STATE OF MISSOURI VS. McCULLOUGH.

A case which has attracted a great deal of attention because of the public interest involved, was that of State of Missouri v. McCullough, in the Circuit Court of Greene County, before Judge Orin T. Patterson. It will be recalled that defendant was indicted for the offense of burglary and larceny in the second degree, in that he feloniously and burglariously broke and entered a building situated in the City of St. Louis, with intent to steal certain referendum petitions therefrom, and that he did take said petitions, thereby committing burglary in the second degree.

It is perhaps not necessary to dwell at length upon the facts. It will suffice to say that said petitions were in existence for the purpose of securing a referendum on an Ordinance of the City of St. Louis, known as the "United Railways Compromise Bill." Many persons were hostile to the passage of this ordinance and, in order to secure a resubmission of the question to the people, had caused these petitions to be circulated. The offense alleged occured the night before the petitions were by law required to be filed in order to be of any effect. While they were in the custody of one of the Election Commissioners, defendant broke into the building where they were kept, and took them from the safe in which they were deposited.

These, in short, are the facts in the case. Defendant was indicted for burglary in the second degree, under Section 4520, R. S. Mo. At the trial, after the State had introduced evidence showing the breaking, etc., defendant interposed a demurrer to the evidence, which was sustained by the Court.

This decision has met with much criticism, nevertheless it is the writer's opinion that the Court, as a matter of law, takes a perfectly sound position. The statute upon which the State based its case defines burglary in the second degree in a general way, and says, in short, that anyone who shall break and enter, etc., with intent to take any goods, wares, merchandise, or other valuable thing therein kept and de-

posited, shall be guilty of burglary in the second degree. The State placed great stress on the words "or other valuable thing," and offered to show that referendum petitions were within the meaning of the statute. Now in order to show that defendant had committed the offense alleged the State surely must show that defendant had taken that which is subject to larceny, that is, personal property. At common law, referendum petitions were unknown, so unless there is a statute in Missouri expressly or by implication making them subject to larceny, it is to be presumed that they are not such property. The question then comes down to this: Is a referendum petition in Missouri such personal property as may be feloniously and burglariously taken and stolen? Unless the State could show that the legislative will had made such instruments subject to burglary and larceny, the Court was bound to sustain defendant's demurrer, as the State had not made out the offense alleged. Section 4927, R. S. Mo., defines "personal property" for this purpose, and says, "the term personal property as used shall be construed to mean goods, chattels, effects, evidences of rights in action, and all written instruments by which any pecuniary obligation or any right or title to property, real or personal, shall be created, acknowledged, etc."

These petitions do not come within the statute, because they were purely public documents of no private or pecuniary benefit or detriment to anyone, and thus they fall within the class of written instruments, which were not subject to burglary and larceny at common law. The State attempted to change the character of the instruments by changing the name from "referendum petitions" to "paper pamphlets," thus showing the uneasiness with which it viewed its case, but without effect, because the paper as paper was merged into the higher form of instrument as petitions.

Such petitions are not personal or private property as the law now stands, but are simply public documents devoted to a public purpose, and are not subject to larceny until the legislature shall see fit so to declare. Defendant may have been

guilty of obstructing the course of legislation, but was not guilty of the higher grade of offense as alleged.

It is regrettable that so few lawyers and law students have seen anything to commend in this decision. It is merely another evidence of the prevailing spirit in America, which seeks to disregard the principles of representative government guaranteed by our constitutions. We profess to put our trust in three distinct departments of government, acting independently of each other, yet, by such measures as the referendum, we make the legislature a debating club, instead of the representative law-making body it is supposed to be. And when occasionally we find a judge who believes his duty to be the interpretation of the law as given him by the legislature, instead of going further in the dangerous course of judicial legislation in order to be in harmony with public opinion, we are ready to condemn him, instead of endorsing his action.

GEORGE H. SKIDMORE.