

Virginia &c

In the County Court of Rockingham August 23^d 1854

Be it remembered that heretofore to wit. at a Court held for said County on Monday August 15th 1853 George O Conrad foreman. David Gilmer. Samuel Gracie. A J. OBader. Peter Showalter. Strauther Sheets. Dorelus Marty. Philip Bible. Wm L Harrison. Henry Sheets. George Bowman. Benjamin D Bowman. John Wine. Samuel Bowman. Jonathan Frank and Wm M K Martmann were sworn a Grand Jury of inquest for the body of this County. and having received their charge withdrew and after some time returned into Court. and not having time to finish the business before them were adjourned until the next day to wit August 16th 1853 at which time the said Grand Jury met pursuant to their adjournment withdrew from the bar and after some time returned into Court and presented "An Indictment against Washington O'Rourke & Hannah May for Lascivious Cohabitation. a true bill" which Indictment is in these words following to wit: "Rockingham County to wit. In the County Court of the said County. The Jurors of the Commonwealth of Virginia in and for the body of the County of Rockingham. and now attending the said Court. upon their oaths present. that on the 1st day of August in the year 1853. in the said County Washington O'Rourke & Hannah May. both being white persons & not married to each other. did lewdly & lasciviously associate & cohabit together against the peace & dignity of the Commonwealth. This indictment is found on the evidence of Michael May a witness sworn in Court & sent to the Grand Jury to give evidence"

And it was ordered that a summons be issued against the said Washington O'Rourke & Hannah May to be directed to the Sheriff of this County and made returnable to the November term of said Court in the year 1853 which summons was accordingly issued. and is in words and figures following to wit. "The Commonwealth of Virginia. To the Sheriff of Rockingham County greeting. You are hereby commanded. to summon Washington O'Rourke and Hannah May to appear before the justices of our Court of Rockingham County at the Court House on the third Monday in November next to answer an indictment of the Grand Jury for Lascivious Cohabitation. and have then there this writ. Witness Wm L Gamble Clerk of our said County at the Court House the 18th day of August 1853 and in 78th year of the Commonwealth

L W Gamble"

Sheriff Return "Executed by A S Byrd S.R."

And at another day to wit at a Court held for said County on the day of November 1850. The summons awarded in this cause being returned executed thereupon came as well the attorney prosecuting for the Commonwealth as the Defendants by their attorney. and the defendants by their attorney said that they are not guilty in manner and form as in the Indictment against them is alleged and of this they put themselves upon the Country and the attorney for the Commonwealth likewise and the trial of the issue is deferred till the next Court, and at another day to wit. at a Court held for said County on the 22 day of February 1851,-- The Defendants this day filed a demurrer to the Indictment on this cause the Attorney for the Commonwealth joined in the demurrer and the trial is deferred till the next term. And now at this day to wit at a Court held for said County on the 23 day of August 1851. This day came as well the Attorney prosecuting for the Commonwealth as the Defendants by their Attorney (the defendants by their Attorney at a former term filed a demurrer to the indictment in this cause) whereupon the matters of law arising upon the demurrer of the defendants to the Indictment being argued it seems to the Court that the indictment and matters therein contained are sufficient to have and maintain the charges alleged in said indictment - and thereupon came a jury to wit. Peter Neff. John S. Heatwole. Wm A. Smith. Hammon B. Hoehn. Wm. C. Eiler. Benjamin D. Bowman. John Swank S. John Smith. Wm. Liley. Rudolph Moyers. Joseph Riepel & Harvey Wise, who being elected tried and sworn the truth to speak upon the issue joined. and having heard the evidence retired from the bar and after some time returned into Court and upon their oaths do say "We the jury find the defendants guilty and assess the fine of each deft to fifty dollars" Therefore it is considered that the Commonwealth recover against the Defendant Washington O'Rourke the sum of \$50 and against the said Hannah May the sum of \$50 according to the verdict of the jury. and the costs expended in prosecuting this said indictment

Copy Teste

Wm. Ambrose clk

Fee \$1.00

To the Hon. John Kenney Judge of the Circuit Court of
Rockingham County.

The Petitioner of Washington O'Rearbs, respectfully represents that
he is aggrieved by a final judgment of the County Court
of Rockingham, rendered on the 23rd of August 1854 - upon
the trial of an Indictment against him and Hannah
May for Lascivious Cohabitation - a transcript of the
record of the judgment complained of is herewith presented
by which it will be perceived that on the 15th of August, 1853,
your Petitioner was indicted in the said County Court - &
on the 22nd of Feb. 1854, your Petitioner demurred to said
Indictment, which he renewed at August, 1854, was over-
ruled - and a trial had upon the plea of not guilty -
and your Petitioner found guilty - and a fine of fifty
dollars imposed upon your Petitioner.

Your Petitioner assigns the following Error in said judgment -

The County Court erred in overruling your Petitioner's be-
murrer to said Indictment.

The offence charged against your Petitioner of lascivious
cohabitation, ought to have been charged with a continuance
It is an offence which cannot be committed in one day or by
one single act of Adultery or Fornication - There must be
a dwelling and living together - to constitute the offence -
See Mayo's Guide - Page 405 - & 408 form of Indictment
also - Wharton Page 558 - 559. An Indictment must set forth
every fact and circumstance, which is a necessary ingredient in the
offence with distinctness and certainty - Archbold P. 38-39 - Wharton P. 72-76-78⁼⁸¹
If this offence could be consummated in one day - a separate fine of
not less than \$50 per day ^{for 12 months} might be imposed which would be oppressive
& unconstitutional - See also 7th Grantan 589. For the said Error your
Petitioner prays a Writ of Error to the judgment aforesaid.

W. O'Rearbs By his Counsel.

I John C. Woodson an Attorney practicing in the Circuit Court of Rockingham County
do hereby certify that in my opinion it is proper the decision complained of in the foregoing
Petition, should be reversed by the Circuit Court of Rockingham County.
John C. Woodson.

Commonwealth

vs
John Kenney

De Court &c

588
311
277

filed at 15: March 1836

1836, Mary Archibald and
Antinuity Oct. 1836 of
County of Rockingham for
County of Rockingham

County of Rockingham

County of Rockingham
County of Rockingham
County of Rockingham

County of Rockingham

To the Clerk of the Circuit Court of Rockingham County:
Washington Brook having presented a petition in relation to
me John Kenney Judge of the Circuit Court of Rockingham
County, for a writ of error to a judgment of the County Court
of Rockingham, on the 23rd day of August in the year 1854 in a
case of the Commonwealth vs the said Washington Brook with
on on indictment vs the said Washington Brook for lewdness and indecent
and a certificate of counsel that in his opinion, it is proper the
decision of the said county court be reversed by the Circuit
court of Rockingham County and also with a copy of the record
of the judgment of the said county court annexed to said
petition. And the said copy of the said record being seen and
inspected by me I am of opinion there is reasonable doubt of
the judgment complained of; and I do now in vacation
order the said writ of error and which shall operate as a
suspense upon the said Washington Brook get or some
person or persons for him giving a bond before you with
sufficient security in the penalty of ~~one hundred~~ ^{twenty} dollars
conditioned ~~according to the 13th section of Chapter 102 of the laws~~
to discharge the costs of this writ of error John Kenney
in case the judgment of the county shall be affirmed
& the fees of the officers of the court for this ser-
vice send down in the production of this writ

Feb'y 16th 1855.

Commth. 3 Ind. for "Las. Coh."
Orwich

The defendant, ^{assigns} an error in the
County Court, ⁱⁿ their refusal to sustain his demurrer to the
Indictment because the offence is not charged with
a Continuando.

There is no precedent that I can
find by which the Courts are to be governed in cases
of this sort - That is, I cannot find that the precise
point has ever been raised and adjudicated. The
cases referred to by the petitioner do not touch the point
in this case - They only show that the indictment in
the one case was drawn with a Continuando, but that
it was necessary or not, is not alluded to. A
class of cases is referred to in "Wharton's A. Crim. Law"
page 702 which throws as much light on this case
as any I have seen. It says - "In Massachusetts
it is said, it is sufficient to charge the defendant
with keeping "a house of ill fame," "a disorderly
House," or "a Common Gaming House" It would not then
be necessary to charge in either case that the
defendants did from the day of to the
day of & during all that time keep a
"house of ill fame," or "disorderly House" &c, because
the word "Keep" or words "did keep" implies &
clearly means that the defendant is not only guilty
of suffering ^{a single} act of fornication or other acts
of lewdness, to be done at his house, but that he

"Keepers," continues and suffers it to be done
from time ^{to time} and that his house is one of
common ingress & egress to persons of that character.
suppose under the 10 Section of the same Chapter
of the Code prohibiting "Lascivious Cohabitation," an Indict-
ment were drawn in the precise phraseology of
that Section - So with: We present that onst in the
County H. A. B. "a free person did keep a house of
ill-fame" & C, I think it would not be denied
that this Indictment would be good because it
follows the language of the Statute & clearly puts
the defendant upon notice of the Charge preferred
against him. Apply these principles to the
Indictment in question and do not the words "did
lewdly and lasciviously ^{associate &} Cohabit together, mean unequivocally
that the parties were not merely guilty of "fornication
or a dwelling", but that they actually lived together
as man and wife - Can those words have any
other meaning? So the defendant cannot be left in
doubt as to the Charge preferred against him.
~~I am clearly of opinion that~~ After the words
"upon their oaths present" strike out "on the 1st day
of August in the year 1853" and the Indictment
will read as follows: "The Grand Jurors & C, present that
in the said County Washington O'Rorick & Hanna
May both being white persons and not married
to each other, did lewdly & lasciviously associate
and Cohabit together against & C. Then the
question of time would be a part of the proof only

so far as to shew whether the Statute of Sim-
stition applied or not. Time is not of the
essence of the offence and therefore need not be
charged. And if charged or erroneously charged
it is mere surplusage and may be stricken
from the Indictment. I am clearly of opinion
that the Indictment omitting the words "on the
1st day of August 1853," is good and ^{such a one} ought to be
Sustained.

If "Time" is not the essence of the
offence, it would be cured by § 11 page 770 - Code
of Virginia "No indictment shall be quashed or deemed
invalid for omitting to state or stating imperfectly
the time at which the ~~offence~~ offence was committed
when time is not the essence of the offence."

This Indictment is in the precise language
of the Statute - moreover its phraseology admits
of but one construction and that is that the
defendant & Harma May, "did lewdly and lascivious
associate and cohabit together" therefore taken in
its technical and ordinary acceptance the defendant
must be apprized of the offence charged against him.

It has been held in Pennsylvania and
North Carolina, that on an indictment for
Adultery, the party might be convicted of
Fornication (Wharton 759) Could not the
Defendant be convicted of the same under
this indictment?

note by
Atta Combs.

Know all Men by these Presents, That we, E. H. Warren
and John C. Woodson (for and instead of Washington O'Roark)

are held and firmly bound unto the Commonwealth of Virginia in the sum of *Twenty*
Dollars to the true payment of which
well and truly to be made, we bind ourselves, our heirs, executors and administrators, joint-
ly and severally, firmly by these presents, sealed with our seals, and dated the *26th* day
of *April* 185*6*, and in the *8th* year of the Commonwealth,

THE CONDITION of the above obligation is such, That whereas the above ~~bound~~
named Washington O'Roark hath obtained from the Judge of the
Circuit Court of Rockingham County, a writ of error to a judgment
of the County Court of Rockingham County, rendered on the 23^d day of
August in the year 1854, in a case of the Commonwealth against the
said Washington O'Roark, on an indictment for Lascivious Co-
habitation, and who was found guilty and fined \$50, 00.

Now if the above named Washington O'Roark or some person for
him, shall well and truly pay and discharge the costs, in case the
judgment aforesaid of the County Court, shall be affirmed, and also
pay all the fees of the officers of the Court for their services rendered
in the prosecution of the said writ of error, then the above obligation
to be void, otherwise to remain in full force and virtue,

E. H. Warren Seal

John C. Woodson - Seal

ROCKINGHAM COUNTY, TO WIT:

This day

the securit in the above bond, personally appeared before A. ST. C. SPRINKEL, Clerk of
the Circuit Court of Rockingham county, and made oath that property is worth
\$ after the payment of debts, and those which security for and
expects to have to pay. Given under my hand this day of

Know all Men by these Presents, That for

are held and firmly bound unto the Commonwealth of Virginia in the sum of
well and truly to be made, we bind ourselves, our heirs, executors and administrators, joint-
ly and severally, firmly by these presents, sealed with our seals, and dated the
13th day of April in the year of the Commonwealth.

Witness our hand and seal this 13th day of April 1834

Benjamin
Dunn
Dunn

THE CONDITION of the above obligation is such, That whereas the above

ROCKINGHAM COUNTY, TO WIT:

This day

the account in the above bond personally appeared before A. ST. C. SPRINKLE, Clerk of
the Circuit Court of Rockingham county, and made oath that
after the payment of debts and those which
property is worth
security for and
expects to have to pay. Given under my hand this
day of