

DAILY JOURNAL. OLDEST DAILY IN THE STATE. ENGBELHARD & PRICE, Proprietors.

WILMINGTON, N. C. WEDNESDAY, DECEMBER 14, 1870.

Supreme Court Opinion.

We give the following from the Knoxville (Tenn.) Daily Press and Herald, as a matter of interest to the general reader, and of especial interest to the Bar:

September Term; Knoxville, 1870; Joseph B. Heiskell, Attorney General and Reporter; No. 132; H. H. Ingersoll vs. A. W. Howard, Judge, &c.

The Act of 1868, c. 75, requiring the courts to administer the adjuration of the Ku Klux, to "all officers," did not apply to Attorneys.

The courts had no power to require such oath, by a general rule.

If a judge improperly exclude an attorney from practice, and refuse to put the order on record, or to sign to appeal, he is a proper defendant to a mandamus, and liable for cost.

From the Criminal Court of Greene, A. W. Howard, J., presiding.

This cause being docketed in the name of H. H. Ingersoll vs. the State, on motion of the Attorney General, it was ordered that the same be corrected, so as to stand H. H. Ingersoll vs. A. W. Howard, J.

In support of the motion he cited Evans vs. the Justices of Claiborne county, 3 Hay, 26, 29. Sevier vs. the Justices of Washington county, Peck 334, 361, and Hardin vs. the Justices of Hardin county, Peck, 291.

At the March Term, 1869, of the Criminal Court of Greene county, the following rule of the court was read in open court, and ordered to be spread of record, as an order of court.

"Order or rule of court. The subject matter of establishing a uniform rule of practice, for the government of attorneys practicing in the Criminal Court of Tennessee, under the Act of the General Assembly of the State of Tennessee, passed on the 10th day of September, A. D., 1868, entitled 'An Act to preserve the public peace,' being under consideration; the Court is pleased to order and direct that it shall hereafter be an established and uniform rule of the Court in the First Judicial Criminal District that all attorneys proposing to practice in said Court, in any of the counties in said district before being permitted to do so, shall under oath, give satisfactory evidence that they are in no way associated, obnoxious to the provisions of said Act of Assembly, passed on the 10th day of September, A. D., 1868, as required by said act, as the same is construed and understood by the Court. The above rule shall be promulgatory and uniform until such time as the same may be altered or modified by the Court. It is not made with a view to oppress, nor with a view of making invidious distinction, but in compliance with what is understood by the Court to be a solemn duty, made so by the provisions of said Act of Assembly, this January 12th, A. D., 1869.

Upon the entry of this rule upon the record, the Criminal Judge, A. W. Howard, ordered the Clerk to destroy the old roll of attorneys and make a new roll, and to enter the name of no attorney thereon who had not complied with the above rule. In obedience to this order, the names of the attorneys were stricken from the roll, including the name of H. H. Ingersoll, the petitioner, who had been for six months a practicing attorney in said court, whereupon the Judge ordered the clerk to read said rule for the information of the attorneys present. Petitioner then stated to the Judge that he was not obnoxious to the provisions of the Act of Assembly, and that he was opposed to the Ku Klux Klan, and all other secret political organizations in existence in Tennessee, U. S.; but as the rule was a new one, and the oath extraordinary, he asked the privilege, in behalf of himself and brother attorneys, of being heard upon the same, but the privilege was insuitably refused. Petitioner then stated to the court in a respectful manner that as there was a wide difference of opinion upon the construction of said act of Assembly between the presiding Judge and all the other Judges of this section of the State, he wished an authoritative construction of the same from the Supreme Court, and, in order to obtain it, he asked the Judge to have a motion entered of record that petitioner be permitted to practice without taking the oath prescribed in said order, and to decide the same, that petitioner might have something from which to appeal to the Supreme Court. But this motion the court refused to enter of record, and fined petitioner for contempt of court in making such a request, and peremptorily ordered him to take his oath, saying that petitioner had no right as an attorney or a party to be heard in that court. Petitioner then procured another attorney who was not under ban to make the same motion for the same purpose, but the Judge peremptorily refused again to enter said motion of record, and threatened to fine said attorney for contempt, at the same time stating that he would not permit the correctness of that rule to be called into question, nor would he permit anything to go of record from which an appeal could be taken. The attorney aforesaid then stated that he would prepare a bill of exceptions to the action of His Honor in refusing to allow the motion to be entered, but the court replied that he would not sign any bill of exceptions to the action of the court in the premises.

In April, 1869, the said H. H. Ingersoll presented his petition for a mandamus to one of the Judges of the Supreme Court, in which the facts already cited were alleged, when the said petition was granted, and the said A. W. Howard required to appear and show cause why a peremptory mandamus should not issue, commanding him to have the proceedings complained of entered of record, to the end that the same might be revised in the Supreme Court.

On the day fixed the said A. W. Howard entered his appearance in the Supreme Court, and filed his answer, in which he states, at great length, his reasons for adopting the said rule, and for refusing to allow petitioner's motions to be entered of record. He states that the "act of the 10th of September, 1868, being placed in respondent's hands, and sworn to, as respondent, was to administer the law faithfully, and having in the 5th section of said act, the following language, viz: 'That it shall be the duty of all courts of this State, at every term, for two years, from and after the passage of this act, to call before it all the officers thereof, who shall be sworn, and have this act read, or explained to them, and the court shall direct said officer if they shall have any knowledge of any person in the State, or out of the State, that shall be guilty of any of the offences contained in this act,' &c. 'Considering the 5th section of said act, as including attorneys, as officers of the court, in the meaning of the makers of the statute, he had no alternative but to administer by his own conscience, but to administer to them the oath, in connection with the officers of the court,' and hence he adopted the rule already set out. The reason of the respondent for not allowing petitioner's motions to be entered of record are stated as follows, viz: "That respondent did not regard the said Ingersoll as being associated in any way, obnoxious to the act of September 10th, 1868, and had to refer his motive in resisting the rule, to some other cause. And the conduct of Mr. Ingersoll warranted such conclusion. That he manifested a disposition to brow beat, and override the court and bring its authority into contempt; believing this, respondent may have acted with some degree of impropriety, which respondent did not, upon other occasions, where manifest due courtesy was shown. Respondent believed at the time, and still believes, it was an absolute duty to the bench to inflict some degree of punishment upon Mr. Ingersoll, which respondent believed at the time and still insists, was done in leniency and forbearance."

entitled, as a matter of right, to appear in the court for suitors, and to argue causes. As decided in the case of ex parte Garland, & Wallace, 379: "this right was something more than a mere indulgence, revocable at the pleasure of the court, or at the command of the Legislature. It is a right of which he can only be deprived by the judgment of the court, for moral or professional delinquency." And in the case of Champion vs. The State, 3 Cold., 111, this court says: It appears from the records of the court, the Plaintiff in error had been admitted as a practicing lawyer in that Court, and he was a regular licensed attorney of this State; and having taken the oath required by law, as prescribed by § 3845, and was enrolled as an attorney, the Judge holding the court had no right to impose other conditions, than those embraced in § 3845."

Holding, as we do, that the Legislature did not intend to subject attorneys to be before the Judge, and sworn to as to their knowledge of offenders under the act of September 10th, 1868, it follows upon the foregoing authorities that the Judge had no right to make nor to enforce the rule aforesaid against the petitioner. The relief prayed for by the petitioner is, therefore, granted, and the defendant, A. W. Howard, will pay the costs of this proceeding.

NICHOLAS, D. J. A TRUE COPY. Test: J. F. DEADERICK, Clerk.

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B. L. FLEMING, Eng. & Supy. may 8

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NIGHT EXPRESS TRAIN (Daily). Leave Wilmington (W. & H. R. Depot) 8:30 P. M. Arrive at Florence, S. C. 1:30 A. M. Arrive at Kingsville, S. C. 3:30 A. M. Leave Kingsville, S. C. 4:30 A. M. Arrive at Wilmington, S. C. 7:30 A. M.

J. N. O. WINDER, Gen'l Supy. may 10, 1870

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STATE OF NORTH CAROLINA. COUNTY OF NEW HAVEN, SUPERIOR COURT. Ann Corcoran, Patrick Behan, James Behan, Patrick Hinson, Charles Hinson and Margaret Moore, plaintiffs.

Against Richard Murphy, Dennis Murphy, Dennis Behan, Patrick Behan, Catherine Duffy, Bridget Doherty, and the heirs of Rev. Thomas Murphy, deceased, whose names and places of residence are unknown to the plaintiffs—defendants.

TO THE ABOVE-NAMED DEFENDANTS. You are hereby notified to appear before J. C. Mann, Clerk of the Superior Court of New Haven county aforesaid, at his office in the Court House, in Wilmington, within twenty days from the date of the publication of this notice, to answer the complaint filed in said Court, and to partition of the real estate of Thomas Murphy, deceased. If the above named defendants fail to appear at the time and answer the complaint, the plaintiffs will apply for the relief demanded in the complaint. Given this 23d November, 1870.

J. C. MANN, Clerk Superior Court, New Haven County, DeBUSSETT ATTORNEY for Plaintiffs. nov 21

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