The Daily Journal.

VOL. XX—NO. 66. WILMINGTON, N. C., WEDNESDAY MORNING, DECEMBER 14, 1870. WHOLE NUMBER 5,718.

DAILY JOURNAL.
OLDEST DAILY IN THE STATE.
ENGELHARD & PRICE, Proprietors.
SUBSCRIPTION.
One year.....$10 00
Six months.....5 00
Three months.....3 00
WEEKLY JOURNAL.
ESTABLISHED SEPTEMBER, 1844.
One square, of ten lines or less, for each and every insertion, $1.
Special Notices will be charged $2 per square, for each and every insertion.
SUBSCRIPTION.
One year.....$3 00
Six months.....2 00

THE DAILY JOURNAL

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. —— § 5, requiring the courts to administer the abjuration 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 allow him 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.

OPINION.

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, in the First Judicial Criminal District 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 peremptory 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. Petitioner inquired of the Judge in open court if such was the order of the 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 provision 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 insultingly 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 suth a request, and peremptorily ordered him to take his seat, 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 reason 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, as respondent, was to administer the law faithfully, and finding 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 ask 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. "Construing 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 left him, in the court of 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 10, 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 promptness, which respondent might 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."

As a further reason for not allowing petitioner's motion to be entered of record, respondent says: "To say that all the rules of the Circuit, Chancery and Criminal Courts, made for their own protection and for the dispatch of their own business, and made in accordance with the written law, are subject to revision in the Supreme Court wherever any captious attorney sees proper to make a question upon the rules and carry them up to the Supreme Court is just to destroy the inherent powers of the inferior tribunals and take from them all their dignity and all their rights of protecting themselves."

After appearing and filing his answer to the alternative mandamus, Judge Howard at the July term, 1869, of the Criminal Court at Greenville had a complete record of the proceedings on Mr. Ingersoll's motion, entered of record, including a bill of exceptions and the granting of an appeal, of which we have a transcript in this Court under the improper caption of H. H. Ingersoll *vs.* the State. This is the record, to procure which, Mr. Ingersoll filed his petition for a mandamus, and which would have been procured by a peremptory mandamus if one had been ordered by this Court. Whilst, therefore, it is unnecessary for this Court to order a peremptory mandamus we deem it proper to remark that, upon the petition and answer thereto, a case is presented which would have justified this Court in ordering a peremptory mandamus. If the Judge had been right in his construction of the act of the 10th of September, 1868, and was authorized thereby to adopt the rule as to attorneys, his refusal to hear a motion to allow Mr. Ingersoll to practice without taking the prescribed oath and to allow the motion to be entered of record and to sign a bill of exception were abuses of his judicial authority and derelictions of official duty so palpable that this Court could not have hesitated to interpose for the protection of the rights of Mr. Ingersoll, and for the correction of the errors involved in the exercise of judicial functions. Nor are we able to discover the slightest legal excuse for his course in the reasons relied on by the Judge in his answer to the alternative mandamus. If Mr. Ingersoll was guilty of violating any of the proprieties of an attorney in his demeanor towards the Judge (of which we have failed to discover the evidence) it was competent for the Judge to protect the court by inflicting punishment, but to undertake to prevent his own official action from being reviewed and revised, upon appeal to a higher tribunal, by refusing to allow proper motions to be made or entered of record, and by refusing to give the benefit of exception to his rulings in bills of exception, was a mode of maintaining "the inherent powers of the inferior tribunals," and of preserving their "dignity" and of "protecting themselves," altogether novel and unsupported by law. But, as we have already remarked, a peremptory mandamus would now accomplish nothing, especially since the Criminal Court, of which the said Howard was presiding Judge, has been abolished by statute; we therefore deem it unnecessary to make any further order in the matter of the petition for mandamus.

Upon the record setting forth the proceedings in the case, as made out and sent up in answer to the alternative mandamus, we deem it proper to remark that we think the rule of the court as applicable to the government of the attorneys in the Criminal Court, over which Judge Howard presided, was based upon a total misconstruction of the 5th section of the Act of September 10, 1868. It is provided in that section that it shall be the duty of all the courts of this State, at every term, for two years, to call before them all the officers thereof, who shall be sworn and have this act read or explained to them." Although in one sense, an attorney is an officer of the court; yet, that he does not belong to the class of officers, referred to in this section, is too clear to admit of discussion, or to require elucidation. The idea that the Legislature ever intended that the Judges should call before them, at any term, for two years, all the attorneys of their respective courts, and have the Act of Assembly read or explained to them, and have them sworn to disclose, as common informers, all their knowledge as to the persons, in or out of the State, who have been guilty of the offences in the act, commonly known as the *Ku-Klux* law, is so palpably absurd that it cannot be entertained for a moment.—The language of the act plainly indicates that it was intended by the Legislature only to those persons who held high offices and who were subject to the orders of the court, but not to attorneys, who hold no offices, and who are not subject to the orders of the court, except in well defined instances. Sec. 2, Tomlin's Law Dictionary, Title office, p. 665.

It appears from the record, that the petitioner was a regular practicing attorney, in the first criminal circuit, and, as such, 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, 4 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 § 3965, and was enrolled as an attorney, the Judge holding the court had no right to impose other conditions, than those embraced in § 3965."

Holding, as we do, that the Legislature did not intend to subject attorneys to be before the Judge, and sworn 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.

NICHOLSON, D. J.

A true copy.
Test: J. F. DEADERICK, Clerk.

STATE OF NORTH CAROLINA.

COUNTY OF NEW HANOVER, SUPERIOR COURT.

Ann Corcoran, Patrick Behan, James Behan, Patrick Hudson, Richard Hudson and Margaret Moore, plaintiffs,
Against
Richard Murphy, Dennis Murphy, Dennis Behan, Patrick Behan, Catharine Duffy, Bridget Dulin, 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 Hanover county aforesaid, at his office in the Court House, in Wilmington, within twenty days from and after the 7th day of January, A. D. 1871, to answer the complaint filed in said Court for sale and 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. Herein fail not.

Given under my hand and seal of said Court this 23d November, 1870.

J. C. MANN,
Clerk Superior Court,
New Hanover County.
DeROSSET CUTLAR,
Attorney for Plaintiffs.
nov 24 93—law6w