

case of murder and can not be heard in a murder trial, even when the defendant has put his character in issue.

41. Because the Court permitted the witness W. D. McWorth to testify, at the request of the Solicitor-General, over the objection of the defendant made at the time the testimony was offered, that the same was immaterial.

"Mr. Pierce is the head of the Pinkerton office here. I do not know where he is; the last time I saw him was Monday evening, I do not know where Mr. Whitfield is (Mr. Whitfield was also a Pinkerton man). I saw him the last time Monday afternoon. I do not know whether Pierce and Whitfield are in the city or not."

The Court admitted this testimony over the objections of the defendant, made at the time the testimony was offered, for the reasons stated and in so doing committed error. This was especially prejudicial to the defendant. Pierce and Whitfield were part of the Pinkerton's force in the city of Atlanta and the inference of the solicitor was that he wished their whereabouts to be shown, upon the theory that the Pinkertons were employed by Frank for the National Pencil Company and that a failure on the part of Frank to produce them would be a presumption against him, as he stated it, upon the well-known principle of law that if evidence is shown to be in the possession of a party and not produced, it raises a presumption against them.

42. Because the Court permitted McWorth, at the instance of the Solicitor-General to testify over the objections of the defendant, made when the evidence was offered, that the same was irrelevant, immaterial and illegal:

"I reported it (the finding of the club and envelope) to the police force about 17 hours afterwards. After I reported the finding, I had a further conference with the police about it about four hours afterwards. I told John Black about the envelope and the club. I turned the envelope and club into the possession of H. B. Pierce."

The Court heard this testimony over the objection of the defendant, made as above stated, and in doing so committed error, for the reasons herein stated.

This was prejudicial to the defendant, because the Solicitor-General contended that his failure to sooner report the finding of the club and the envelope to the police were circumstances against Frank. These detectives were not employed by Frank, but by Frank for the National Pencil Company, and movant contends that he is not bound by what they did or failed to do. The Court should have so instructed the jury.

43. Because the court permitted the witness Irene Jackson, at the instance of the Solicitor-General and over the objection of the defendant, that the testimony was irrelevant, immaterial, illegal, to testify as follows:

Q. Do you remember having a conversation with Mr. Starnes about something that occurred.

A. Yes, sir.

Q. Now what was that dressing room incident that you told him about that time?

A. I said she was undressing.