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CASES AT LAW

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

JUNE TERM, 1866
TO
JANUARY TERM, 1868
INCLUSIVE

REPORTED BY
S. F. PHILLIPS

ANNOTATED BY
WALTER CLARK
(FURTHER ANNOTATIONS ADDED, 1929)

(3D EDITION, ANNO.)

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The prisoner's counsel requested the judge to charge:

1. That if the prisoner gave the laudanum in order to put the child to sleep, the case was one neither of murder nor manslaughter, but of misadventure only.

2. That if in giving the laudanum the prisoner intended neither to kill it, nor to do it great bodily harm, she was not guilty of murder.

3. That if she administered it carelessly, or by way of experiment only, she was guilty of manslaughter only.

The court refused to give the first instruction, and told the jury that there was no evidence in the case to which it was applicable. The second instruction also was refused, and the court charged that if the prisoner gave the laudanum knowing what it was and that it was likely to kill, the law presumed malice and the case would be one of murder; but that if she did not know the character of the laudanum as a poison, etc., it would be no more than manslaughter; that upon this point the burden of proof was upon the prisoner. The court gave the third instruction substantially as asked for.

Verdict, guilty; rule for new trial discharged; judgment and appeal.

Phillips & Battle for prisoner.
Attorney-General, contra.

READE, J. The first exception to his Honor's charge was properly abandoned in this Court, as there was no evidence to which it was applicable.

(452) The second exception is liable to the same objection, and to the further objection that, while his Honor did not give the charge upon the abstract proposition asked, yet he did give such a charge as fitted the evidence.

The evidence was that the prisoner had been told a few days before that the laudanum was a poison. We may suppose that she also knew that it was a medicine, but that there was no occasion to use it as a medicine, inasmuch as the child was in good health, and no laudanum had ever been given to it. She must have poured the poison out of the vial into the child's mouth, as there was no cup or spoon. When the mother ran into the room when she heard the child's scream, the prisoner was standing, with the child in her arms, near the vial, which had just been set down uncorked, the liquid being still in motion. The poison was in the child's mouth and upon its clothes. The prisoner tried to drown the child's scream, and when the mother charged her with giving the child laudanum, she denied it, saying she had been only smelling it, and spilt it on the child. She knew it was poison. She knew poison would kill. She poured it down the child's throat, and attempted to

conceal what she had done by a falsehood. There was not a single fact in the case tending to show that the prisoner did not know that it was poison; or, that she did not intend the reasonable consequence of her act. How could his Honor leave it to the jury to *suppose* that she did not intend it? If A. deliberately point his gun at B., and discharge it and kill him, could his Honor charge the jury that if he did not intend to kill, he would not be guilty? When an act is proved, and there is *no evidence* of accident, the question of accident cannot be left to the jury any more than any other fact upon which there is no evidence.

His Honor charged substantially, that if the prisoner knew that it was poison, and that it was likely to kill, and gave it under the circumstances detailed, and it did kill, she was guilty. We think this gave the prisoner the benefit of every consideration to which she (453) was entitled. The proof was that she knew it was poison; that there was no reason why she should have given it as a medicine, she did not pretend that she had so given it, but denied that she had given it at all. The reasonable consequence was killing; it did kill; there was *no* evidence that she did not intend to kill; and therefore it must be taken that she did intend to kill. There is no error.

Let this be certified, etc.

PER CURIAM. No error.

Cited: S. v. Elwood, 73 N. C., 637.

STATE v. A. B. RHODES.

1. The laws of this State do not recognize *the right of the husband to whip his wife,* but our courts will not interfere to punish him for moderate correction of her, even if there had been no provocation for it.

2. Family government being in its nature as complete in itself as the State government is in itself, the courts will not attempt to control, or interfere with it, in favor of either party, except in cases where permanent or malicious injury is inflicted or threatened, or the condition of the party is intolerable.

3. In determining whether the husband has been guilty of an indictable assault and battery upon his wife, the criterion is the *effect produced,* and not the manner of producing it or the instrument used.

(*S. v. Hussy,* Bus., 123; *S. v. Black,* 1 Wins., 266, cited and approved; *S. v. Pendergrass,* distinguished and approved.)

ASSAULT AND BATTERY, tried before *Little, J.,* at Fall Term, 1867, of the Superior Court of WILKES.

The defendant was indicted for an assault and battery upon his wife, Elizabeth Rhodes. Upon the evidence submitted to them the jury returned the following special verdict:

(454) "We find that the defendant struck Elizabeth Rhodes, his wife, three licks, with a switch about the size of one of his fingers (but not as large as a man's thumb), without any provocation except some words uttered by her and not recollected by the witness."

His Honor was of opinion that the defendant had a right to whip his wife with a switch no larger than his thumb, and that upon the facts found in the special verdict he was not guilty in law. Judgment in favor of the defendant was accordingly entered and the State appealed.

Attorney-General for the State.
No counsel for defendant.

READE, J. The violence complained of would without question have constituted a battery if the subject of it had not been the defendant's wife. The question is how far that fact affects the case.

The courts have been loath to take cognizance of trivial complaints arising out of the domestic relations—such as master and apprentice, teacher and pupil, parent and child, husband and wife. Not because those relations are not subject to the law, but because the evil of publicity would be greater than the evil involved in the trifles complained of; and because they ought to be left to family government. On the civil side of this Court, under our divorce laws, such cases have been unavoidable and not infrequent. On the criminal side there are but two cases reported. In one the question was, whether the wife was a competent witness to prove a battery by the husband upon her, which inflicted no great or permanent injury. It was decided that she was not.

(455) In discussing the subject the Court said, that the abstract question of the husband's right to whip his wife did not arise. *S. v. Hussy,* Bus., 123. The other case was one of a slight battery by the husband upon the wife after gross provocation. He was held not to be punishable. In that case the Court said, that unless some permanent injury be inflicted, or there be an excess of violence, or such a degree of cruelty as shows that it is inflicted to gratify his own bad passions, the law will not invade the domestic forum, or go behind the curtain. *S. v. Black,* 1 Winst., 266. Neither of those cases is like the one before us. The first case turned upon the competency of the wife as a witness, and in the second there was a slight battery upon a strong provocation.

In this case no provocation worth the name was proved. The fact found was that it was "without any provocation except some words which were not recollected by the witness." The words must have been of the

slightest import to have made no impression on the memory. We must therefore consider the violence as unprovoked. The question is therefore plainly presented, whether the court will allow a conviction of the husband for moderate correction of the wife without provocation.

Our divorce laws do not compel a separation of husband and wife, unless the conduct of the husband be so cruel as to render the wife's condition intolerable, or her life burdensome. What sort of conduct on the part of the husband would be allowed to have that effect, has been repeatedly considered. And it has not been found easy to lay down any iron rule upon the subject. In some cases it has been held that actual and repeated violence to the person was not sufficient. In others that insults, indignities and neglect without any actual violence, were quite sufficient. So much does each case depend upon its peculiar surroundings.

We have sought the aid of the experience and wisdom of other (456) times and of other countries.

Blackstone says "that the husband, by the old law, might give the wife moderate correction, for as he was to answer for her misbehavior, he ought to have the power to control her; but that in the polite reign of Charles the Second, this power of correction began to be doubted." 1 Black., 444. Wharton says, that by the ancient common law the husband possessed the power to chastise his wife; but that the tendency of criminal courts in the present day is to regard the marital relation as no defense to a battery. Cr. L., secs. 1259-60. Chancellor Walworth says of such correction, that it is not authorized by the law of any civilized country; not indeed meaning that England is not civilized, but referring to the anomalous relics of barbarism which cleave to her jurisprudence. Bish. M. & D., 446, n. The old law of moderate correction has been questioned even in England, and has been repudiated in Ireland and Scotland. The old rule is approved in Mississippi, but it has met with but little favor elsewhere in the United States. *Ibid.,* 485. In looking into the discussions of the other States we find but little uniformity.

From what has been said it will be seen how much the subject is at sea. And, probably, it will ever be so: for it will always be influenced by the habits, manners and condition of every community. Yet it is necessary that we should lay down something as precise and practical as the nature of the subject will admit of, for the guidance of our courts.

Our conclusion is that family government is recognized by law as being as complete in itself as the State government is in itself, and yet subordinate to it; and that we will not interfere with or attempt to control it, in favor of either husband or wife, unless in cases where permanent or malicious injury is inflicted or threatened, (457)

or the condition of the party is intolerable. For, however great are the evils of ill temper, quarrels, and even personal conflicts inflicting only temporary pain, they are not comparable with the evils which would result from raising the curtain, and exposing to public curiosity and criticism, the nursery and the bed chamber. Every household has and must have, a government of its own, modeled to suit the temper, disposition and condition of its inmates. Mere ebullitions of passion, impulsive violence, and temporary pain, affection will soon forget and forgive, and each member will find excuse for the other in his own frailties. But when trifles are taken hold of by the public, and the parties are exposed and disgraced, and each endeavors to justify himself or herself by criminating the other, that which ought to be forgotten in a day, will be remembered for life.

It is urged in this case that as there was no provocation the violence was of course excessive and malicious; that every one in whatever relation of life should be able to purchase immunity from pain, by obedience to authority and faithfulness in duty. And it is insisted that in *S. v. Pendergrass*, 2 D. & B., 365, which was the case of a schoolmistress whipping a child, that doctrine is laid down. It is true that it is there said, that the master may be punishable even when he does not transcend the powers granted; *i. e.*, when he does not inflict permanent injury, if he grossly abuse his powers, and use them as a cover for his malice. But observe, the language is, if he *grossly* abuse his powers. So that every one would say at once, there was no cause for it, and it was purely malicious and cruel. If this be not the rule then every violence which would amount to an assault upon a stranger, would have to be investigated to see whether there was any provocation. And that would con-

travene what we have said, that we will punish no case of trifling
(458) importance. If in every such case we are to hunt for the provocation, how will the proof be supplied? Take the case before us. The witness said there was no provocation except some slight words. But then who can tell what significance the trifling words may have had to the husband? Who can tell what had happened an hour before, and every hour for a week? To him they may have been sharper than a sword. And so in every case, it might be impossible for the court to appreciate what might be offered as an excuse, or no excuse might appear at all, when a complete justification exists. Or, suppose the provocation could in every case be known, and the court should undertake to weigh the provocation in every trifling family broil, what would be the standard? Suppose a case coming up to us from a hovel, where neither delicacy of sentiment nor refinement of manners is appreciated or known. The parties themselves would be amazed, if they were to be held responsi-

ble for rudeness or trifling violence. What do they care for insults and indignities? In such cases what end would be gained by investigation or punishment? Take a case from the middle class, where modesty and purity have their abode, but nevertheless have not immunity from the frailties of nature, and are sometimes moved by the mysteries of passion. What could be more harassing to them, or injurious to society, than to draw a crowd around their seclusion? Or take a case from the higher ranks, where education and culture have so refined nature, that a look cuts like a knife, and a word strikes like a hammer; where the most delicate attention gives pleasure, and the slightest neglect pain; where an indignity is disgrace and exposure is ruin. Bring all these cases into court side by side, with the same offense charged and the same proof made; and what conceivable charge of the court to the jury would be alike appropriate to all the cases, except that they all have domestic government, which they have formed for themselves, (459) suited to their own peculiar conditions, and that those governments are supreme, and from them there is no appeal except in cases of great importance requiring the strong arm of the law, and that to those governments they must submit themselves.

It will be observed that the ground upon which we have put this decision is not that the husband has the *right* to whip his wife much or little; but that we will not interfere with family government in trifling cases. We will no more interfere where the husband whips the wife than where the wife whips the husband; and yet we would hardly be supposed to hold that a wife has a *right* to whip her husband. We will not inflict upon society the greater evil of raising the curtain upon domestic privacy, to punish the lesser evil of trifling violence. Two boys under fourteen years of age fight upon the playground, and yet the courts will take no notice of it, not for the reason that boys have the *right* to fight, but because the interests of society require that they should be left to the more appropriate discipline of the school room and of home. It is not true that boys have a right to fight; nor is it true that a husband has a right to whip his wife. And if he had, it is not easily seen how *the thumb* is the standard of size for the instrument which he may use, as some of the old authorities have said; and in deference to which was his Honor's charge. A light blow, or many light blows, with a stick larger than the thumb, might produce no injury; but a switch half the size might be so used as to produce death. The standard is the *effect produced*, and not the manner of producing it, or the instrument used.

Because our opinion is not in unison with the decisions of some of the sister States, or with the philosophy of some very respectable law writ-

ers, and could not be in unison with all, because of their contrariety—a decent respect for the opinions of others has induced us to be (460) very full in stating the reasons for our conclusion. There is no error.

Let this be certified, etc.

PER CURIAM. No error.

Cited: S. v. Mabrey, 64 N. C., 593; *S. v. Davidson,* 77 N. C., 523; *S. v. Pettie,* 80 N. C., 368; *S. v. Jones,* 95 N. C., 592; *S. v. Dowell,* 106 N. C., 724; *S. v. Thornton,* 136 N. C., 616; *S. v. Fulton,* 149 N. C., 496, 502; *Gill v. Commissioners,* 160 N. C., 194; *Price v. Electric Co., ibid.,* 455; *S. v. Nipper,* 166 N. C., 278; *S. v. Seahorn, ibid.,* 378; *S. v. Knight,* 169 N. C., 362; *Wallin v. Rice,* 170 N. C., 419; *S. v. Mincher,* 172 N. C., 904; *Jones v. Jones,* 173 N. C., 285; *Odum v. Russell,* 179 N. C., 8; *Young v. Newsome,* 180 N. C., 317; *S. v. Falkner,* 182 N. C., 808; *Small v. Morrison,* 185 N. C., 595.

STATE v. GEORGE ELAM.

1. In cases of bastardy the county of the mother's "settlement" and not that of her "domicil" is chargeable with the maintenance of the child, and *settlement* is gained only by a continuous residence of twelve months.

2. Therefore, where the mother, having lived in Granville County for several *years*, removed to Franklin two or three months before the birth of her child, with a bona fide intention of changing her domicil, the former and not the latter county had jurisdiction of proceedings to charge the putative father.

(S. v. Roberts, 10 Ire., 350; *S. v. Jenkins,* 12 Ire., 121, and *Ferrell v. Boykin, ante,* p. 9, cited and approved.)

BASTARDY, tried upon a case agreed before *Fowle, J.,* at the Fall Term, 1867, of the Superior Court of FRANKLIN. The proceedings were returned to the county court, and carried from thence by appeal of the defendant to the Superior Court.

One Arianna Herndon, a single woman (colored), charged the defendant, a colored man, with being the father of a child of which she was delivered in March, 1867, in the county of Franklin. She had resided continuously in Granville County for ten or twelve years before January or February, 1867, when she removed to Franklin, with a *bona fide* intention of residing permanently in that county. The defendant resided in Granville, where it is admitted that the child was begotten.

It was agreed that if the court should be of opinion that the court of Franklin County had jurisdiction of the proceedings, a (461) verdict should be entered for the State; if otherwise the proceedings should be quashed. His Honor directed a verdict to be entered in favor of the State, and gave judgment accordingly. Whereupon the defendant appealed to this Court.

Edwards for appellant.

The judge ought to have quashed the proceedings, upon the ground that the county of Franklin had no jurisdiction of the case. See Rev. Code, ch. 86, sec. 12, par. 1, 4, 5. Also the case of *S. v. Roberts,* 10 Ire., 350; *Ferrell v. Boykin, ante,* p. 9.

Attorney-General for the State.

PEARSON, C. J. The Revised Code (ch. 12) provides in general terms for proceeding against the putative father in the county where the child is born, to compel him to give bond for the maintenance of the child so as to indemnify the county against the charge of its maintenance.

In most cases the child is born in the county where the mother has her *settlement,* and there is no difficulty in regard to the county in which the proceeding should be instituted.

But sometimes, as in our case, the child is born in one county, and the settlement of the mother is in another county, which makes it necessary to put a construction on the statute, in order to see to which of the two counties the jurisdiction belongs. Indeed, the question might be still further complicated if we suppose Granville to be the county of settlement, Franklin the county of domicil, and that the mother while on a visit to Wake is delivered of the child. Here Wake has the honor of its nativity, and construction must be resorted to in order to (462) arrive at the meaning as to which of the three counties has jurisdiction.

Upon the question of construction it will be seen that the general police regulations on the subject of paupers are contained in the statute—Revised Code, ch. 86, "Poor"—and that the statute under consideration, and the statute Revised Code, ch. 5, "Apprentices," are supplements to the "Poor" act, and intended to carry out its provisions in regard to children who are paupers. So the three statutes make one system, and are to be construed together.

The "Poor" act imposes upon every county the burthen of supporting all persons having a settlement in it, who are paupers, or who may