide the question as a matter of law; while again the duty might be left to the jury. This Court has construed the words "just compensation" as used in the Fifth Amendment, to "be a full and perfect equivalent for the property taken," and Mr. Justice Brewer said that the language of the amendment in this respect was "happily chosen." Monongahela Navagation Co. v. United States, 148 U. S. 310, 325-6. And so in the present case, the words "without just cause" will leave the question to be reviewed by the courts; and the language is in our judgment "happily chosen."

But this is a question entirely of the construction of the statute, and in no possible way can it involve a Federal question. The point having been made before and decided by the Alabama Supreme Court adversely to the plaintiff in error, that holding is conclusive upon this court.

Noble v. Mitchell, 164 U. S. 367.

We respectfully insist that the statute is constitutional and should be upheld.

ALEXANDER M. GARBER,
Attorney General of Alabama.

THOMAS W. MARTIN,
Assistant Attorney General of Alabama.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1910

No. 300

ALONZO BAILEY, *Plaintiff in Error,*

—VS.—

THE STATE OF ALABAMA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ALABAMA

SUPPLEMENTAL BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR

FRED S. BALL,
Attorney for Appellant.

ASSIGNMENTS OF ERROR.

1. The said Supreme Court of Alabama erred in affirming the judgment of the Court below.

2. The said Supreme Court of Alabama erred in not reversing the judgment of the Court below, and remanding said cause to the City Court of Montgomery for further proceedings.

3. The said Supreme Court of Alabama erred in not reversing the judgment of the Court below and directing the discharge of plaintiff-in-error.

4. The said Supreme Court of Alabama erred in affirming the action of the lower court in overruling the motions of plaintiff-in-error to quash the indictment against him.

5. The said Supreme Court of Alabama erred in affirming the action of the lower court in overruling the demurrers of plaintiff-in-error to the indictment against him.

6. The said Supreme Court of Alabama erred in affirming the action of the lower court in overruling the demurrer of plaintiff-in-error to the indictment against him on ground No. I. (Record, page 5.)

7. The said Supreme Court of Alabama erred in affirming the action of the lower court in overruling the demurrer of plaintiff-in-error to the indictment against him on ground No. II. (Record, page 5.)

8. Said Supreme Court of Alabama erred in affirming the action of the lower court giving to the jury that portion of said general charge which is numbered (1) and which was excepted to by the plaintiff-in-error.

(Record, pages 12, 28, 38.)

(1.) "Any person who, in Montgomery County, Alabama, and within twelve months before the finding of the indictment, and with intent to injure or defraud his employer, enters into a contract in writing for the perform-

ance of any act or service, and thereby obtains money or other personal property from such employer, and with like intent, and without just cause, and cause, and without refunding such money, or paying for such property, refuses or fails to perform such act or service, must, on conviction, be punished by a fine in double the damage suffered by the injured party, but not more than three hundred dollars, one half of said fine to go to the County one-half to the party injured."

"And the refusal of any such person who enters into such contract to perform such act or service, or refund such money, or pay for such property, without just cause, shall be prima facie evidence of the intent to injure his employer or to defraud him."

9. Said Supreme Court of Alabama erred in affirming the action of the lower court giving to the jury that portion of said general charge which is numbered (2) and which was excepted to by the plaintiff-in-error. (Record pages 13, 28, 38.)

"Any person who, with intent to injure or defraud his employer, enters into a contract in writing for the performance of any act or service, and thereby obtains money or other personal property from such employer, and with like intent, and without just cause, and without refunding such money, or paying for such property, refuses or fails to perform such act or service, must, on conviction, be punished by a fine in double the damage suffered by the injured party, but not more than three hundred dollars, one half of said fine to go to the County and one-half to the party injured."

10. Said Supreme Court of Alabama erred in affirming the action of the lower court giving to the jury that portion of said general charge which is numbered (3) and which was excepted to by the plaintiff-in-error. (Record, pages 13, 28, 39.)

(3) "And the refusal of any person who enters into such contract to perform such act or service, or refund

such money, or pay for such property, without just cause shall be prima facie evidence of the intent to injure his employer, or to defraud him."

11. The said Supreme Court of Alabama erred in affirming the action of the lower court in refusing to give to the jury the charge requested in writing by the plaintiff-in-error, called Charge No. 1. (Record, pages 13, 29.)

"Charge No. 1. The Court charges the jury that Section 4730 of the Code of Alabama of 1896 is invalid and void."

12. The said Supreme Court of Alabama erred in affirming the action of the lower court in refusing to give to the jury the charge requested in writing by the plaintiff-in-error called Charge No. 2. (Record, pages 13, 29.)

Charge No. 2. The Court charges the jury that Section 4730 of the Code of 1896, as amended by an Act entitled An Act to amend Section 4730 of the Criminal Code of Alabama of 1896, approved Oct 1, 1903, is invalid and void."

13. The said Supreme Court of Alabama erred in affirming the action of the lower court in refusing to give to the jury the charge requested in writing by the plaintiff-in-error called Charge No. 3. (Record, pages 14, 29.)

"Charge No. 3. The Court charges the jury that Section 4730 of the Code of Alabama of 1896, as amended and of force at the time the offense charged in the indictment is alleged to have been committed, is invalid and void."

14. The said Supreme Court of Alabama erred in affirming the action of the lower court in refusing to give to the jury the charge requested in writing by the plaintiff-in-error called Charge No. 4. (Record, pages 14 30.)

"Charge No. 4. The Court charges the jury that the provision in Section 4730 of the Code of Alabama of 1896, as amended, and of force at the time said offense is alleged to have been committed, that "The refusal of any person who enters into such contract to perform such act or service or to cultivate such lands, or refuses to perform such act or to cultivate such lands or refund such money or pay for such property, without just cause, shall be prima facie evidence of the intent to injure his employer or landlord or to defraud him, is invalid and void."

15. The said Supreme Court of Alabama erred in affirming the action of the lower court in refusing to give to the jury the charge requested in writing by the plaintiff-in-error called Charge No. 5. (Record, pages 14, 30.)

Charge No. 5. "The Court charges the jury that the provision in said Section 4730 of the Code of Alabama of 1896 as amended and of force at the time the offense charged in the indictment is alleged to have been committed that 'the refusal of any person who enters into such contract to perform such act or service or refund such money or pay for such property without just cause, shall be prima facie evidence of the intent to injure his employer or to defraud him,' is invalid and void."

16. The said Supreme Court of Alabama erred in affirming the action of the lower court in refusing to give to the jury the charge requested in writing by the plaintiff-in-error called Charge No. 6. (Record, pages 14, 30.)

"Charge No. 6. The Court charges the jury that if it believes all the evidence in this case, it must find the defendant not guilty."

17. The said Supreme Court of Alabama erred in affirming the action of the lower court in refusing to give to the jury the charge requested in writing by the plaintiff-in-error called Charge No. 7. (Record, pages 14, 30.)

Charge No. 7. The Court charges the jury that the refusal or failure of the defendant to perform the service alleged in the indictment, or to refund the money obtained from the Riverside Co., under the contract between it and the defendant, without just cause, does not of itself make out a prima facie case of the defendant's intent to injure or defraud said Riverside Company."

ARGUMENT.

After the many decisions of the Supreme Court upon the subject, it is unnecessary to cite the authorities as to due process of law, the equal protection of the laws and involuntary servitude.

The Fourteenth Amendment in forbidding the states to deny—thereby commanding them to afford—"due process" and "equal protection of the laws" in the administration of their government, created no new right in these respects, save to place their enjoyment under the final arbitrament of the Federal authority. What the Fourteenth Amendment commands the state to afford, when it prosecutes a person for violation of its law, is the enjoyment of "its established course of judicial procedure" and the benefit of "the law of the land," as established by the constitution, statutes and decisions of that State.

In Hurtado vs. California, 110 U. S. 516, the court says, "the commands of the Fourteenth Amendment are not too vague and indefinite to operate as a practical restraint," and that it "forbids any course of procedure, unless it hears before it condemns and proceeds upon fixed principles, and not arbitrarily, and renders judgment only after trial."

STATUTE VIOLATES 13TH AMENDMENT.

With these limitations, the State is free from any restraint in the constitution of the United States, to establish and enforce such rules as it thinks proper to constitute "due process." So also, whether it denies "the equal protection of the laws" is to be determined by the natural and ordinary operation of the statutes. The constitution, statutes and decisions of the State are adopted by the Fourteenth Amendment as the standard by which to determine whether under the operation of a particular statute, due process is afforded, or the equal protection of the laws is denied to any person.

The decisions of the State Supreme Court that the act under which Bailey was convicted was not in violation of the State constitution foreclosed further inquiry on that point, and is conclusive on all other courts. The only question the Supreme Court of the United States can consider is whether the statute as administered in this case, violates any right of Bailey under the constitution and laws of the United States.

Viewing this statute in the light of the constitution of the United States, it is apparent that it offends several of its provisions. To constitute the offense the statute denounces, the defendant must entertain the fraudulent intent on three different occasions: First, when he enters into the contract of personal service; Second, when he obtains the money or advances from his employer; and third, when he fails to refund the money. But the fraudulent intent and acts at these different periods, antecedent to the quitting of the contract, does not constitute any offense whatever under this statute. Standing alone, these bad acts, under this statute, are grievances only under the civil law. The situation which brings the defendant under criminal condemnation, and puts life in the statute, which up to that time is inert, is not that the

defendant did these things fraudulently, but that after the doing of them, he failed or refused to perform the contract of personal service, "without just cause." In no jurisprudence that we are aware of, has it ever been held that the abandoning of any contract with just cause, whatever its nature, can subject the party to any liability whatever, either civil or criminal. So that the punishment for which the statute provides is rested on, and can be justified only, because there has been an unjust abandonment of the contract—"without just cause." It cannot be based upon anything else, because none of the antecedent frauds mentioned in the statute, or all of them combined, are criminal offenses. The dominating, controlling and sole fact which puts this statute in motion is the failure without just cause to perform the contract of personal service. The 13th Amendment and the statutes passed in pursuance thereof, secure to every person the absolute right to abandon the performance of a contract for personal service, whether with or without just cause, and to exercise it at his pleasure, and forbids his being subjected to any pains or penalties because he so acts, except the ordinary civil liabilities for the breach of his contract. This is necessarily so, because otherwise the State can by compulsory, criminal, means compel performance of labor or service against the will of the servitor, and thus destroy a right which it is the end and design of the constitution and statutes to protect and safeguard. In its last analysis, therefore, this statute punishes an American citizen because he exercises the fundamental right of quitting, without just cause, the performance of a contract of personal service, the enjoyment of which right is secured to him by the constitution and laws. What stronger assault can be made upon the enjoyment of a right the constitution secures than to punish the person to whom the right is secured because he exercises it? If the State may punish a man for quitting a contract of personal service because he abandons

it without just cause, it may annihilate the 13th Amendment, and re-establish involuntary servitude in the teeth of the Supreme law. The right thus given to quit performance of a contract is absolute and unconditional. It cannot be taken away or undermined directly or indirectly under the guise or the device of regulating the right. Railroad Company v. Morris, 65 Ala. 199; Joseph v. Randolph, 71 Ala. 499. The State has no power to declare that a person shall not exercise this absolute right because prior to its exercise, he may have offended against some law of the State. That would be to outlaw a man, and destroy a right he has under the Federal constitution because he had offended in some other respect against the laws of the State. If the legislature may constitutionally declare that a man shall not exercise a right secured to him by the constitution, because he has fraudulently obtained advances, it may likewise so declare if he commits any other crime, or is guilty even of a civil breach of the rights of another. The legislature has no constitutional power to declare that a certain line of conduct shall, or shall not be an offense, accordingly as the person exercises or refrains from exercising an absolute right which he has under the constitution of the United States. To uphold such a doctrine, we must add a new canon to our jurisprudence,—that a man may be punished criminally because he exercises a constitutional right.

The ordinary, natural and inevitable result of the statute here if allowed effect, being the compulsory performance of labor against the will of the employe, the statute is void, no matter what the language it employs, or however it clouds the issue by cunning words and phrases to disguise the real object and purpose of the framers of the statute.

But this aside, the words and framework of the statute conclusively demonstrate that its purpose is not to punish fraud, or to protect public morals, but merely to com-

pel performance of a contract for personal service. The obtaining of money or property by a fraudulent promise to render personal service in the future, not meant to be kept, in whatever form accomplished, can undoubtedly be made a crime by the State, whether or not the thing fraudulently obtained is restored and whether or not the contract under which it was obtained was breached, with or without just cause. The statute purposely and studiously refrains from making the fraud that is mentioned in it the crime which the statute punishes. The fraud is treated only as an incident, and not worthy of the notice of a legislature said to be bent on protecting public morals, but the real grievance is, that there is failure to perform a contract of personal service without just cause. The quitting of the service without just cause is the thing the statute is designed to prevent. The purpose is to compel performance by stress of criminal penalties. The fraud is brought into the statute only incidentally, and solely to cloak the design to punish nonperformance of the contract, and to bolster up the pretense, that under this statute the offender is not punished because he quit the contract without just cause, but for the fraud perpetrated in getting advances before he quit without just cause. The legislature as we have seen has the undoubted power to punish the fraudulent obtaining of advances by criminal enactment, whether the advances are afterwards returned or not, but it cannot use this power so as to hamper and undermine a positive right secured by the constitution. Under the constitution a man cannot be punished criminally, directly or indirectly, or in any manner, shape or form, or by any device, because he exercises his constitutional right to abandon a contract without just cause. Such conduct on his part, cannot be made an element of the fraud. The 13th Amendment excepts from the power of the State in dealing with fraud all authority to make such quitting of a contract for personal service an element of any fraud,

which it may otherwise punish. Having imported into the statute, as one of the elements of fraud for which an offender is to be punished, the ingredient that the offender exercised a right under the constitution, and the provision of the law in this respect being inseparable and designed to promote one end, the compulsory performance of a contract of personal service, the whole act is void.

STATUTES VIOLATES 14TH AMENDMENT.

This statute also violates the 14th Amendment. The State constitution ordains that the right of trial by jury shall remain inviolate. The right to enjoy it as it is afforded to all other persons in like circumstances is a part of the due process the 14th Amendment commands the State to afford, when it prosecutes persons for crime. There can be no difference in the State court in the measure of rights which the defendant shall there enjoy, because he belongs to a particular class, or occupation, or in the nature of the presumption which the law indulges as to his innocence because of the means by which the offense was committed. The enjoyment of the right cannot be burdened in the case of particular persons or particular offenses by exactions or burdens which are not put upon all others. Under the general law of the land the defendant goes before the jury with the presumption of innocence, and that remains with him during the whole trial, until, upon the whole case all the facts establish his guilt as a matter of fact, beyond a reasonable doubt. Ogletree vs. The State, 28 Ala. 693; Coffin vs. the United States, 156 U. S. 432.

Here, the charge is that the advances were obtained by fraud. The party quit the service without just cause, without repaying them. The statute upon these facts raises the presumption as matter of law that the defendant is guilty. It takes away from him the

right to have the jury decide as a matter of fact whether, under all the circumstances, the quitting, etc., proves guilt. It says as a matter of law, if these facts are shown, the law presumes the defendant guilty, unless he proves himself innocent. This burden is placed upon no other person who is indicted for fraud. In all other cases the presumptions of guilt are presumptions of fact which the jury, under the direction of the court, must draw from the circumstances of the whole case. Not only have defendants in this class of cases to meet a presumption of law rigidly fixed in the statute, which is not authorized under the law of the land in similar cases, but the statute arbitrarily, and without any justification in reason or morals, requires the jury, in this class of cases only, to repudiate the great general and essential principle of justice that where an act equally denotes either of two intentions, one of which points to innocence and the other to guilt, the jury must adopt that construction and draw those inferences which lean to innocence rather than those which lean to guilt. Under this statute, if it be conceded to be valid otherwise, the jury, in order to convict, must find, beyond reasonable doubt, that he had the fraudulent intent at three different periods of time; first, when he made the contract; second, when he obtained the advances; third, when he quit without repaying them. If the defendant did not have the fraudulent intent at the time he made the contract, or at the time he obtained the advances, he cannot be guilty under this statute, although he had the fraudulent intent of cheating his employer when he quit the service. How can the *law* say that the mere fact of quitting proves that the fraudulent intent was formed prior to the quitting rather than at the time of quitting? That is not the experience of mankind. Ordinarily men who make contracts and get advances under them do not intend at the time to defraud, but rather expect to repay the advances, and the formation of the

criminal intent generally arises subsequently, in consequence of poverty, disappointment in the results of the contract, or of the pressure of other vicissitudes to which men are subjected in the struggle for subsistence and the pursuit of happiness. There is no presumption that men intend to defraud one another, and there is no presumption of law, where there is an intent to defraud, that it was formed at one time rather than another, when the facts relied on point equally to any period of time anterior to the quitting, as well as to the time of the quitting of the contract. To make a rule and presumption of law, merely because the party quit without just cause, that the fraudulent intent was formed at one time rather than another, is to destroy the right of the defendant to be tried by jury, and his right to have the jury determine the significance of the facts as to the time when the fraudulent intent was formed, as matter of fact, in view of the whole case. This right is given by the law of the land in all other cases.

Chief Justice Brickell, a great jurist, in Gassenheimer vs. The State, 52 Ala. page 319, emphatically condemned as a violation of the legal rights of defendant, any rule which required or authorized the jury to draw inferences of guilt, when the facts admitted of inference in favor of innocence. Speaking of the fact relied on there to justify an inference unfavorable to the defendant, he said (on page 320), "Why that inference? It is the most uncharitable which can be drawn, and must juries, despite the charity of the law which does not permit crime or fraud to be presumed when the facts are consistent with innocence, be invited to indulge such inference? We are of opinion that the evidence was improperly admitted." This statute compels the jury to draw the inference of guilt, merely from the unlawful quitting, that the fraudulent intent existed before the quitting—a fact which must be proved to uphold a conviction under this statute —when the inference may as well, if not better, be in-

dulged from the quitting that the intent was formed then and not at any earlier period. That decision shows, as do numerous others, the established course of judicial procedure. The application of the statutory presumption here, therefore, amounts to a denial of the equal protection of the laws. It not only strikes down the great general and essential principle which inheres in all our jurisprudence, that the defendant shall not be convicted until guilt is proved beyond a reasonable doubt, but puts upon him arbitrarily the burden of overcoming a statutory presumption of guilt, arising from one fact—the quitting of the service—which does not, and cannot, prevail in any other case. See Birmingham Water Works Co. vs. the State, 159 Ala. page 120, wherein the Supreme Court of the State reaffirms Railroad Co. vs. Morris, 65 Ala. 193, and Smith vs. Railroad, 75 Ala. 449, and holds in the case then under consideration that there was arbitrary distinction, which under like circumstances, in principle, it held in the Bailey case was not arbitrary. See Cooley Constitutional Limitations, Sec. 391-3.

These cases, which are in line with like decisions everywhere in the United States, declare that "unequal, partial and discriminatory legislation, which secures rights to some favored class or classes, and denies them to others similarly circumstanced, who are thus excluded from the equal protection of the law, designed to be secured by the general law of the land, is in clear and manifest opposition to the letter and spirit of these provisions." The provisions of the Alabama constitution there alluded to are found in the bill of rights.

DUE PROCESS OF LAW.

This statute also amounts to a denial by the State of due process of law, because of the vague and uncertain terms in which the rule of action which the statute intends to enforce is expressed. Section 7 of the consti-

tution of 1901, which the 14th Amendment requires to be observed, when the State prosecutes for violation of its laws, provides that "no person shall be accused or arrested or detained, except in cases ascertained by law and according to the forms it has prescribed, and no person shall be punished but by virtue of law established and promulgated prior to the offense and legally applied."

What constitutes "just cause" for breach of a contract for personal service? The statute does not undertake to furnish any guide. Its language furnishes no clue to the causes which the legislature intended to treat as just or unjust. No person who refuses to perform a contract, no matter how honestly he believes he has cause for quitting it, can tell when the court and jury will convict or acquit him, or what they will deem to be just or unjust cause in any particular case. The statute here is not a law, because the statute itself does not "ascertain" the cause, but it leaves it to the judge and jury to ascertain the cause and declare the law in view of the facts of the particular case. When the judge and jury undertake these functions, they exercise usurped authority, and the legislature illegally delegates to them under this statute power which the constitution of the State says the law making power alone shall exercise. The "law of the land," which the 14th Amendment requires to be applied requires that the rule of action, for non-conformity to which the citizen may be punished criminally, shall be defined with such certainty that a person of ordinary intelligence, on reading the statute, may know what he may do and what he may not do.

But, if this obstacle were out of the way, we are confronted with the further obstacle that the law must be "promulgated" before the offense. There is no promulgation of the law covering the particular offense until the verdict of guilt or innocence. The only way the defendant can know of the promulgation of the law, is after his act is performed, when he is brought in the prisoners'

dock, and the jury promulgate the law by their verdict, based upon such instruction as the judge may give. See Toney vs. The State, 141 Ala. 120, which adopts the conclusion in this respect, in the Peonage Cases, 123 Fed. Rep. 671. The statute might as well have attempted to declare in general terms that, if a man does any wrong to his neighbor about the performance of a contract, or fails to do equity regarding it, he shall be guilty of a criminal offense. The statute prescribes no rule of conduct whatever. No one on reading it can tell what abandonment of the contract the legislature intended to be within, and what without, the influence of the statute. A person punished for violation of such a statute is not punished by due process of law. U. S. vs. Reese, 92 U. S. 214. In the words of Supreme Court of Louisiana in State vs. Castor, 45 La. Annual, S. C. 12 Sou. Rep. 739: "Language of such wide and indefinite import as to leave absolutely uncertain what acts are within, and what acts are without, the statutory provision, cannot operate as a valid criminal statute." See also Bishop on Statutory Crimes, Sec. 41, Ex parte Bell, 22 Tex. Criminal Reports, 31. Carney vs. Andrews, 5 Stockton Chancery Reports, N. J. p. 76.

We are far from contending that the legislature may not lawfully create a criminal offense by using terms which have a well defined and settled meaning at the common law, the known meaning of which, includes all the constituent elements of the offense thus defined. In that case the very words employed inform the defendant of what he is forbidden to do. Hence, the legislature may lawfully provide for the punishment of arson, burglary, larceny, and the like, without defining them more particularly, or prohibit certain games of chance by referring to them only by their popular and well known names, such as the keeping of a gaming table, betting at faro, and the like. In these and like instances, the terms used have a well defined, settled and certain meaning, and ev-

erybody knows when the statute uses them what it means to forbid and what conduct it prescribes. But the phrase "just cause" in this connection has no popular or settled legal meaning, and the very statute shows on its face that the justice of the cause is to be ascertained by the judge and jury in view of the facts of the particular case. They have no constitutional history or meaning as has the term "just compensation" as used in the 5th Amendment; nor have they any well defined, settled meaning at the common law. To uphold this statute is to repudiate Section 7 of the Alabama Bill of Rights.

THE PHILIPPINE CASE.

The defendant in error cannot derive any comfort from the decision in Freeman vs. United States, 217 U. S. 539. The defendant was convicted for embezzling money. No element of performance of a contract was involved. The local statute imposed punishment for violation of the law for a certain term of imprisonment, to uphold the offended dignity of the local sovereign there. It further provided for "subsidiary" punishment according to the value of the property embezzled, etc. The latter it imposed to compel restoration to the wronged party. If the emblezzled money be refunded, the subsidiary punishment may be avoided. If it is not, the offender must submit to the punishment, first, for violating the laws of the island, and, secondly, to further punishment to compel restoration to the wronged individual. Of course an embezzler by undergoing punishment for the crime against the State, is not thereby absolved from civil liability for the conversion. There was no violation of any constitutional right or of the Acts of Congress, which stands in lieu of the constitution in the Phillipine Islands. That case involved no question of due process of law, or the denial of equal protection of the laws, or unjust discrimination in the terms upon which a jury trial can

be had, or arbitrary presumption of guilt. It involves only a question whether or not there was imprisonment for debt.

The argument in support of the statute confounds throughout different things and proceeds on the supposition that, as the legislature can, under certain circumstances, make certain rules for the government of persons in particular occupations and the liabilities that may result therefrom, and sometimes justly discriminate between them by imposing different burdens and liabilities, that this same power of classification obtains as to the rights that these persons may enjoy in the courts of justice. But, such persons are not engaged in their calling or occupation when they seek their rights or defend their liberty in a court of justice. Justice is administered without respect of persons or causes. A man's right in the court cannot be different from the like rights granted other men, either because of the manner in which he obtains advances, or the class to which he belongs, or because he intended to defraud. Justice is not subject to classification, and this statute attempts to make an arbitrary distinction between defendants in these cases and other defendants, as to the extent of the privileges they shall enjoy when proceeded against in the courts of the country for like crime.

What is said in Peonage cases 123 Fed. 671, as to the validity of the original statute, 4730 of the Code, of 1876, before it was amended by the Act of 1885, is pure dictum. It was not enquired about in the questions propounded by the grand jury. The Judge's attention was called to the different acts which he declared unconstitutional. In answering questions put by a grand jury, the judge does not have the benefit of argument of counsel, and it is quite apparent from the reasoning of the court as to the case before it, that had the statute been before him, and the judge's attention been directed to it and to the objections now urged against it, the court would have declared

it unconstitutional. The statute then before that Court, did not contain the arbitrary legal presumption, embodied in the present statute. However this may be, in a case which presents such momentous issues, this court will rely upon its own judgment, not attach influence to a mere dictum of an inferior court in dealing with a different statute.

The fact that Bailey did not offer to testify to his intention does not avoid the effect of the decisions that such evidence cannot be received. It is not deferential to courts and it is specially forbidden by the Alabama and American Bar Association codes of ethics to offer evidence which counsel well knows the highest court has repeatedly decided is illegal. It is true Bailey had the right to testify in his own behalf, and give any *legal* testimony but the statutes of this State prescribe that no presumption shall be drawn against him if he does not testify in his own behalf, and therefore no presumption can be drawn in this case that Bailey had any intention to defraud, be cause he did not essay the vain task of testifying to his mental status or intent.

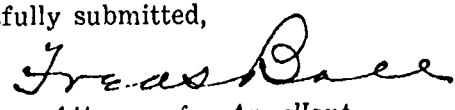
The strange contention is made, that although the amend ment to the statute making the quitting, etc., prima facie evidence of intent to defraud, be stricken out of the statute, yet a conviction in a court which held that legal presumption warranted and upon which the case was submitted to the jury, should nevertheless be affirmed. If the presumption could not be drawn as a matter of law, and the defendant was convicted by reason of it, the conviction would be illegal, although the remaining parts of the statute were severable from the other feature and capable of carrying out the legislative intent standing alone. See on the general proposition Cooley Con. Lim. Sec. 178 page 196 and note, where he says, speaking of the presumption in favor of an act as a whole and where parts of it have been declared invalid: "In one case the act should be sustained, unless its invalidity is clear; in

the other the whole should fall, unless it is manifest the portion not opposed to the constitution can stand by itself and that in the legislative intent it was not modified or controlled in its construction and effect by the part which was void."

Again he says, in another place: "We do not know that the legislature would have been willing that a part of the act should be sustained if the remainder were void, and there is generally a presumption, more or less strong, to the contrary." Cooley Con. Lim. note page 197.

However, the original statute is void, because, in its last analysis it punishes a man for the exercise of a constitutional right without which the statute can have no effect and was not designed to have any. Therefore, it is of no moment whatever, in this case, whether the presumption provision is separable from the rest of the statute. Taken together or taken separately they are part and parcel of a scheme to work the forfeiture of a citizen's liberty because he exercises an unconditional and arbitrary right, of the propriety of which the constitution and laws of the United States make him the sole judge.

Respectfully submitted,



Attorney for Appellant.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1910

No. 300

ALONZO BAILEY, *Plaintiff in Error,*

—VS.—

THE STATE OF ALABAMA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ALABAMA

SUPPLEMENTAL BRIEF OF ALEXANDER M. GARBER, ATTORNEY GENERAL, AND THOMAS W. MARTIN, ASSISTANT ATTORNEY GENERAL, FOR THE DEFENDANT IN ERROR

ALEXANDER M. GARBER,
Attorney General of Alabama.
THOMAS W. MARTIN,
Assistant Attorney General of Alabama.

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IN ERROR TO THE SUPREME COURT OF THE STATE OF ALABAMA.

SUPPLEMENTAL BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

In Reply to the Brief of the Attorney General of the United States as Amicus Curæ, and to the Supplemental Brief for Plaintiff in Error.

From the time the statute was first considered by the Supreme Court of Alabama, in *Ex parte* Riley, 94 Ala., 82, to the present time, that court has *consistently held that the purpose of the statute was to punish fraudulent practices—not the mere failure to pay a debt;* and that "*a mere breach*

of a contract is not by the statute made a crime. The criminal feature of the transaction is wanting unless the accused entered into the contract with the intent to injure or defraud his employer, and unless his refusal to perform was with like intent and without just cause." (*Ex parte* Riley *vs.* State, *supra.*) Or to state the holding in a different form, "While it is clear that a mere breach of contract cannot be made the foundation for a criminal offense, and that undue restrictions cannot be placed on the right of an individual to enter into contracts, yet, when the individual enters into a contract *with the intent to perpetrate a fraud,* it is equally obvious that he passes over the constitutional boundary line in respect to the free right to contract. * * *

This is all that is effectuated by the legislation in question."

Bailey *vs.* State, 158 Ala., 18.

It is conceded, we believe, by counsel for plaintiff in error that a statute having the purpose and capable of the construction given to it by the Supreme Court of Alabama, creates an offense which is clearly within legislative competency. We have here a statute of the State of Alabama, which has been interpreted by the highest court of the State as defining such an offense; but counsel ask this court to disregard that interpretation and by an adverse construction to hold that the State law is repugnant to the Constitution and laws of the United States. The statute can only be held invalid by disregarding that construction. We again call attention to the rule, which has long prevailed, that "this court accepts the interpretation of a statute of the State affixed to it by the court of last resort thereof."

Tullis *vs.* Lake Erie Company, 175 Ala., 348.
Am. Steel & Wire Co. *vs.* Speed, 192 U. S., 523.
Missouri Co. *vs.* McCann, 174 U. S., 580.
Sioux Co. *vs.* Trust Co., 173 U. S., 99.
Smiley *vs.* Kansas, 196 U. S., 447.
Castillo *vs.* McConnico, 168 U. S., 674.

It is important to note the principle upon which this rule is founded.

In Tullis *vs.* Lake Erie Company, 175 U. S., 348, the court considered a statute of Indiana making a railroad company liable to an employee injured by the negligence of a fellow-servant. It was contended that the act violated the equality clause of the Fourteenth Amendment. Under the construction given the act by the State Supreme Court the statute was held to apply in a way to conform it to the Fourteenth Amendment. It was still insisted, however, in this court that by reason of the peculiar phraseology of the act the court should give a different construction to it; but the Supreme Court of the State of Indiana having held otherwise as to the proper interpretation of the act, this court held that such construction would be followed in this court. And the court responded to the question propounded by the Circuit Court of Appeals, "That the statute *as construed and applied* by the Supreme Court of Indiana is not invalid and does not violate the Fourteenth Amendment to the Constitution of the United States."

In American Steel & Wire Co. *vs.* Speed, 192 U. S., 500, it was contended that a tax statute of the State of Tennessee violated the Fourteenth Amendment by reason of a provision of the State Constitution that no article manufactured of the products of Tennessee should be taxed otherwise than to pay inspection fees. This provision of the constitution was construed by the Supreme Court of the State to refer only to a direct levy of taxation on articles manufactured of the products of the State, and not to apply to the tax levied upon merchants. The tax in question in that case was the merchant's tax, and, therefore, not within the purview of the exemption clause from which it was asserted the discrimination arose. The merchant's tax was construed to apply to all merchants, but it was insisted that this court should review that construction and hold that the exemption feature in the Constitution applied likewise to the mer-

chant's tax. But the court, through Mr. Justice White, held that "The construction of the State law being operative on persons doing a like business with the Steel Company, it follows that there was no discrimination. * * * *As this statute has been construed by the State court* as applying to all merchants, and as embracing alike all persons engaged in the character of business which the Steel Company was carrying on, it follows that there is no ground on which to predicate the complaint of undue discrimination."

In Castille *vs.* McConnoco, 168 U. S., 674, Mr. Justice White for the court said:

> "The vice which underlies the entire argument of the plaintiff in error, arises from a failure to distinguish between the essentials of due process of law under the Fourteenth Amendment, and matters which may or may not be essential under the terms of a State assessing or taxing law. The two are neither correlative nor coterminous. The first, due process of law, must be found in the State statute, and cannot be departed from without violating the Constitution of the United States. The other depends upon the law-making power of the State, and, as it is solely the result of such authority, may vary or change as the legislative will of the State sees fit to ordain. It follows, that to determine the existence of the one, due process of law, is the final province of this Court, whilst the ascertainment of the other, that is, what is merely essential under the State statute, is a State question within the final jurisdiction of courts of last resort of the several States. When, then, a State court decides that a particular formality was or was not essential under the State statute, such decision presents no Federal question, providing always the statute *as thus construed,* does not violate the Constitution of the United States, by depriving of property without due process of law. This paramount requirement being fulfilled, as to other matters *the State interpretation of its own law is controlling and decisive.*"

In Missouri, Kansas and Texas Railway *vs.* McCann, 174 U. S., 580-585, it was argued that the statute of Missouri, as interpreted in the highest court of the State, had the effect of depriving a railway company doing the business of interstate commerce of power to limit its liability under bills of lading to its own line, thereby imposing a direct burden on interstate commerce. But Mr. Justice White said:

> "The contention advanced in these several propositions is, however, without foundation, from the fact that it proceeds upon an erroneous assumption of the purport of the Missouri statute in question, since the Supreme Court of Missouri, in applying that statute in the case before us, has, in the most positive terms, declared that it was not intended to and did not prevent a carrier engaged in interstate commerce traffic from limiting his liability to his own line, and that far from doing this the statute left the carrier the amplest power to make such limitation in receiving goods for interstate carriage and in issuing a through bill of lading therefor. * * * The reasoning now relied on then is, that, although the Supreme Court of the State of Missouri has interpreted the statute of that State as not depriving a carrier of power, on receiving an interstate shipment, to limit its liability to its own line, this court should disregard the interpretation given to the State statute, by the court of last resort of the State, and hold that the statute means the very contrary of its import, as declared by the Supreme Court of the State, and upon such construction decide that the State law is repugnant to the Constitution of the United States. But the elementary rule is that this court accepts the interpretation of the statute of a State affixed to it by the court of last resort thereof. * * * Considering the statute as thus interpreted by the Supreme Court of the State of Missouri, it cannot be held to be repugnant to the Constitution of the United States."

Without further discussion of the cases the rule is settled beyond question that this court will accept the construction

placed by the highest State court upon its own statute; and then this court will determine *whether the statute as thus construed*, violates the Federal Constitution or laws. If the basal fact of the offenses as defined and declared by the Alabama court is fraud, then the question of the conflict of this statute with Federal provisions is easy of solution.

In the supplemental brief, by an ingenious course of reasoning, counsel insist that the punishment for which the statute provides is rested on and can be justified only because there has been an unjust abandonment of the contract without just cause, and this statement founded on the next clause, to wit, that it cannot be based on anything else, because none of the antecedent frauds mentioned in the statute or all of them combined are criminal offenses. *The premise is false.* In the Riley case the court declared in language that cannot be misunderstood, that a mere *breach of a contract is not by the statute made criminal; and that the criminal feature was wanting unless the accused entered into the contract with the intent to injure or defraud and unless the refusal to perform was with like intent.* So that coupled with the abandonment without just cause, and as a part of it, there must exist a criminal intent on the part of the defendant. Is it fair to thus argue the case and to so far disregard the plain letter and meaning of the statute? Certainly counsel cannot plead ignorance of this established construction of the statute by the Alabama court. The statement is a clear perversion of the language of the statute quoted in the assignments of error in the brief; and leads to the conclusion that the statute reads *if any person enters into a contract for personal service and fails without just cause to perform it, he is guilty regardless of any fraud in the making or abandonment of it.* This, in effect, is the statute held void in Toney *vs.* State, 141 Ala., 120.

It would have been competent for the legislature to define the offense as consisting only of written contract, the fraudulent representation by the employee that he would

perform personal service, the obtaining of money on the faith of the contract, and representation, and the failure to perform the service with like intent to defraud—regardless of whether the money obtained was restored or the contract under which it was obtained was breached without just cause. But the legislature went further than was necessary and required the prosecution to show an abandonment without just cause and a failure to restore the thing fraudulently obtained, thus giving to the defendant the benefit of the restoration of the property of a cause for quitting if it be a just one, notwithstanding the criminal offense committed by him. This is merely of benefit to the defendant, and he certainly is in no position to complain. If it would have been competent for the legislature to define the offense, omitting all reference to quitting the service, certainly the statute is good with that feature. (Freeman *vs.* U. S., 217 U. S., 539; State *vs.* Nicholson, 67 Md., 1.)

It is further insisted that in its last analysis the statute punishes an American citizen because he exercises the fundamental right of quitting, without just cause, the performance of a contract of personal service, the enjoyment of which is secured to him by the Constitution and laws; but, as pointed out above, this "last analysis" is not justified, either by the words of the statute or by the construction thereof by the Supreme Court of Alabama, and therefore no punishment is imposed upon the exercise of this alleged "fundamental right." It is also said that the State has no power to declare that a person shall not exercise this right because prior to its exercise he may have offended against some law of the State. But the statute does not make that declaration. The State has the right to use the defendant's subsequent conduct, to wit, the fact of the abandonment of the contract, *as evidence that he originally intended to defraud.* The whole theory of this argument of counsel is based on the assumption that the original contract was honest and not fraudulent. But, as is said, the ordinary, natural, and inevitable

result of the statute, if allowed effect, being the compulsory performance of labor against the will of the employee, the statute is void. The statute does not compel the service under a contract, but merely punishes the employee under State sovereignty for the fraud; and there is no evidence in the record that the statute has the result mentioned.

But this aside, counsel say, the words and frame-work of the statute demonstrate that its purpose was not to punish fraud or to protect morals, but to compel performance of a contract for personal service. It is immaterial what counsel may think the legislature intended. The court has construed the statute otherwise, and that construction will be here accepted as conclusive. It is strange, indeed, that this foreign purpose has to this day failed of discovery by the Alabama courts and by Judge Jones, of the Federal District Court of Alabama, who held it constitutional in 1903. (Peonage Cases, 123 Fed., 690.)

It is further said that *the obtaining of money or property by a fraudulent promise to render personal service in the future not meant to be kept in whatever form accomplished can undoubtedly be made a crime by the State whether or not the thing fraudulently obtained is restored and whether or not the contract under which it was obtained was breached with or without just cause.* It must be admitted that the Alabama Supreme Court has construed this to be the plain meaning of the statute. It is then said that the statute purposely and studiously refrains from making the fraud mentioned therein the crime which is punished. This is just what the statute does if we look to the language of the statute and to its construction by the Alabama court. The only evidence contra is the statement of counsel. If the statute had declared it a crime to fraudulently enter into a contract and thereby obtain money, with no intent to perform, but simply to appropriate the money, it is admitted that the law would be valid; but counsel say because the statute permits the defendant to relieve himself by performing the en-

tire act is invalid; but this conclusion is unsound. (Freeman *vs.* U. S., 217 U. S., 539.) Counsel also refer to what is said to be a constitutional right to abandon a contract without just cause. We deny that the Constitution guarantees any man the *right* to abandon his contract, for if that were true no civil action could be maintained for its breach. This is a confusion of ideas. The most that can be said is that it guarantees a defendant against imprisonment for a mere abandonment of the contract. But in the case at bar the abandonment is not made an element of the fraud, but under the rule of evidence is *merely evidence of the fraud*, and by no sort of construction can it be held that the defendant is punished for an abandonment.

The Fourteenth Amendment.

It is admitted by opposing counsel that the statute would declare a valid rule of evidence if limited to cases where the defendant made a contract for immediate service, and immediately refused to enter upon it, for it is said that refusal might support an inference of his specific intent. This admission is decisive of the validity of the statute. If the defendant would have committed a fraud if he had immediately refused to enter upon the performance of his contract, that conclusion of fraud is the result of his subsequent refusal. With the lapse of time, the presumption of fraud becomes weaker.

In Considine *vs.* United States, 112 Fed., 342 (6 C. C. A.), heard before Circuit Judges Lurton, Day and Severns, opinion by Judge Day, the defendant was convicted of breaking and entering the post-office at Granville, Ohio, on October 15, 1896. He was arrested December 25, 1896, in Chicago, after undertaking to pass a money order, which was taken from the Granville post-office. The lower court charged the jury that if the defendant was in the town of Granville on the night the post-office was broken into, and there passing

under an assumed name, and that if afterwards some of the property which was stolen on that occasion was found in his possession, then the jury might infer that he was one of the persons who broke into the post-office and robbed it, unless he explained his possession of the stolen property in such a way as to show that he *was not, and could not have been,* connected with the breaking of the post-office; and the defendant requested the court to charge the jury that the fact of the goods being in his possession at Chicago on December 25 raised no presumption that he committed the crime. The charge was refused and Judge Day, for the court, said:

> "The unexplained possession of goods recently stolen, is entitled to more or less weight as an inculpatory circumstance, *depending upon the fact of each case,* and unless rebutted by the evidence, or explanation of the accused, the jury may act upon it. The term 'recently' in this connection, has no fixed and definite meaning, and is a variable term, depending upon other circumstances."

The theory upon which the defendant would have been guilty if he had abandoned the contract immediately, was and is the same theory upon which the presumption referred to by Judge Day is founded. The abandonment in the case suggested by opposing counsel was immediate and recent, and the presumption obtained; while in the case at bar, being thirty-four days subsequent to the making of the contract, the presumption could not obtain, according to their contention, and to admit it, even for the consideration of the jury, was a denial of due process of law; when, in truth, the weight to be attached to the possession of the fruits of the crime depends upon the facts of each case, and it is for the jury to find as a fact the existence of a criminal intent, after considering the abandonment and its *prima facie* legal effects. If it be admitted that the crime would have been complete if the defendant had immediately aban-

doned it, then this court, if it undertakes to decide this question, becomes a trier of facts, and is merely weighing the evidence before the jury, in determining whether the jury was warranted in finding a criminal intent. It is the rule in Alabama that the Supreme Court cannot revise the action of the lower court in refusing a new trial to the defendant; and the effect of the present contention is to invite this court to weigh the evidence and, if it be found insufficient, to grant to the defendant a new trial. This goes, not to the validity *vel non* of the statute, but to the sufficiency of the evidence to convict. This the court will not do (Smiley *vs.* Kansas, 196 U. S., 447).

It is also contended that the rule of evidence contained in the statute violates the Fourteenth Amendment in that the State constitution ordains that the right of trial by jury shall remain inviolate, and that the enjoyment of this right, as it is afforded to all other persons in like circumstances, is a part of the due process the Fourteenth Amendment commands the State to afford when it prosecutes persons for crime. If the statute declared that the abandonment was conclusive evidence of the fraud, it could not be sustained. But the legislature has merely given to the act of abandonment a *prima facie* presumption which the jury may accept or disregard at will. The Alabama Supreme Court expressly held, in the case at bar, that the statute does not make it the duty of the jury to convict on the evidence referred to in the enactment if unrebutted, whether satisfied thereby of the guilt of the accused beyond a reasonable doubt or not. It is still open for the jury to find him not guilty—therein is the fallacy of the contention of the opposing counsel. A like argument seems to have been in Adams *vs.* N. Y., 192 U. S., 585, and was made in practically all of the cases in which the courts of the land have sustained rules of evidence. This contention would lead to the invalidity of that long-established principle that the recent possession of stolen property is presumptive evidence of guilt.

Consedine *vs.* U. S., 112 Fed., 342. A burden similar to this is placed upon every defendant in whose possession recently stolen property may be found; and also prevails in certain civil cases where a conveyance is attacked for fraud by an existing creditor. Proof that the debt existed when the conveyance was made under a charge that it was fraudulent, casts the burden upon the defendant of proving the *bona fides* of the transaction.

It is said ordinarily men who make contracts and get advances do not mean at the time to defraud. Probably so, ordinarily, but the contrary frequently happens, and the legislature has the right to declare its *prima facie* effect. And it is also said that the formation of the criminal intent generally arises subsequently; and if that is conceded to be generally true, yet the legislature has the right to put the burden upon anyone to show that he does belong to the general class and not to the excepted one, granting for the sake of argument that such classification is correct.

The further insistence that the statute *compels* the jury to draw the inference of guilt, merely from the unlawful quitting, is a perversion of the statute.

Without Just Cause.

If we understand the argument of counsel it is that the legislature should have defined "just cause"—that is, should have laid down the facts going to make up or to show in every case whether the accused was or was not without just cause. In all the varied conditions of human affairs the mind of no man could conceive of every situation which would constitute just cause for the abandonment of a contract, and any attempt to lay down such facts would have been in itself futile. The words "just cause" include any legal defense for the breach of a civil contract. And if it be left for the jury to say whether the cause of quitting was a just one under the fact of each case, the defendant has

still greater rights of defense than if the law attempted to define that term. If there is merit in this contention it leads to the conclusion that the statute is void for uncertainty. The point having been made before and decided by the Supreme Court of Alabama, the question is not now open to this court. No element of a Federal question is involved in its determination.

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For the Defendant in Error.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1910

No. 300

ALONZO BAILEY, *Plaintiff in Error,*

—VS.—

THE STATE OF ALABAMA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ALABAMA

BRIEF OF THE ATTORNEY-GENERAL OF THE UNITED STATES AS AMICUS CURIAE

GEORGE W. WICKERSHAM,
Attorney-General.
WILLIAM R. HARR,
Assistant Attorney-General.

In the Supreme Court of the United States.

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THE STATE OF ALABAMA. } No. 300.

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STATEMENT.

The important bearing which this case has upon the enforcement of the acts of Congress against peonage, passed in pursuance of the Thirteenth Amendment, induced the present Attorney-General, as it did his predecessor, to obtain leave to appear therein by brief and argument.

When this case was here before, the court, speaking by Mr. Justice Holmes, and referring to the contention that the statute of Alabama involved was in violation of the Thirteenth and Fourteenth Amendments to the Constitution of the United States, said (*Bailey* v. *Alabama*, 211 U. S., 454):

> The trouble in dealing with this contention is due to the meager facts on which this case

> comes before us at this stage. If the principal case had been tried it is imaginable that it might appear that a certain class in the community was mainly affected, and that the usual course of events, including the consequences in case of inability to pay the fines, was such that in view of its operation and intent the whole statute ought to be held void.

The case has since been tried, with the result, we think, that, under the facts developed, no doubt remains as to the unconstitutional operation and intent of the statute. Agricultural laborers appear upon the face of the statute, as well as by its practical operation, to be the class aimed at, and compulsory service in satisfaction of debt the object sought to be accomplished.

At the trial the State offered in evidence the written contract of Bailey to work for the Riverside Company as a farm hand for one year for the sum of $12 per month, the contract reciting that Bailey had received $15 in advance and was to receive the balance due him at the rate of $10.75 per month. (Rec., 11, 12.)

The evidence on behalf of the State further showed that Bailey began work for the company under the contract and continued to work thereunder for a month and three or four days, when he quit, according to the manager of the company, without just cause, and refused and failed to refund the money advanced him. (Ib.)

It was also shown that Bailey was a negro. (Ib.)

This was all the evidence in the cause, none being offered on behalf of the defendant.

The jury, under instructions from the court as to the law, found the defendant guilty and fixed the damages sustained by the Riverside Company at $15, and assessed a fine of $30. (Rec., 7.)

The court sentenced the defendant to hard labor for twenty days for the fine, and for an additional term of one hundred and sixteen days in payment of costs; in all, to one hundred and thirty-six days' service. (Ib.)

This judgment was affirmed by the Supreme Court of Alabama. (Rec., 17.)

The statute of Alabama in question, as first enacted (Feb. 17, 1885, Laws Ala., 1884–5, p. 142), provided:

> *Obtaining property by false pretenses.* Any person who by any false pretense or token and with the intent to injure or defraud, obtains from another any money or personal property, or any person who has entered into a written contract, with, at the time, the intent to defraud, to do or to perform any act or service and in consideration thereof obtains from the hirer money or other personal property, and who abandons the service of such hirer without just cause, without first repaying such money or other advances, and with the intent to injure or defraud, must, on conviction, be punished as if he had stolen it.

This statute, with some modification in form, became section 3812 of the Code of Alabama of 1886 and section 4730 of the Code of 1896. It was entitled in the Codes "Obtaining property under false pretenses—under contract for performance of act or service."

The statute as embodied in the Codes was amended October 1, 1903, to read as follows, the amendments being indicated by italics (Gen. Acts, Ala., 1903, p. 345):

> SEC. 4730. Any person, who with intent to injure or defraud his employer, enters into a

> contract in writing for the performance of any act *of* service; And thereby obtains money or other personal property from such employer, and with like intent, and without just cause, and without refunding such money, or paying for such property, refuses *or fails* to perform such act or service, must on conviction be punished as if he had stolen it. *And the refusal or failure of any person, who enters into such contract, to perform such act or service, or refund such money, or pay for such property, without just cause, shall be prima facie evidence of the intent to injure or defraud his employer.*

The statute was further amended by an act approved August 15, 1907, so as to read as follows, the amendments being indicated by italics (Gen. Acts, Ala., 1907, p. 636):

> SEC. 4730. Any person, who with intent to injure or defraud his employer, enters into a contract in writing for the performance of any act of service, and thereby obtains money or other personal property from such employer, and with like intent, and without just cause, and without refunding such money, or paying for such property, refuses or fails to perform such act or service, must on conviction be punished *by a fine in double the damage suffered by the injured party, but not more than $300, one-half of said fine to go to the county and one-half to the party injured; and any person, who with intent to injure or defraud his landlord, enters into any contract in writing for the rent of land, and thereby obtains any money or other personal property from such landlord, and with like intent,*

without just cause, and without refunding such money, or paying for such property, refuses or fails to cultivate such land, or to comply with his contract relative thereto, must on conviction be punished by fine in double the damage suffered by the injured party, but not more than $300, one-half of said fine to go to the county and one-half to the party injured. And the refusal or failure of any person, who enters into such contract, to perform such act or service *or to cultivate such land,* or refund such money, or pay for such property without just cause shall be prima facie evidence of the intent to injure *his employer or landlord or to defraud him. That all laws and parts of laws in conflict with the provisions hereof be and the same are hereby repealed.*

The indictment in this case was under the statute as last amended.

ARGUMENT.

I.

The judgment in this case, and the statute of Alabama upon which it is based, are in conflict with the Thirteenth Amendment to the Constitution of the United States and Sections 1990 and 5526 of the Revised Statutes.

By the Thirteenth Amendment the people of the United States determined that involuntary servitude, except as a punishment for crime, whereof the party had been duly convicted, should be utterly abolished within the jurisdiction of the United States. By the act of March 2, 1867, passed for its enforcement, and embodied in sections 1990 and 5526 of the Revised Statutes, Congress prohibited the system known as peonage, penalized the holding or returning of any person to such a condition, and nullified all acts, laws, resolutions, orders, regulations or usages of any State or Territory, by which "the voluntary or involuntary service of any persons as peons, in liquidation of any debt or obligation, or otherwise," was sought to be established, maintained or enforced, *directly or indirectly*.

In *Clyatt* v. *United States* (197 U. S., 207, 216), where sections 1990 and 5526 were held to be constitutional, this court said:

> That which is contemplated by the statute is compulsory service to secure the payment of a debt.

Discussing the subject of peonage, the court had said (ib., p. 215):

> What is peonage? It may be defined as a status or condition of compulsory service, based upon the indebtedness of the peon to the master. The basal fact is indebtedness. * * * Peonage is sometimes classified as voluntary or involuntary, but this implies simply a difference in the mode of origin, but none in the character of the servitude. The one exists where the debtor voluntarily contracts to enter the service of his creditor, the other is forced upon the debtor by some provision of law. *But peonage, however created, is compulsory service, involuntary servitude.* The peon can release himself therefrom, it is true, by the payment of the debt, but otherwise the service is enforced. A clear distinction exists between peonage and the voluntary performance of labor or rendering of services in payment of a debt. *In the latter case the debtor, though contracting to pay his indebtedness by labor or service, and subject like any other contractor to an action for damages for breach of that contract, can elect at any time to break it, and no law or force compels performance or a continuance of the service.*

Referring to the Thirteenth Amendment, the court said (ib., 216):

> This Amendment denounces a status or condition, irrespective of the manner or authority by which it is created.

We think this case demonstrates that the statute of Alabama "compels performance or a continuance of the service" of the debtor, against his will, by threat of punishment if he breaks his contract, and that, as in the case of the peon stated by the court, a debtor thereunder can release himself from the servitude by the payment of the debt, "but otherwise the service is enforced."

The *Clyatt* case, it will be observed, settled the question, left somewhat in doubt by the opinion of the court in *Robertson* v. *Baldwin* (165 U. S., 275, 280), that—

> the constitutional freedom of the laborer should be interpreted to mean, not only that he can not be compelled to enter a service against his will, but that he can not even be forced to continue in a service which he has voluntarily entered under a contract to remain for a stated period of time. (See Freund, Police Power, sec. 448.)

It is true that in the *Clyatt* case the court recognized that there might be "exceptional cases, such as the service of a sailor, *Robertson* v. *Baldwin*, 165 U. S., 275, or the obligations of a child to its parents, or of an apprentice to his master, or the power of the legislature to make unlawful and punish criminally an abandonment by an employee of his post of labor in any extreme cases." But we are here concerned only with the ordinary case of a contract for agricultural service, which certainly can not be said to be an extreme one, justifying unusual measures.

The only question for consideration, therefore, is whether the statute of Alabama involved, as construed and applied in this case, is a proper exercise of the police power of the State to punish fraudulent practices, or is intended to insure personal service in payment of debt. We think that an analysis of the statute and its practical application in this case make it plain that the latter is its real purpose and effect.

The statute was first enacted in 1885, but it appears that prior to the amendment making the refusal or failure of the debtor to perform the act or service or return the money or property advanced, *prima facie* evidence of an intent to defraud, it could not be effectively enforced.

It appears that the act, as amended, is the result of a serious effort on the part of the State of Alabama to enforce the performance of labor contracts.

By an act of the legislature approved March 1, 1901, the State penalized the action of a contract laborer or tenant of land who before the expiration of his contract "and without the consent of the other party, and without sufficient excuse, to be adjudged by the court," broke his contract and entered into a second contract of a similar nature with another person.

In *Toney* v. *The State* (141 Ala., 120), the Supreme Court of Alabama declared this act unconstitutional "because of the restrictions it purports to place on the right to make contracts for employment and con-

cerning the use and cultivation of land." The court there said (Id., 125):

> The act in question purports to prohibit the employee and renter to make contracts of the kind he may have abandoned except under one of three alternative conditions. The first of these, the employer in the case of the employee, or the landlord in the case of the renter, could, by withholding his consent, render unavailable; the *second, the existence of an excuse for the abandonment to be judged of by the court—could never be known to be available except at the risk of, and at the end of, a criminal prosecution;* the third, that of giving notice of the existing contract would tend to prevent the making of a similar contract with a new employer or landlord. * * *

The act of March 1, 1901, was also declared unconstitutional by United States District Judge Jones upon the further ground that it denied to laborers the equal protection of the law guaranteed by the Fourteenth Amendment. (*Peonage Cases*, 123 Fed. Rep., 671–691.)

The act of March 1, 1901, failing, resort was then had to the statute here in question. But first the statute, which had been found ineffective under the ruling of the Supreme Court of the State in *Ex parte Riley*, 94 Ala., 82, upon the subject of intent, was amended by adding the *prima facie* clause.

That our inference is correct as to the reason for the insertion of the prima facie clause appears from

what that court said when this case first came before it (*Bailey* v. *The State*, 158 Ala., 18, 24), as follows:

> In *Ex parte Riley* (94 Ala., 82, 83) it was said: "As the intent is the design, purpose, resolve, or determination in the mind of the accused, it can rarely be proved by direct evidence, but must be ascertained by means of inferences from the facts and circumstances developed by the proof. In the absence, however, of evidence from which such inferences may be drawn, the jury are not justified in indulging in mere unsupported conjectures, speculations, or suspicions as to the intentions which were not disclosed by any visible or tangible act, expression, or circumstances."
>
> It is no doubt true that the difficulty in proving the intent, made patent by that decision, suggested the amendment of 1903 to the statute, which provides that the refusal or failure of a person who enters into such contract to perform such act or service, or refund such money, or pay for such property, without just cause, shall be *prima facie* evidence of the intent to injure or defraud his employer.

The *Riley* case was similar to the present, in that there had been a partial performance of the contract, and nothing to indicate bad faith but the subsequent breach, which arose out of the failure of Riley to serve in his son's stead, as he had agreed, when the boy abandoned his work. Nevertheless, Riley had been held for trial. But the Supreme Court of Alabama, in awarding relief, said (94 Ala., 85):

> This failure, without more, was a mere breach of contract. All the circumstances

> point to the conclusion that the petitioner entered into the contract with the honest intention of having his son perform the service stipulated for. The making of the contract was not a trick, contrivance or device for getting money or other personal property. There is nothing in the evidence to suggest that, at the time the contract was entered into, the petitioner intended thereby to injure or defraud Counters. This essential element of the charge against him is wholly unsupported by proof.

The statute in question was further amended by an act approved August 15, 1907 (Gen. Act Ala., 1907, p. 636), so as to cover expressly tenants of land, and by changing the penalty so as to make it peculiarly applicable to contracts with agricultural laborers.

As originally enacted, the statute, by limiting its operation to the case where the debtor, in breaking his contract for personal service, failed to refund the money advanced him, indicated that its principal purpose was to enforce the payment of a debt, and not to punish fraudulent practices. The *prima facie* rule added in 1903 emphasizes the purpose of the legislature to penalize the failure or refusal to refund the money or perform the service. The later amendments, by changing the punishment from that applied to stealing a like amount—fine and imprisonment (see secs. 5049 and 5050, Code of Alabama, 1896, vol. 2, pp. 366, 368)—to double the damage suffered by the injured party, but not more than $300, one-half to go to the party injured, and by

applying it specifically to tenants of land, indicate the class against whom the statute was directed and the character of contracts sought to be protected.

The history of this legislation and the position of the Supreme Court of Alabama in regard thereto are thus stated in its opinion upon the first appeal (*Bailey* v. *State*, 158 Ala., 18, 22):

> The law under which the applicant was charged with crime, and under which the commitment was made, is an act entitled "An act, to amend an act entitled an act to amend section 4730 of the Criminal Code of 1896 approved October 1, 1903." (Gen. Acts 1907, p. 636.) The statute, in its form as section 4730 of the code of 1896, came before this court for construction in the case of *Ex parte Riley* (94 Ala., 82; 10 South., 528), and there it was clearly pointed out that a mere breach of contract is not by the statute made a crime, but that the criminal feature of the statute consists in the entering into a contract with the intent to injure or defraud the employer, and the refusal of the employee to perform the contract, with a like intent. (*Dorsey's case*, 111 Ala., 40; 20 South., 629; *McIntosh's case*, 117 Ala., 128; 23 South., 668.) In neither of the cases cited was the constitutionality of the statute presented for consideration; but in the case of *State* v. *Vann* (150 Ala., 66; 43 South., 357), the constitutionality of the statute, as section 4730 of the code of 1896, was presented for determination, and it was there insisted that the statute was obnoxious to the twentieth section of the bill of rights of 1901, which

is in this language: "That no person shall be imprisoned for debt." The insistence was overturned, and the statute was held not to be unconstitutional, the court, as the basis of the ruling, again pointing out the fact that "a mere breach of contract is not by the statute made a crime," but that the criminal feature consists in the intent to injure or defraud. This intent to injure or defraud marks the line of cleavage between the statute in judgment and the one approved March 1, 1901 (Acts, 1900–1901, p. 1208), which made it a misdemeanor for any person, who had contracted in writing to labor for or serve another for any given time, etc., and who, before the expiration of such contract, and without the consent of the other party, and without sufficient excuse (to be judged by the court), shall leave such other party, etc. This last statute was by Judge Jones of the federal court held to be obnoxious to the state constitution (*Peonage cases* (D. C.), 123 Fed., 671); and was by this court held to be unconstitutional in *Toney's case* (141 Ala., 120; 37 South., 332; 67 L. R. A., 286; 109 Am. St. Rep., 23), because of the restrictions it attempts to place on the right to make contracts. These two cases are now urged as authority in support of the insistence of appellant that the statute under consideration is violative of the Constitution, and we are asked to overrule the *Vann case, supra.* While it is clear that a mere breach of contract can not be made the foundation for a criminal offense, and that undue restrictions can not be placed on the right of an individual to enter

> into contracts, yet when the individual enters into a contract, with the intention to perpetrate a fraud, it is equally obvious that he passes over the constitutional boundary line in respect to the free right to contract; and it is within legislative competency to enact a law penalizing the entering into a contract with such intent, and obtaining money or other personal property through such agency. This is all that is effectuated by the legislation in question. On its face the purpose is to punish fraudulent practices, not the mere failure to pay a debt. Thus considered, it is constitutional. Without further extension of the argument we not only decline to depart from the ruling made in *Vann's case*, on this subject, but reaffirm it. (*Banks* v. *State*, 124 Ga., 15; 52 S. E., 74; 2 L. R. A. (N. S.), 1007.)

In the same opinion the court also approved its previous decisions upholding the *prima facie* clause. (*The State* v. *Thomas*, 144 Ala., 77; *Vann's Case*, 150 Ala., 66.)

It may be that the legislature can punish fraudulent practices in obtaining property by false pretenses under contract for the performance of an act or service. If such were the real object of the statute, it would be clearly distinguishable from one punishing a mere breach of contract. (*Freeman* v. *United States*, 217 U. S., 539.) But is the fact that "*on its face* the purpose is to punish fraudulent practices, not the mere failure to pay a debt," sufficient? Clearly not. As this court has said, "in whatever language a statute may be framed, its purpose must

be determined by its natural and reasonable effect." (*Henderson* v. *Mayor of New York*, 92 U. S., 268.)

What is the natural and reasonable effect of this statute, logically and as illustrated by the case at bar?

The statute purports to punish fraud on the part of the debtor in entering into and breaking his contract, but limits the punishment to cases where he fails or refuses to return the money or property advanced or perform the act or service contracted for. What then is the crime, the alleged fraud—which as we shall hereafter show is *conclusively* presumed against him because of his failure or refusal to return the advance or perform the service—or such failure or refusal? If the statute is a *bona fide* attempt to punish fraud, why limit it to the case where the debtor fails to perform the service or return the advance? What would be said of a statute which, while purporting to prevent theft, provided that there should be no offense if the property were returned?

Fortunately, the Supreme Court of Alabama has itself informed us as to at least one of the chief objects of the statute, and by a parity of reasoning the other may be easily inferred.

In *McIntosh* v. *The State* (117 Ala., 128), where it was held that the trial court erred in refusing to charge the jury that if they believed McIntosh performed enough labor under his contract to repay the money advanced him they must acquit, the Supreme Court of Alabama said (130 *ib.*):

> Refunding the money, or restoring other property, with which the employer, by reason

> of the contract was induced to part, *is a principal purpose, the statute is intended to enforce.* When the money is refunded, or the property restored, the employer is saved from injury or loss, and subsequent breaches of the contract must be redressed by the pursuit of civil remedies. The rendition of service by the defendant for a period more than sufficient to have repaid the money advanced to him, takes away an essential ingredient of the offense.

Notwithstanding this decision that court, in *State* v. *Vann* (150 Ala., 66), held that the statute was not repugnant to the provisions of the Alabama Bill of Rights that no person should be imprisoned for debt.

If refunding the money is a principal purpose the statute was intended to enforce, and the method of enforcement is by compelling the performance of the service, under threat of fine and consequent imprisonment, then inevitably the statute imposes imprisonment for debt and involuntary servitude. And if refunding the money can properly be said to be a principal purpose of the statute, so likewise is the performance of the service, by which the return of the money is secured. Both these acts are equally potent in suspending the operation of the statute, and in law as in mathematics things that are equal to the same thing are equal to each other.

In the present case Bailey entered into his contract for service and worked for over a month thereunder. He then quit the service, "without good cause," it is said, whatever that may mean. To the average mind such facts negative any idea of fraud in the making

of the contract. As above pointed out, it was so held by the Supreme Court of Alabama in the *Riley* case. Yet, because of the alleged *prima facie* rule established by the amended statute, Bailey, under circumstances parallel to those in the *Riley* case, has been convicted of fraud and condemned to hard labor for the county. Who can gainsay that, on this record, he has been virtually imprisoned for debt?

We think that the Supreme Court of Alabama, in its decisions upholding the amended statute, has allowed itself to be misled by a mere artifice into mistaking the shadow for the substance of things.

In Florida and Mississippi, we are advised, statutes of the same general tenor as the Alabama statute have been, by the United States judges in charges to grand juries, declared void, as inconsistent with the act to enforce the Thirteenth Amendment.

In North Carolina, in a case not reported, the chief justice of the highest court of the State said:

> This indictment is under revisal, 1905, 3367, which provides that if any tenant or cropper shall procure advances from a landlord to enable him to make a crop on the land rented to him, *and then willfully abandon the same without good cause*, and without paying for such advances, he is guilty of a misdemeanor and liable to a fine and imprisonment. This and the almost identical provisions of section 3366 apply to certain counties named therein. As such conduct is merely a breach of contract, and there is no crime if the advances are repaid, a grave question arises whether these

> sections are not in violation of the provisions in the state constitution (art. 1) forbidding "imprisonment for debt, except in cases of fraud," and also whether they do not conflict with the Thirteenth Amendment to the Constitution of the United States against "involuntary servitude, except as punishment for crime whereof the party shall have been (i. e., previously) duly convicted." If the service is enforced, unless the debt is paid, is it not "involuntary servitude?"

In Louisiana an "Act to enforce labor contracts," approved July 5, 1892, provides (Acts of La. 1892–94–96, p. 71):

> That whoever shall willfully violate a contract of labor upon the faith of which money or goods have been advanced and without first tendering to the person from whom said money or goods was obtained the amount of money or value of the goods shall be deemed guilty of a misdemeanor, * * *

This act was held not to be in violation of the Thirteenth and Fourteenth Amendments to the Federal Constitution in *State* v. *Murray*, 116 La. Rep., 655, though it is manifest that it punishes a mere breach of contract.

The United States attorney for the Western District of Louisiana has written the Department as follows in respect to the Louisiana statute and the practices thereunder:

> I do not believe that there is a well-advised man in the State, lawyer or layman, that does

not know that this act was passed in order to give the large planters of the State absolute dominion over the negro laborer. It was no secret among the planters that "the laborer could not leave the place upon which he was engaged unless he paid whatever debt was asserted against him by his employer before so doing." If he did leave, he was sought for and brought back and put to labor, not simply to pay the debt claimed, but to be held indefinitely, at the will of his employer.

This was peonage without the aid of this act; no arrest was made under the law; the laborer was taken into manual custody by the employer, or some one representing him, without the intervention of any legal process—no affidavit and no warrant. In other instances the act was resorted to as a mere subterfuge; an affidavit was made before some magistrate, a warrant was issued and placed in the hands of the constable of his court, and the person sought was arrested under it; and, instead of being put under bond to answer a charge under this act, he was delivered to the employer, who paid the costs of the magistrate and constable, and he was taken back to the place of his employment and put to work. These cases seldom, if ever, reached the attention of the district attorneys, grand juries, or judges. One of the judges referred to in this letter learned of this procedure and instructed the police juries not to allow any claim for costs that might be presented to them for fees or costs rendered in such cases; and, further, called it to the attention of the

district attorney of his district, who promptly notified the magistrates and constables that they had no authority to *compromise* any case without his knowledge and consent.

This action on the part of the judge and the district attorney went far to break up this mode of procedure, and some other course had to be invoked to meet the wishes of the employer. Affidavits were made, warrants issued, and the party arrested and put in jail; the employer engaged the services of some attorney to defend the man he had caused to be apprehended for the alleged violation of this labor act; the attorney waived preliminary examination, had the bond fixed, and the employer became surety on an appearance bond; the prisoner was released and promptly returned to work; the bond was executed for the appearance of the accused to *answer such charges as the grand jury might prefer against him.*

No charges were ever preferred, of course, the employer failing to appear before the grand jury, or, if appearing, exonerating the accused, and having the charge either ignored or continued for further action. The very worst sort of servitude. The prisoner is unrepresented; the attorney representing the employer is led to believe that the case is at an end, receives his fee, and has no further connection with the matter. The prisoner simply knows that he is out of jail; when he asks about it, if he ever does, he is informed that his case has been continued and he remains in bondage, working for his surety, perhaps without any compensation, and surely "laboring against

> his will to pay the debt formerly claimed against him," and for the nonpayment of which he was arrested.

If the court wishes a practical illustration of the manner in which the Alabama statute may be used, it need only refer to the records in cases Nos. 378 (pp. 215–220) and 379 (pp. 383–387) on its docket for this term, *Harlan et al.* v. *McGourin* and *Gallagher* v. *McGourin*. These show that Harlan,, who was manager of a lumber company **in Alabama, swore** out warrants before a justice of the peace in Alabama, under **the statute in question,** charging two men named Barsoda and Krum with violating their contracts of service without repaying certain advances made them; that the parties named were arrested and put in jail, and that subsequently Harlan dismissed the complaints upon their entering into new contracts with the company. Harlan, Gallagher, and others were convicted of conspiring to return certain persons to peonage, and the evidence in those cases showed that a most atrocious system of enforced labor prevailed in their lumber camp.

A former officer of the Department of Justice, who made a special study of the subject of peonage, says:

> I have no doubt, from my investigations and experiences, that the chief support of peonage is the peculiar system of state laws prevailing in the South, intended evidently to compel service on the part of the workingman.
>
> From the usual condition of the great mass of laboring men where these laws are

in force to peonage is but a step at most. In fact, it is difficult to draw a distinction between the condition of a man who remains in service against his will, because the State has passed a certain law under which he can be arrested and returned to work, and the condition of a man on a near-by farm who is actually made to stay at work by arrest and actual threats of force under the same law. The actual spoken threat of an individual employer who makes his laborer stay at work against his will by fear of the chain gang and the threat of the State to send him to the chain gang whenever his employer chooses to have him arrested are the same in result and do not seem to me very different in any other way.

This Congress may have vaguely understood when it passed Revised Statutes, 1990, declaring void all laws under color of which peonage should be maintained. But Congress omitted to provide any punishment for enforcing such laws. Void or not, until repealed or Congress provides a special punishment for officers and others who use them for this criminal purpose of producing involuntary service, they are in the way as the main strength of peonage.

In construing the Alabama statute the court will bear in mind that the legislature would naturally seek to accomplish by indirection what it could not do directly. But section 1990 of the Revised Statutes specifically covers such a case. Mere plausibility—which is all we think the statute in question presents—

is therefore insufficient. Can it be doubted that the statute, as practically construed and applied in this case, at least indirectly enables a system of involuntary service in payment of debt to be established, maintained, and enforced?

Freeman v. *United States* (217 U. S., 539) is in no wise inconsistent with the argument here made against the Alabama statute. The only ground of objection to the Philippine statute involved in that case was that the penalty paid for the misappropriation of the personal property of another went to the creditor and not into the public treasury. We agree that this was clearly insufficient to show that the statute imposed imprisonment for debt, and there was nothing else in the statute to justify any such implication. It clearly and unequivocally imposed a penalty for misappropriating and misapplying the personal property of another. Here the statute imposes no punishment for the fraud condemned unless the debtor fails to perform the service or return the property. The nature of the penalty in this case is only one of a number of incidents that go to show the actual intention of the legislature in enacting this statute. Were the penalty to go entirely to the State, the essential purpose of the statute would not be changed. Reference to the nature of the penalty is made for the purpose of showing that a particular class of contracts is aimed at, rather than as indicating an intention to imprison for debt.

II.

The judgment in this case, and the statute of Alabama upon which it is founded, are in violation of the Fourteenth Amendment to the Constitution of the United States.

(1) AS DENYING THE DEFENDANT THE EQUAL PROTECTION OF THE LAWS.

It is common knowledge that Alabama is chiefly an agricultural State and that the majority of laborers upon the farms and plantations are negroes.

While the original statute applied generally, the amendments, in terms and by their necessary effect, single out tenants of land and agricultural laborers. Every reported case under the statute, it will be observed, is that of a farm laborer. The maximum penalty fixed by the statute, $300, also makes it peculiarly applicable to this class of laborers.

In *Ex parte Drayton* (153 Fed., 986), the United States District Court for South Carolina held unconstitutional a statute of that State which provided that—

> any laborer working on shares of crop or for wages in money or other valuable consideration, under a verbal or written contract to labor on farm land, who shall receive advances either in money or supplies and thereafter willfully and without just cause fail to perform the reasonable service required of him by the terms of the said contract, shall be liable to prosecution for a misdemeanor, etc.

The opinion in that case states that the purpose of this statute to coerce agricultural laborers, largely

negroes, into a performance of their contracts of service, was not denied by the Attorney-General of the State, but openly defended on the ground of public necessity.

The court held that it was unnecessary to determine—

> whether a statute declaring it to be a misdemeanor to fail to pay debts, or to perform contracts generally, will fall within the general police powers of the State, for this statute is not of that character. It is directed toward a single class of citizens, which is arbitrarily singled out and punished for failing to perform certain duties.

It is true that in that case the court distinguished the statute of Alabama, *as originally enacted*, from the South Carolina statute, as had been done by Judge Jones in the *Peonage cases*. (123 Fed. Rep., 690.) The distinction was made on the ground that the Alabama statute was general in its nature and "applies to all persons who enter into contracts with intent to injure or defraud, and declares that persons who obtain money with such intent shall be punished as if they had stolen it."

But even if the Alabama statute, as originally enacted, was not to be regarded as class legislation, and was valid, notwithstanding the language it even then contained, showing that its real purpose was to compel personal service in satisfaction of debt, the subsequent amendments, by applying it specifically to tenants of land and changing the punishment so as

to make it peculiarly applicable to debtors of the agricultural labor class, and the actual enforcement of the statute against that class of laborers alone, place it on all fours with the South Carolina statute in the respect under consideration.

In this connection the language of this court in *Yick Wo* v. *Hopkins* (118 U. S., 356, 373), in reference to the California laundry ordinance, seems especially pertinent:

> This conclusion, and the reasoning on which it is based, are deductions from the face of the ordinance, as to its necessary tendency and ultimate actual operation. In the present cases we are not obliged to reason from the probable to the actual, and pass upon the validity of the ordinances complained of, as tried merely by the opportunities which their terms afford, of unequal and unjust discrimination in their administration. For the cases present the ordinances in actual operation, and the facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion, that, whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration, and thus representing the State itself, with a mind so unequal and oppressive as to amount to a practical denial by the State of that equal protection of the laws which is secured to the petitioners, as to all other persons, by the broad and benign provisions of the Fourteenth Amendment to the Constitution of the United States.

> Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution. This principle of interpretation has been sanctioned by this court in *Henderson* v. *Mayor of New York* (92 U. S., 259), *Chy Lung* v. *Freeman* (92 U. S., 275), *Ex parte Virginia* (100 U. S., 339), *Neal* v. *Delaware* (103 U. S., 370), and *Soon Hing* v. *Crowley* (113 U. S., 703).

The general principles governing the determination of the question whether a State statute is in violation of the equal protection clause of the Fourteenth Amendment are fully stated by Mr. Justice Harlan, in *Connolly* v. *Union Sewer Pipe Co.* (184 U. S., 540, 558), where the antitrust statute of Illinois was held invalid because exempting from its operation agricultural products or live stock while in the hands of the producer or raiser.

In *Gulf, Colorado & Santa Fe Ry.* v. *Ellis* (165 U. S., 151), a statute of Texas which imposed an attorney's fee on railway companies alone was held unconstitutional. Speaking by Mr. Justice Brewer, the court used this language, which seems to be equally pertinent here:

> It is, of course, proper that every debtor should pay his debts, and there might be no

> impropriety in giving to every successful suitor attorney's fees. Such a provision would bear a reasonable relation to the delinquency of the debtor, and would certainly create no inequality of right or protection. But before a distinction can be made between debtors, and one be punished for a failure to pay his debts, while another is permitted to become in like manner delinquent without any punishment, there must be some difference in the obligation to pay, some reason why the duty of payment is more imperative in the one instance than in the other.

We submit that the statute of Alabama, as amended and as construed and applied in this case, singles out a particular class of laborers and, under the guise of punishing fraudulent practices, penalizes a mere breach of contract for the purpose of coercing such laborers into the performance of their obligations. Doubtless the employers of such labor have much to complain of, but this does not relieve the statute of the taint of unconstitutionality. The abuse of personal liberty that a statute so construed and applied would engender is manifest to all.

The situation in this respect is well stated by Judge Jones in his charge to the grand jury in the *Peonage cases* (123 Fed. Rep., 691):

> The "great, general, and essential principles" of government can not be bent or swayed to the prejudice of renters or laborers, who are freemen and citizens, in order to improve the efficiency of our system of labor,

or to avert the disastrous consequences to landlords and farmers which result in every other business in life when the obligations of contracts are not performed or respected. The gap once made by discrimination against laborers and renters, no other class of men would be safe from like discrimination. All other classes of society, alike with landlords and persons engaged in agricultural pursuits, are subject to losses and damages from the unreliability and dishonesty of debtors and employees who fail to perform contracts; but in all free governments the good sense of mankind, since the days when imprisonment for debt was abolished, has condemned and frowned down any attempt to coerce the performance of civil obligations by criminal penalties.

(2) AS DEPRIVING THE DEFENDANT OF LIBERTY AND PROPERTY WITHOUT DUE PROCESS OF LAW.

We shall discuss under this heading the operation and effect of the provision of the Alabama statute making the failure or refusal of the debtor to refund the money or property advanced him to perform the service contracted for, "without just cause," *prima facie* evidence of an intent to defraud his employer.

The general rule that it is within the power of the legislature to prescribe rules of evidence so as to affect the burden of proof, may be admitted. (*Holmes* v. *Hunt*, 122 Mass., 505–517.) But the rule is subject to certain qualifications which are of especial importance in criminal proceedings.

In *People* v. *Cannon* (139 N. Y., 32, 43), where the authorities were collated and examined, Judge Peckham said:

> It can not be disputed that the courts of this and other States are committed to the general principle that even in criminal prosecutions the legislature may with some limitations enact that when certain facts have been proved they shall be *prima facie* evidence of the existence of the main fact in question. (See cases cited in 103 N. Y., 143, *supra*.) The limitations are that the fact upon which the presumption is to rest must have some fair relation to, or natural connection with the main fact. The inference of the existence of the main fact because of the existence of the fact actually proved, must not be merely and purely arbitrary, or wholly unreasonable, unnatural or extraordinary, and the accused must have in each case a fair opportunity to make his defense, and to submit the whole case to the jury, to be decided by it after it has weighed all the evidence and given such weight to the presumption as to it shall seem proper. A provision of this kind does not take away or impair the right of trial by jury. It does not in reality and finally change the burden of proof.

The Rhode Island cases, referred to below, were cited by Judge Peckham and distinguished from the statute he was reviewing.

In *State* v. *Beswick* (13 R. I., 211) the clause in a statute providing that—

> * * * the notorious character of any such premises, or the notoriously bad or intem-

> perate character of persons frequenting the same, or the keeping of the implements or appurtenances usually appertaining to grog shops, tippling shops, or places where such liquors are sold, shall be *prima facie* evidence that said liquors are kept on such premises, for the purposes of sale within the State—

was held unconstitutional. Durfee, C. J., said (p. 217):

> * * * It virtually strips the accused of the protection of the common-law maxim, that every person is to be presumed innocent until he is proved guilty, which is recognized in the Constitution as a fundamental principle of jurisprudence. And we think it is repugnant to the constitutional provision that the accused shall not "be deprived of life, liberty, or property, unless by the judgment of his peers or the law of the land."

Again, p. 218:

> * * * . Among these rules there is none which is more fundamental than the rule that every person shall be presumed innocent until he is proved guilty. "This rule," said Judge Selden, in *The People* v. *Toynbee* (2 Park Cr., 490, 526), "will be found specifically incorporated into many of our state constitutions, and is one of those rules which in our Constitution are compressed into the brief but significant phrase, 'due process of law.'" Indeed to hold that a legislature can create artificial presumptions of guilt from facts which are not only consistent with innocence, but which are not even a constituent part of the crime when committed,

> is to hold that it has the power to take away from a judicial trial, or at least substantially reduce in it, the very element which makes it judicial. To hold so is to hold that the legislature has power to bind and circumscribe the judgments of courts and juries in matters of fact, and in an important measure to predetermine their decisions and verdicts for them. (See also *State* v. *Kartz*, ib.)

In *Board of Commissioners* v. *Merchant* (103 N. Y., 143, 148), Judge Earl said:

> A law which would practically shut out the evidence of a party and thus deny him the opportunity for a trial would substantially deprive him of due process of law. It would not be possible to uphold a law * * * which made that *prima facie* evidence of crime which had no relation to a criminal act and no tendency whatever by itself to prove a criminal act.

It may be that the absolute or immediate failure or refusal to execute a contract would warrant the inference of an intent to defraud. But where, as here, the performance of the contract is entered upon and continued for a period sufficient to establish good faith, a subsequent breach would support no such inference as to the original intent in making the contract. This was distinctly held by the Supreme Court of Alabama in the *Riley* case, *supra*.

In *Commonwealth* v. *Rubin* (165 Mass., 453) it was held that if the conversion followed hard upon the receipt of the property, it was not unnatural to assume that the felonious intent existed in the beginning.

There the conversion was immediate, and besides the question was left to the jury, while a rule of law which makes such a fact *prima facie* evidence of guilt in effect concludes the question in the absence of countervailing evidence.

In *Kelly* v. *Jackson* (6 Pet., 622, 631) the court, speaking by Mr. Justice Story, said:

> What is *prima facie* evidence of a fact? It is such as, in judgment of law, is sufficient to establish the fact; and, if not rebutted, remains sufficient for the purpose. The jury are bound to consider it in that light, unless they are invested with authority to disregard the rules of evidence, by which the liberty and estate of every citizen are guarded and supported. No judge would hesitate to set aside their verdict and grant a new trial, if, under such circumstances, without any rebutting evidence, they disregarded it. It would be an error on their part, which would require the remedial interposition of the court. In a legal sense, then, such *prima facie* evidence, in the absence of all controlling evidence or discrediting circumstances, becomes conclusive of the fact; that is, it should operate upon the minds of the jury as decisive to found their verdict as to the fact.

See also to the same effect Greenleaf on Evidence, section 33.

In *Vankirk* v. *Staats* (24 N. J. L., 121, 123) the Supreme Court of New Jersey held that "in order to warrant a commissioner's order to hold to bail for the fraudulent *contracting* of a debt, there must be

some proof of fraudulent intention at the time of contracting," and that "a subsequent refusal to pay over an account will not warrant an inference of fraud in contracting." The court said:

> But, besides this defect, the affidavits contain no facts from which the commissioner could legally infer that the debt was fraudulently contracted. They do not even prove that the defendant, when he contracted the debt, did not mean to pay it. The most that is shown is, that under various pretenses he refuses to settle. No false statement or fraudulent concealment of his circumstances are alleged, nor is it shown that he made any false representation to induce the plaintiffs to trust him. He simply promised to account and pay, as every man does when he contracts a debt. Fraud in contracting the debt, in the nature of things, means some fraudulent conduct at the time of the contract whereby the other party was deceived.

A similar ruling was made in *Steinhardt* v. *Beir* (60 N. Y. Super. Ct. Rep., 489) and in *Mooney* v. *La Follette* (21 N. Y. App. Div., 510).

In the present case, Bailey entered upon the performance of his contract and worked thereunder for over a month. He had not worked a sufficient time to pay for the money advanced him, however. The facts proved negative any intention to defraud on his part at the time of making the contract and receiving the money. Yet the jury, under the instructions of the court that failure or refusal to perform the act or service, or return the advance,

without just cause, was *prima facie* evidence of an intent to defraud, convicted him, and the court sustained the judgment.

"Where an act, in itself indifferent," said Lord Mansfield, in *Rex* v. *Woodfall* (5 Bur., 2667), "if done with a particular intent become criminal, the intent must be proved and found; but where the act is in itself unlawful, the proof of justification or excuse lies in the defendant, and in failure thereof the law implies a criminal intent." So, an intent to murder is conclusively presumed from the deliberate use of a deadly weapon. (1 Greenleaf on Evd., sec. 18.)

This statute makes acts, in themselves as consistent with innocence as guilt, sufficient evidence of guilt. It presumes guilt as matter of law. And in its practical operation it makes this a conclusive presumption.

By the law of Alabama a person on trial for a criminal offense can testify for himself; but it has been decided that he can not testify as to his uncommunicated purpose or intent, "such mental status, when relevant, being a matter of inference to be determined from the circumstances of the case by the jury." (*McCormick* v. *Joseph*, 77 Ala., 236–240.)

This rule was recognized as applying in this case. (Rec., 18.)

How is the presumption of guilt which this statute impresses upon the accused to be rebutted? It is true that Bailey was not called as a witness. Why call him? What could he testify to? He would have to admit signing the contract, receiving the

advance, working for a time, failure to refund, and quitting the service. As to anything further, his mouth was closed. The "inference from the circumstances of the case" as to his intent are determined by the presumption of law created by this statute. He is deprived of his right to submit to the jury the thing to be proved—fraudulent intent.

The statute, as construed and applied in this case, takes away from the accused the presumption of innocence. The controlling presumption of guilt raised by it is wholly irreconcilable with the presumption of innocence. These can not exist together without unreasonable confusion. In *Coffin* v. *United States* (156 U. S., 432, 453) Mr. Justice White, speaking for the court, said:

> The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.

This axiomatic and elementary principle is substantially destroyed by the creation of an artificial presumption of guilt, which the accused, under the rule stated, is wholly unable to refute.

The rule of evidence established by the statute receives no assistance from the words "without just cause." Whatever they mean, the fact that a man breaks his contract without just cause, especially after he has begun its performance and continued therein for a period which indicates good faith, has

no such relation to the making of the contract as to warrant what is, in effect, a conclusive presumption of the existence of a felonious intent in the beginning.

The Supreme Court of Alabama says in this case, that "just cause" is "defensive matter brought forward by the accused, necessarily depending for its sufficiency upon the facts of each case." As pointed out by the same court in holding the act of March 1, 1901, unconstitutional, the existence of an excuse of this kind "could never be known to be available except at the risk of, and at the end of a criminal prosecution." Under such circumstances, the statute would seem to be void for ambiguity. (*United States* v. *Reed*, 92 U. S., 214; 12 Cyc., 142.)

In *The State* v. *Thomas* (144 Ala., 77), the Montgomery City Court held this *prima facie* rule unconstitutional, but was reversed by the Supreme Court of Alabama.

On its face, the statute creates what Greenleaf terms a disputable presumption of law. (1 Greenleaf on Evidence, sec. 33.) But, as construed and applied in this case, the presumption is conclusive, because of the inability of the defendant to testify to his intent otherwise than by the very acts which the law says shall be deemed evidence of guilt.

The rules referred to virtually deprived Bailey of an opportunity to be heard in his defense. The facts—which tended to show his innocence—were, under the rule stated, concluded against him. The jury were not instructed that they might disregard the *prima facie* rule, if they were satisfied, from the

fact of partial performance, that the defendant entered into the contract in good faith. Both court and jury evidently regarded such fact as of no importance under the rule.

It is true the Supreme Court of Alabama, in its final opinion in this case, said (Rec., 19):

> Again, it must be borne in mind that the rule of evidence fixed by the statute does not make it the duty of the jury to convict on the evidence referred to in the enactment, if unrebutted, whether satisfied thereby of the guilt of the accused beyond a reasonable doubt or not. On the contrary, with such evidence before them, the jury are still left free to find the accused guilty or not guilty, according as they may be satisfied of his guilt or not, by the whole evidence.

But the trouble with this is, that the *prima facie* rule makes the only acts of the debtor which would go to show his intent, including partial performance of the contract, evidence against him, and all that he can prove is that he broke the contract for just cause—a wholly immaterial matter.

In *Twining* v. *State of New Jersey* (211 U. S., 78, 101), the court, speaking by Mr. Justice Moody, and referring to guaranty of due process of law in the fourteenth amendment, said, that—

> * * * consistently with the requirements of due process, no change in ancient procedure can be made which disregards those fundamental principles, to be ascertained from time to time by judicial action, which have relation

> to process of law and protect the citizen in his private right, and guard him against the arbitrary action of government.

In that case the court refers to notice and opportunity to be heard as one of "the fundamental conditions which seem to be universally prescribed in all systems of law established by civilized countries."

Can anyone read the record in this case and escape the conclusion that, by the operation of the rules of evidence referred to, Bailey has been condemned without a hearing? It is true he was brought into court and a jury impaneled to try him. But, by the rules stated, the facts which show his innocence were converted into evidence of guilt, and he was forced to stand mute, while under the forms of law he was deprived of his liberty.

GEORGE W. WICKERSHAM,
Attorney-General.
WILLIAM R. HARR,
Assistant Attorney-General.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1910

No. 300

ALONZO BAILEY, *Plaintiff in Error,*

—VS.—

THE STATE OF ALABAMA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ALABAMA

SUPPLEMENTAL BRIEF OF THE ATTORNEY GENERAL OF THE UNITED STATES AS AMICUS CURIAE

GEORGE W. WICKERSHAM,
Attorney-General.
WILLIAM R. HARR,
Assistant Attorney-General.

In the Supreme Court of the United States.

OCTOBER TERM, 1910.

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v.
THE STATE OF ALABAMA. } No. 300.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ALABAMA.

SUPPLEMENTAL BRIEF OF THE ATTORNEY-GENERAL OF THE UNITED STATES AS AMICUS CURIÆ.

I.

AS TO IMPRISONMENT FOR DEBT.

It is not contended that the thirteenth amendment, or section 1990, Revised. Statutes, invalidates generally statutes imposing imprisonment for debt, whether such a statute provides for imprisonment at hard labor or not. The statute of Alabama is not attacked on that ground. It is not a statute imposing imprisonment for debt in the ordinary sense, although construed as we think it should be construed it might be violative of the provision of the state constitution prohibiting imprisonment for debt.

The statute in question punishes, as we contend, *the mere breach of a contract for the performance of personal service.* This is the feature which distinguishes it from a statute merely imposing imprisonment for debt, as debts may be contracted in various ways not necessarily arising from a failure to perform a contract for personal service. If, as here, a State undertakes to punish a mere breach of contract for failure to perform personal service upon which money bas been advanced, then the statute operates to compel by coercion personal service in satisfaction of debt, and this brings it within section 1990 of the Revised Statutes and the thirteenth amendment, as construed by this court in the *Clyatt* case. It would make no difference in this case if neither the statute in question nor the general law of Alabama prescribed punishment by imprisonment at hard labor or otherwise for a breach thereof. The vital fact is that the statute, as we construe it, undertakes to punish a breach of a contract for personal service—to compel by coercion personal service in satisfaction of a debt. There is no relation between this statute and statutes generally imposing imprisonment for debt.

For the convenience of the court, sections 1990 and 5526 of the Revised Statutes are here set out:

> SEC. 1990. The holding of any person to service or labor under the system known as peonage is abolished and forever prohibited in the Territory of New Mexico, or in any other Territory or State of the United States;

and all acts, laws, resolutions, orders, regulations, or usages of the Territory of New Mexico, or of any other Territory or State, which have heretofore established, maintained, or enforced, or by virtue of which any attempt shall hereafter be made to establish, maintain, or enforce, *directly or indirectly*, the voluntary or involuntary service or labor of any persons as peons, in liquidation of any debt or obligation, or otherwise, are declared null and void.

SEC. 5526. Every person who holds, arrests, returns, or causes to be held, arrested, or returned, or in any manner aids in the arrest or return of any person to a condition of peonage, shall be punished by a fine of not less than one thousand nor more than five thousand dollars, or by imprisonment not less than one year nor more than five years, or by both.

II.

IT IS IMMATERIAL WHETHER THE SO-CALLED PRIMA FACIE RULE IS CONCLUSIVE OR NOT, AS IN EITHER CASE IT CONVERTS THE STATUTE FROM ONE PUNISHING FRAUD INTO ONE PUNISHING A MERE BREACH OF CONTRACT.

It may be conceded, as held by the Supreme Court of Alabama in the *Riley* case (94 Ala., 82), that the statute as originally enacted punished only fraudulent practices, and that so construed it was constitutional. But the amendment of October 1, 1903, providing in substance that the breach of the contract should be evidence of the intent to defraud required by the original statute, destroyed the very foundation of the statute, whether the *prima facie* rule is conclusive or

not. This is shown by the fact that, as held in the *Riley* case, under the original statute it was not only necessary to allege that the party entered into the contract with intent to defraud, but to *prove* that fact, the court holding that the mere breach of the contract was no evidence of the intent to defraud; while under the statute as amended, although the State must allege that the contract was entered into with the intent to defraud, etc., all that it is required to prove in order to make out its case is that the defendant broke the contract without just cause, proof of the breach of the contract being sufficient evidence of the intent to defraud. In other words, under the amended statute a person may be convicted for a mere breach of the contract, and the intent to defraud which was said to mark the line of cleavage between this and the act of March 1, 1901, declared unconstitutional in *Toney* v. *The State* (141 Ala., 120), becomes of no real consequence, being inferred from the mere breach of the contract.

As stated in our original brief, the history of this statute shows that prior to the amendment it was ineffective for the enforcement of labor contracts. There can be no doubt that the amendment making breach of the contract *prima facie* evidence of the intent to defraud was added for the purpose of making this statute applicable to the enforcement of labor contracts, such amendment being made shortly after the act of March 1, 1901, which referred specifically to contract laborers and tenants of land, was declared unconstitutional. The inference in

this case as to the intention of the legislature to use this statute to coerce the performance of labor or other contracts by agricultural laborers and tenants of land is shown further by the amendment in 1907, applying it specifically to tenants of land and changing the penalty to $300, one-half to go to the party injured, advances on labor contracts not usually exceeding that amount.

That the State of Alabama has been constantly engaged in an effort to compel laborers to perform their contracts by personal service is shown by the act of March 1, 1901, declared unconstitutional in *Toney* v. *The State*, and the immigration statute referred to in the *Harlan* and *Gallagher* cases, section 5510, Code of Alabama, 1896, as well as the present statute. Similar statutes exist in nearly all, if not all, the Southern States employing agricultural labor. Many of them, being less artfully worded than the statute in question, have been declared unconstitutional by the supreme courts of the States and the federal courts in the cases cited in the brief. There can be no doubt that these statutes are intended to coerce laborers into the performance of their contracts and are the greatest source of peonage in the States referred to.

III.

THE PRIMA FACIE RULE.

No case is cited by counsel for the State which supports their contention that a breach of a contract for personal service upon which advances have been re-

ceived can be made *prima facie* evidence of a fraudulent intent in entering into the contract. Such cases as *Adams* v. *New York* (192 U. S., 585), where the possession of policy slips, etc., was made *prima facie* evidence of illegal possession and *Commonwealth* v. *Williams* (6 Gray (Mass.), 1), where the delivery of spirituous liquors in any other place than a dwelling house was declared *prima facie* evidence of sale are clearly not in point.

The only case cited in support of the rule which is at all analogous to the present case is *State* v. *Kingsley* (108 Mo., 135), cited on page 36 of the brief of the attorney-general for Alabama. He states that case as follows:

> In the case of *State* v. *Kingsley* (108 Mo., 135), *supra*, the court considered a statute which provided that every person who should obtain board or lodging by means of any trick or deception or false or fraudulent representation, and should fail or refuse to pay therefor, should be held to have obtained the same with intent to cheat or defraud, and that proof of the facts mentioned should be prima facie evidence of the intent.

It is manifest from his own statement of the case that it is necessary to establish fraudulent intent before the *prima facie* rule in this statute becomes operative.

There is a statute of Tennessee similar to the innkeepers' statute of Missouri, which is sustained in

State v. *Yardley* (95 Tenn., 546). That statute provided:

> SECTION 1. *Be it enacted by the General Assembly of the State of Tennessee,* That persons who shall, at any hotel, inn, or boarding house, order and receive, or cause to be furnished, any food or accommodation, with intent to defraud the owner or proprietor of such hotel, inn, or boarding house out of the value or price of such food or accommodation; and any person who shall obtain credit at any hotel, inn, or boarding house, by the use of any false pretense or device, or by fraudulently depositing at such hotel, inn, or boarding house any baggage or property of less value than the amount of such credit, or of the bill by such person incurred, unless credit be given by express agreement; *and any person who, after obtaining credit or accommodation at any hotel, inn, or boarding house, and shall surreptitiously remove his or her baggage or property therefrom, shall, upon conviction, be adjudged guilty of a misdemeanor and be punished accordingly.*
>
> SEC. 2. *Be it further enacted,* That proof that lodging, food, or other accommodation *was obtained by false pretense,* or *by false or fictitious* show or pretense of baggage; *or that the party refused to pay for such food, lodging, or accommodation on demand;* or that he *absconded* without paying, or offering to pay, for such food, lodging, or other accommodation, *or that he surreptitiously removed,* or attempted to remove, his or her baggage, shall be *prima facie* proof of the fraudulent intent mentioned in section 1 of this act.

In upholding this statute and the *prima facie* cause, the Supreme Court of Tennessee was careful to say (p. 567):

> It should be added, by way of construction, that the clause "or that the party refused to pay for such food, lodging, or accommodation, on demand," used in the second section to describe one of the acts, which, when proven, shall be taken as *prima facie* evidence of fraudulent intent, *does not refer to, or include, an honest refusal,* a mere failure or declination, to pay on demand. Standing alone, the words used would naturally embrace every refusal, but, when they are considered in connection with other parts of the act, and in their true relation thereto, it is manifest that *only a fraudulent refusal* or evasion was in the legislative mind when that clause was introduced.
>
> Every other clause of that section, and every clause of the first section, by express terms, relates to fraudulent conduct, and to that alone, as the matter for investigation and punishment in the courts. Only fraudulent acts are contemplated and embraced in the first and second sections.

In other words, the Supreme Court of Tennessee held that where the only thing shown was a refusal to pay, the fraudulent intent must be proved before the *prima facie* rule could become operative. In this case mere breach of contract **is made evidence** of the fraudulent intent.

All the courts, including the Supreme Court of Alabama, have uniformly held that the mere breach

of a contract is no evidence of intent to defraud. (*Ex parte Riley*, 94 Ala., 82; *State* v. *Williams*, 63 S. E., 949; *Ex parte Hollman*, 79 S. E., 9; *Vankirk* v. *Staats*, 24 N. J. L., 121).

The *prima facie* rule established by the Alabama statute, as shown by this case, is unyielding. The inference under that statute of an intent to defraud from a mere breach of the contract is as absolute when the breach occurs eleven months thereafter as when it occurs one day after the making of the contract.

Counsel for the State to the contrary notwithstanding, it is not admitted in this case that the legislature can declare the immediate breach of the contract prima facie evidence of intent to defraud, although, as stated in our original brief (p. 34), a breach of the contract might justify such an inference by the jury. But the argument is beside the mark, because we have here no such case. The rule as established by the Alabama statute is not limited to the immediate breach of the contract, but extends, as illustrated in this case, to a breach of contract occurring during the period of service, however long continued.

It is submitted that a *prima facie* rule is practically conclusive in this case; that the circumstances tending to establish good faith on Bailey's part were, under the rule, held to prove guilty intent, and that there was no way in which he could overcome the effect of the rule, in view of the other rule of evidence established by the Alabama courts forbidding

a party to testify to his uncommunicated intent except by his acts, which was recognized as applicable in this case by the Supreme Court of Alabama.

IV.

THE JUDGMENT IN THIS CASE DENIES BAILEY THE EQUAL PROTECTION OF THE LAW.

Even if it be held that the statute in question only undertakes to punish debt incurred by fraud, Bailey is denied the equal protection of the law by the judgment in this case, in violation of the fourteenth amendment, because other persons incurring debt by fraud are not liable to imprisonment therefor.

In *Carr* v. *The State* (106 Ala., 35) the Supreme Court of Alabama held that the provision of the State constitution forbidding imprisonment for debt forbade imprisonment for debt *in case of fraud.* In that case a statute of the State providing in substance that any banker who received a deposit knowing of his insolvency should be held guilty of a misdemeanor and be punished by fine in double the amount of the deposit, one-half of which should be paid to the depositor, was held unconstitutional. The Supreme Court of Alabama said (pp. 37–38):

> The statute, it is insisted for the appellant, is violative of Art. I, sec. 21, of the constitution of the State, which provides: "That no person shall be imprisoned for debt." It is to be observed in the outset that this provision of the organic law is essentially different from the provisions on this subject in many other state constitutions, in that it contains no exception

of "cases of fraud;" and on the same line is essentially different from the constitutions of this State of 1819, 1861, and 1865, in each of which the language is that, "The person of a debtor, where there is not strong presumption of fraud, shall not be detained in prison after delivering up his estate for the benefit of his creditors in such manner as shall be prescribed by law." (Const. 1819, Art. I, sec. 18; Const. 1861, Art. I, sec. 18; Const. 1865, Art. I, sec. 22.) This change was made in the constitution of 1868 (Art. I, sec. 22), where the provision assumed its present form. In *Ex parte John Hardy* (68 Ala., 303, 318), it was held—and we do not understand that there was any division of opinion on this point—that the elimination of the exception as to frauds was a pregnant omission, which left the guaranty of immunity from imprisonment to the debtor to apply to all cases of debt, whether they involved fraud or not. So that the statute we are considering can derive no aid from the idea that the receipt of a deposit by a banker under the circumstances stated is a fraud, and, hence, that the transaction would constitute "a case of fraud," since even in such cases there can be no imprisonment for debt.

In the case at bar the court says (R., 21) that the Carr case was differentiated from cases like the present one in *Chauncey* v. *State* (130 Ala., 71).

In *Chauncey* v. *State* the court sustained a statute of that State making it a criminal offense to obtain board by fraud or misrepresentation. The indictment in that case charged that the defendant in

obtaining board in violation of the statute falsely represented that he was Supreme Grand Treasurer of the Knights of the Mystic Chain, and that he had money to pay his board in a certain bank. All that the Supreme Court does in the Chauncey case to distinguish that case from the Carr case is to say that it is entirely different therefrom without attempting to explain why.

Manifestly the Chauncey case and the Carr case are essentially similar in that both are cases where imprisonment for fraud was provided.

In the Carr case the court held that a banker who incurs a debt by what is in effect fraudulent misrepresentation as to his solvency can not be imprisoned therefor. In the present case the court holds that a contract laborer who incurs a debt with intent to defraud may be imprisoned therefor. The only apparent line of demarcation between the two cases is that one is a laborer and the other a banker.

V.

As stated upon the argument, our main interest and insistence is upon the invalidity of the Alabama statute and judgment in this case under the thirteenth amendment and section 1990 of the Revised Statutes.

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