

THE COMET.

Saturday, February 8, 1879

SUPREME COURT DECISIONS.

MONDAY, February 8, 1879.

Reported Weekly by Jenkins & Little, Attorneys at Law.

MARTHA S. BAILEY AND HUSBAND, vs. W. H. FITZGERALD, ADMINISTRATOR.

The main question involved in this case is the validity of an investment by George G. Harvey, intestate of appellee, made during the late war, under an order of the Probate Court of Tallahatche county, by which he, as guardian of appellant Martha J. Bailey, (then Martha J. Bradford, a minor) converted a portion of her funds into Confederate Bonds, under an Act of the Legislature of Mississippi, passed in 1861.

SIMBALL, C. J.

It is the settled doctrine of this Court in numerous cases that the State, during the existence of the late civil war, could rightfully legislate upon all subjects of internal and domestic policy, and that the Courts could exercise their ordinary and accustomed jurisdiction. There was no limitation or restriction on the exercise of the powers of the State during that period within the sphere just named, except that any law passed or act done by its legislature in contravention of the Federal Constitution should be void.

2. The State Judges in their official capacity are bound to give supremacy to the Constitution of the United States, and to repugnance to the Federal Constitution, and the statute is sustained, a review or writ of error by the Supreme Court of the United States may be had, if the record shows that such questions were before the court.

3. If the decision of the highest tribunal of the State is in favor of the validity of a State statute, which statute is alleged to be repugnant to the Federal Constitution, and the statute is sustained, a review or writ of error by the Supreme Court of the United States may be had, if the record shows that such questions were before the court.

4. Since the decision of this Court in Trotter vs. Trotter, 40 Miss., 707, the Supreme Court of the United States in Horn vs. Lockhart, 17 Wallace, 579, had the precise question before it, and it is held that the statute and the order of the Probate Court are valid.

5. We are constrained to follow the adjudication of the Supreme Court of the United States in this instance.

Decree reversed and cause remanded for further proceedings.

CHALMERS, J. concurred, in a written opinion.

MAJOR JACKSON, vs. THE STATE.

The plaintiff in error was jointly indicted with one Robertson, for the crime of murder. At a term of Court proceeding that at which he was tried plaintiff in error was introduced as a witness against Robertson who had several and was on trial. At said trial, plaintiff in error made admissions showing his participation in the crime for which he was yet held in custody.

At a subsequent term of Court when plaintiff in error was being tried, the State introduced witnesses to prove what his testimony was when he implicated himself at the trial of Robertson.

CHALMERS, J. concurred, in a written opinion.

It was erroneous to introduce the prisoner's own testimony against himself. The fact that the Circuit Judge cautioned him at the time he testified against Robertson that he need not testify about his own connection with the crime, does not affect the result.

The principle is that no statement made upon oath in a judicial investigation of a crime can ever be used against the party making it in a prosecution of him for the same crime because the fact that he is under oath of itself operates as a compulsion upon him to tell the truth and his statements, therefore, cannot be regarded as free and voluntary.

JUDGMENT REVERSED AND NEW TRIAL AWARDED.

JOSHUA DALEY, Ex-Sheriff, vs. STATE OF MISS., Use, etc.

This was a suit upon a Sheriff's bond under §225, Code of 1872, to secure damages for failure of duty in returning eight executions issued upon judgments rendered in a Justice's Court. One of the executions was never returned, the other seven were returned after the proper return day.

The Sheriff seeks to escape liability upon their faces and because of the invalidity of the judgments upon which they were based and upon the further ground that the defendants in execution were insolvent.

The alleged invalidity in the executions consisted of dates found in them which were manifestly erroneous and in some cases absent, (as, for instance, the recitation in one of them of the rendition of a judgment at a safe subsequent to issuance of the f. f.), and the fact that in nearly every instance the executions commanded the Sheriff to collect larger rates of money than the judgments upon which they had been issued.

CHALMERS, J. Neither of these irregularities protect the officer in his failure to levy and return them. No more invalidities were shown which would excuse a neglect to obey its command upon the part of a judicial or executive officer.

tion void and hence will not justify neglect to serve it. Plaintiff only seeks to hold the officer liable for the amounts of the judgments and it is well settled that an execution is not void because issued for too large a sum. Three of the executions were improperly admitted in evidence, two because issued as void judgments, and one because issued on no judgment at all.

In the two, summons was executed after the return day, the judgments were by default, no evidence as to the amounts having been issued. In the third the defendant appeared and consented in writing that judgment might be entered against him. The consent was written in judgment book but no judgment entered, and upon it execution issued.

3. The Court erred in its charge with reference to the wagon owned by Delahanty, one of the defendants in execution, which it was claimed was exempt property. Delahanty stated that he had no property liable to execution. He then, in response to a cross interrogatory, stated that he owned a wagon worth \$75--one wagon is by law exempt to every inhabitant living in the country, and personal property to be selected by the debtor not exceeding \$250 in value is exempt to every resident of a town.

4. The Court properly charged the jury that when the Auditor in the return of the execution had established its devolution upon the defendants to show the insolvency of the debtors.

5. The Court erred, by the instructions to have devolved upon the jury the determination of the validity of the judgments and of the facts. This should have been determined by the Court, and such of them as were deemed absolutely void should have been excluded. Those which were merely irregular should have been admitted.

JUDGMENT REVERSED.

THOS. B. CARTER, et al., vs. CHARLES McLARAN.

Defendant in error brought ejectment against plaintiff in error to recover certain lands, claiming under a tax title.

The lands were sold March 1st, 1875, and sold May 10th 1875 (the latter sale being under the "Abatement Act") and bought by the State at both sales. They were delinquent for taxes of 1874 only.

McLaran purchased the land from the State Oct. 21st, 1875, the deed reciting that the lands were sold to the State May 10th, 1875, (the latter sale being under the Abatement Act,) and bought by the State at both sales. They were delinquent for taxes of 1874 only.

McLaran purchased the land from the State October 21st, 1875, the deed reciting that the lands were sold to the State May 10th, 1875, (the latter sale being under the Abatement Act,) and bought by the State at both sales. They were delinquent for taxes of 1874 only.

5. The taxes for the year 1874, were not delinquent until the 1st of January 1874, and the sale was properly made under the 9th Article, 22nd Chapter of the Code, except so far as modified as to time of sale by the provision in the Act of 1874 and the supplemental Act of January 22, 1875.

6. A right of redemption by the owner or claimant of the land attached as an incident of the sale on the 1st of March, 1875. The sale by the Auditor prior to its expiration of redemption by Moore & Co. (the land of plaintiffs in error) was in due time, being within two years after the sale.

JUDGMENT REVERSED AND CAUSE REMANDED.

ADELINE CUNNINGHAM, vs. THE STATE OF MISS.

Adeline Cunningham, was convicted of the murder of her husband and sentenced to be hung. That she committed the deed and that it was one of peculiar atrocity is not denied or gainsaid.

In the dead hour of night while her husband lay sleeping on the bed, she split open his head with a hatchet without provocation or motive so far as can be ascertained. She waited quietly until morning came, and then freely and voluntarily avowed the act to all inquirers offering no excuse save that to one person she stated that her husband was attempting to take her life with a knife which she said would be found in the bed but which could no where be discovered.

The defense set up for her is temporary or periodical insanity produced by delirium tremens in her monthly menstruations and which it is said was liable to attack her at each recurring monthly period.

Instructed numbered 12, asked by defendant was "that the jury must verify if the testimony of a reasonable doubt of the sanity of the accused." The instruction is neither "given" or "refused," and the Court here has no means of discovering what was the action of the Court upon it.

The 13th instruction given for the State was in conflict with the 12th as quoted.

The 9th instruction asked by the defendant and refused by the Court, was in these words: "When the decision of a party is such that he has a real and firm belief of the existence of a fact which is wholly imaginary and under that insane belief he has done an act which would be justifiable if he were sane, he is not responsible for such act, nor is a party responsible for an act done under an uncontrollable impulse which is the result of mental disease."

It is assigned for error among other things that the Court below permitted the District Attorney to ask a witness what instrument was used in inflicting the wound on the head of the accused--on the ground

that it was assumed by the question matters that have not been proved--and also the ruling of the Court permitting the District Attorney to ask a witness "if he could identify the hatchet handled him as the one found in evidence, two because issued as void judgments, and one because issued on no judgment at all.

CHALMERS, J. 1. Without desiring to express any opinion on the facts, it is proper to say that there was sufficient evidence to suggest at least a probability of the truth of her defence and the demand that the jury should be left free to determine the question unembarrassed by erroneous instructions from the Court. They were not so left, but were in effect told that though they believed the defendant probably insane, she must be convicted on some presumptions of fact which overthrew all probabilities of fact.

2. Three distinct theories are held by courts and text writers of the highest character and each may be supported by a long array of authority, viz: 1. The prisoner must prove his insanity beyond a reasonable doubt. 2. He must establish it by a preponderance of evidence. 3. He must raise a reasonable doubt of his sanity.

The last though held as yet by a minority of the adjudged cases, is gaining in favor, and is the well settled law in many of the States, and is supported by a power of reasoning which we deem convincing.

3. If in proving the crime evidence is offered which suggests a doubt of the sanity of the witness, the State must promptly meet it, and this without regard to the side from which the proof suggesting the doubt comes, and establish the sanity of the prisoner to the satisfaction of the jury beyond a reasonable doubt arising out of all the circumstances in the case. There can be no crime without mental accountability, and it is just as essential to show the conscious mind as the unlawful act.

4. If the 13th instruction for defendant was given, it was in conflict with the 15th instruction for the State, and the giving of conflicting instructions, is erroneous. Of the correctness of the 9th instruction, there can be no doubt, and it seems to us another method of stating that there can be no crime where there is a mental incapacity to distinguish between right and wrong.

5. The exceptions taken to the action of the Court in its rulings on the evidence are without merit.

JUDGMENT REVERSED, AND NEW TRIAL AWARDED.

F. A. McSHAN, vs. F. E. McSHAN.

Appellant sued on a writ of Habeas Corpus to recover possession of his two daughters who were in the possession of their mothers, the defendant.

The facts are that, in 1871, the above named parties intermarried in Lee county, Mississippi, and subsequently removed to Arkansas. The two children in question were the result of the marriage. Just before the birth of the second, the first being about two and a half years of age, the parents being in reduced circumstances, and their domestic relations being unhappy, the father deserted the mother and child taking with him all the money the mother had, and leaving her and the child without means of support. The mother returned with her child to Itawamba county, in this State, and formed a pleasant and happy home with her father, who often visited her during his life, and provided for them afterwards. The father returned to Lee county, became more prosperous and sued for possession of his children.

The Chancellor decreed them to the mother.

SIMBALL, C. J. 1. If the husband by misconduct breaks up the marital home, and puts the wife under necessity to seek shelter and support elsewhere, for her self and children, and she finds it in her father's house, the hand of the law (to say the least of it) would be against her, who offers to support them.

2. Although the father may have since improved his fortune, and repented of the wrong he did his wife and child, it is not now our duty to invade the happy home of the wife and children, and alter its conditions and relations, when we do not see that the condition of these little girls would be benefited thereby.

3. If the children were of competent age to appreciate their situation, it would have been entirely competent for the Court to have consulted them. That has been done in this case, and the result, though the Court is not bound to conform to their inclinations and preferences.

We concur in the decree of the Chancellor and affirm it.

ACQUITTED SIMPSON, vs. THE STATE.

In this case the record fails to show the presence of the prisoner when the motion for a new trial was heard and determined.

CHALMERS, J. 1. It has been held by this Court that the presence of the prisoner must affirmatively appear at the disposition of the motion for a new trial.

2. The law in this respect is now changed by the Act of February 12, 1878, section Acts p. 200, but this trial was had before that law took effect and we will not give it retroactive operation.

3. The action of the Court in the legally presumed absence of the prisoner, and therefore be treated as a nullity and the motion for a new trial regarded as still pending and undetermined in the Court below.

4. The judgment will be reversed and remanded in order that the motion for a new trial may be acted on in the presence of the prisoner.

5. Should a new trial be refused, the prisoner will have the right to demand another writ of error, the present one having been presented before there was a proper final judgment in the Court below.

The reversal of the judgment will not affect the verdict.

THE WIFE'S AMBITION.

BY AMY RANDOLPH.

"It's a hard rub to get along, little wife, isn't it?" said Gerald May, as he closed his account book, and looked somewhat ruefully at the solitary one dollar bill, which was all that remained of his mother's salary after the house-keeping bills were settled, and the rent paid, and the outstanding accounts at the dry goods store balanced up satisfactorily.

Mabel May was kneeling on the hearth rug toasting a piece of bread for her husband's supper. She turned around with cheeks flushed by the fire-light, and rosy lips apart.

"Oh, Gerald," said she, "I do try so hard to be economical."

"Of course you do, little chick," said May, leaning over to catch one particular curl of reddish brown hair that was drooping in spirals of gold over the fair forehead, and giving it an affectionate little twitch. "Don't I know that without you telling me?"

"But I wish I could help you," cried out Mabel. "Oh, I wish if I knew of any way to earn money myself."

Gerald May looked at her with an amused smile.

"My dear," said he, "one would as soon expect an oversized doll to earn money."

"Other women do," said Mabel, critically surveying the slice of bread to make sure that it was artistically browned on both sides.

"But you are such a child!" "I am two and twenty," said Mabel solemnly.

"Nonsense!" said Gerald. "What could you do to earn money?"

"I could do the deprecatory tone of the world."

"Gerald," she said, "I do wish you would treat me more like a woman and less like a child. Don't you suppose I have as much talent as the rest of my sex?"

Gerald laughed good humoredly.

"You're out of the era, dear," said he, before you go rhapsodizing! Of course, I know that you're a dear little puss, and can make an omelette or a shirt with any woman in christendom. But you can't write a stirring book like George Elliott, nor paint a grand picture like Rosa Bonheur!"

"Of course, I don't aspire to any such greatness as that," said Mabel, impatiently, "but I can sing."

"You've got a nice little voice enough," said her husband, patronizingly. "For the parlor, but as to making money out of it I hardly think you'll find it so easy."

"You don't think I can do anything," said Mabel, half indignantly, "only just because I am a woman."

"Some women drive fast single-handed," said Gerald May, sipping his tea with provoking nonchalance, "but you are not one of the sort, my dear!"

But long after Gerald had lighted his student lamp and commenced his evening study, Mabel was still sitting at her desk, which she had placed in the parlor, and which she had adorned with a slender vase containing a bouquet of flowers. She was looking at a letter which she had just received from a friend, and which she had just opened.

"Only one dollar left of our month's money after one month's bills are all settled," said Mrs. Mabel to herself, screwing up her little rosy mouth. "Oh, dear! that isn't the way to get rich. We must make a little more money somehow. I can't write love stories and poetry, and I don't see for starvation prices; and I don't see my way clear to being a shop girl or a cashier, even if anybody would employ me, because there's dear old Gerald to be looked after and kept comfortable. But I do think that I could sing if I only obtained a chance. Mr. Martel, at the boarding school, used to say I had a good soprano. I'll ask Mrs. Lucy, up stairs, to let me practice a little on her piano, and then I'll try my fortune. Gerald would say it was all nonsense; but I don't mean to ask Gerald's advice."

And thus, or four weeks afterwards, when Mrs. Mabel presented herself, trembling and fluttering, before Signor Severo, that musical antrover viewed her, with favorable eyes, through an immense pair of tortoise shell eyeglasses.

"You advertised for a soprano, sir," said Mabel, turning carmine and white by turns. "Certainly, madame, I did," said the Signor; "for the choir of St. Endocia, in Magnolia Square."

"I've felt just exactly like Robinson Crusoe on his desert island," said Gerald, with a grimace.

"And what sort of a day have you had, little woman?" "Oh, pleasant enough," evasively. "But tell me, Gerald, how have you willed away your time?"

"I've been to a fashionable church," said Mr. May, "St. Endocia's, in Magnolia Square. And I must take you there, Mabel, to hear the music. Why, it's equal to an oratorio. The tears came out of my eyes as I listened--it seemed as if my soul were floating up, and up, and up, on the current of that divine melody."

"Was it very fine?" Mrs. May's face was turned away as she was fastening a loose button in her boot.

"The finest soprano I have ever heard," cried Gerald, enthusiastically. "You must listen to her, Mabel!"

"The young wife turned to him with brimming eyes and cheeks suffused with crimson."

"Gerald," said she, "I must tell you a secret, I, too, was at St. Endocia's Church this morning."

"And you heard that delicious soprano?" "Yes--no--I don't know whether I did or not. Gerald, flinging her arms around his neck, 'I was the soprano at St. Endocia's. Oh, Gerald, forgive me for keeping you in ignorance so long, but I dared not tell you until I knew positively that I should either succeed or fail. And, Heaven be praised, I have succeeded!"

Gerald's eyes, too, were full, in spite of his assumed stoicism.

"My little darling," he whispered carelessly. "And I suppose they pay you some trifling salary?"

"Six hundred a year, Gerald," she answered with triumphant triumph.

"What!" he involuntarily exclaimed. "That's something worth having. Why you must be a genius, little wife."

"We can have a little money now, dear," she said lightly; "you needn't take any more of that tiresome law copying, and I can hire a piano to practice with, and--and--oh! Gerald, I am so happy!"

For Mabel May had at last succeeded in attaining the goal of the feminine ambition, and wouldn't have envied England's Queen that night.

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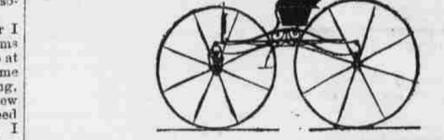
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