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State of Virginia

At a Court continued and held for the County of
Rockingham at the Court-house thereof on Friday the
21st day of November 1856

Be it remembered that heretofore to wit at a Court held for said County
on Monday August the 15th 1855. George O'Connor foreman (David Gilmer
Samuel Lyralice. J. O. Baden. Peter Showalter. Strauther Shees. (Dorilas
Warty. Philip Dible. William C. Harrison. Henry Sheets George Bowman
Benjamin D. Bowman. John Uline. Samuel Bowman Jonathan Funk and
William M. Montmann 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 dispatch all
the business before them, were adjourned until the next morning, at
which time to wit. at a Court continued and held for said County on the
16th day of August 1855 The Grand Jury sworn for this County on yesterday
appeared in Court in pursuance to their adjournment, and withdrew and
after some time returned into Court and presented "An Indictment against
Henry Gilmer and Catharine Black for Lascivious Cohabitation a true bill"

which Indictment is in the words and figures 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 1855, in the said
County Henry Gilmer & Catharine Black both being white persons not married
to each other, did lewdly & lasciviously associate & cohabit together against the
peace and dignity of the Commonwealth. This Indictment is founded
on the evidence of Philip Heltzel a witness sent for by the Grand Jury & sworn
in Court to testify before them" And at another day to wit, at a Court
continued and held for said County on Tuesday the 22nd day of November
1855. This day came as well the Attorney for the Commonwealth
as the defendants by their attorney, and the said depts said that they are
not guilty in the manner and form in the indictment against them is
alleged & the defendants by their attorney in addition to said plea this day
filed a general demurror to the said Indictment to which plea & demurror the
attorney for the Commonwealth replied generally. And now at this day to wit
At a Court continued and held for said County on Friday the 21st day of

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November 1856 This day came as well the attorney prosecuting for the Commonwealth as the defendants by their attorney and thereupon came a jury to wit Martin Garber Martin Cromer John Sellers Jr David Bear George Will John Leedy Michael Bear Marcus J Vanpel Morgan Layton Mem R Hopkins Timothy Turk Henry T Martmann who being elected tried and sworn the truth to speak upon the issue joined and having heard the evidence retired from the bar to consider and after sometime returned into court and upon their oaths do say "We the jury find the Defendants guilty and a fine their assessments at two hundred dollars each" It is therefore considered that the Commonwealth recover against the said Henry Gilmer the sum of \$200 the fine aforesaid, and against the said Catharine Black the sum of \$200 the fine aforesaid, and the costs expended in prosecuting the said indictment

Dec. 85⁰⁰

Copy

Teste

W. G. Yarnbill C. R.

To the Hon John Henney, Judge of the Circuit Court of Rockingham.

The Petition of Henry Gilmer respectfully represents that he is aggrieved by a final judgment of Rockingham County Court, rendered on the 21st of November 1856 - upon the trial of an Indictment against him and Catharine Black, 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 for said offence in the said County Court - and at the next term your Petitioner demurred to said Indictment and pleaded not guilty - and on the 21st of November 1856, the said Petitioner, was tried upon a jury and convicted - and judgment rendered against your Petitioner without deciding upon the demurrer to said Indictment which demurrer your Petitioner insists ought to have been sustained by the Court.

One thing is certain your Petitioner is entitled to have the Judgment of the Court upon his demurrer - & although it does not appear upon the record that the demurrer was

overruling yet by analogy to the rule in civil cases - a final judgment by the Court upon the verdict of the Jury, embraces with it an overruling of the demurrer.

Your Petitioner assigns the following errors in said judgment -
1st The County Court erred in overruling the demurrer to said Indictment -

2nd - The Court erred in not deciding said demurrer.

The offence of lewd & lascivious cohabitation ought to be laid with a continuanda. - This is the nature & character of the crime - a living together in a manner offensive to the Public eye & morality - it is the vile public example which is to be stopped & corrected - and cannot be completed in one day - or by one A.C. - There are four offences of a kindred character ^{specified by the Code} - Adultery - Fornication - open & gross lewdness - & lascivious association & cohabitation. The distinction between these offences, is clearly defined in May's Guide - Page 405 - to 408 - 10 Mass. Reports. 15-3 - An Indictment must set forth every fact & circumstance which is a necessary ingredient in the offence - As this Page 38-39 - Wharton - 72-76-78-81. The offence must be stated in such a way - as to leave it uncertain what offence is intended. Under this Indictment the Commonwealth might have proved open & gross lewdness on the 1st of August 1853 - but to prove lascivious association it would be necessary to prove a continued association and cohabitation ^{and that the parties were not married to each other on the day named - then compare the charge to one day -} a dwelling or living together - the object of the Statute being to prevent the vile public examples - See Comw. vs. Calif - 10 Mass. 15-3 - cited in Wharton's Criminal Law - notes to Title "Fornication". - it being necessary to prove a continuous dwelling or living together - that being the essence of the offence - it is necessary to charge it in that way - How would it be proven that this offence was committed on a particular day on the 1st of August 1853 - It could not be - The Commonwealth might prove one act of adultery or fornication - or one act of open & gross lewdness - but to prove lascivious cohabitation - they must prove a continuous cohabitation - and living together ^{by persons not married to each other, during the whole period} - and could not be confined to

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one day - and a lascivious association on any ^{particular} one day, could only be inferred, from previous general habit of living together - If the offence could be committed ^{or consummated} on one day - then the defendant might be convicted and fined not less than \$50 - for each day - for the period of twelve months - viewing each day as a separate & distinct offence - which would be exasper and unconstitutional - and in this way an offence which is but one and continuous in its nature would be subdivided into 365 distinct offences - any one of which must be supported separately by evidence of a general living together - and the plea of a prior conviction or acquittal, could never be filed - if the subsequent offences were laid upon a different day from the first - & could be consummated on one day - see also 7th Gratton 589.* For the said Error your Petitioner prays a Writ of Error to the judgment aforesaid.

Henry Gilmer & his Counsel.

I John C. Woodson an Attorney practicing in the Circuit Court of Rockingham Lane, certify that on my opinion the decision complained of in the foregoing Petition should be reversed by said Circuit Court. Jno. C. Woodson

* The parties might have come to-

gether on the 1st of August - for the ^{Commence}
first time - had improper connections ^{as of Record & Petition.}
I been married on the next ^{Gilmer's} for Writ of Error.
^{or the same day -}
~~day~~ This would not be within

The Statute - The Indulgent should have a continuity of living together by persons not married to each other during the whole time.

To the Clerk of the Circuit Court of Rockingham County.
A writ of error allowed the petitioners
and to operate as a supersedeas upon
the petition or some process for him
appearing & bond before the Clerk of the
^{concrete} County Court of Rockingham, in the
penalty of \$250. Committed to satisfy
the said judgment of the County Court of
Rockingham in case said judgment shall
be affirmed.

John Kenney
Dec. 11th 1856.

The Commonwealth of Virginia, to the Justices of the Court of Rockingham
County, Greeting;

Whereas in the record and proceedings, and also in the rendition
of the judgment, in our said Court, given on the 21st day of November, in the
year 1856, against Henry Gilmer, upon an Indictment for Lascivious cohabi-
-tation with Catharine Black, whereby it was considered that the Commonwealth
against the said Henry Gilmer the sum of \$200, the fine specified for the offence,
and the costs expended in prosecuting the said indictment; manifest error
has happened, to the great damage of the said Henry Gilmer, as by his complaint
we have understood. We being willing that the error, if any has been, should be
duly corrected, and full and speedy justice done to the said Henry Gilmer
in this behalf; command you, and every of you, that the record and proceedings
aforesaid, with all things touching the same, you, or one of you, under your, or
one of your seals, distinctly and plainly send to the Judge of our Circuit Court
of Rockingham County, at the Court house thereof, on the first day of the May
Term next, so that our said Judge, the record and proceedings aforesaid being
inspected, may farther cause to be done therein, that of right and according to
law, ought to be done; and that you cause it to be made known to the Sheriff
of our said County, that it is our command, that from all further proceedings
on the judgment aforesaid, he altogether supersede, And have then there
this writ. Witness Arthur St. C. Sprinkel clerk of our said Circuit Court, the
23rd day of March 1857, and in the 81st year of the Commonwealth,

A. St. C. Sprinkel

May 8, 1857. - Executed upon John J. Harris
for J. J. Harris & Co.
J. J. Harris & Co.

Gilmer }
vs } Unit Error
South }
Burr Error,

May Term 1857.

Know all men by these presents that we Henry Gilmer and Allan C. Bryan are held and firmly bound unto the Commonwealth of Virginia, in the sum of Two Hundred and fifty dollars, to the payment of which, well and truly to be made, we bind ourselves our heirs, Executors and Administrators, jointly and severally, firmly by these presents, sealed with our seals and dated the 23^d day of March 1857, and in the 81st year of the Commonwealth,

The condition of the above obligation is such that whereas the above bound Henry Gilmer hath obtained from the Judge of the Circuit Court of Rockingham County, a writ of error, (to have the effect of a writ of supersedeas,) to a judgment of the County Court of Rockingham County, rendered on the 21st day of November 1856, in a case of the Commonwealth against the said Henry Gilmer, on an indictment for Scurrilous Cohabitation with Catharine Black, and who was found guilty and fined two Hundred dollars,

Now if the above bound Henry Gilmer, shall well and truly pay and satisfy the said judgment of the County Court of Rockingham, and all such fees and costs as shall be awarded against him, in case the said judgment of the County Court shall be affirmed, then the above obligation to be void, otherwise to remain in full force and virtue,

Henry Gilmer
Allan C. Bryan. Seal

Rockingham County to Wit:

This day Allan C. Bryan, the security in the above bond personally appeared before A. St. C. Sprinkel clerk of the Circuit Court of Rockingham County, and made oath that his property is worth \$250. or after the payment of all his debts and those which he is security for and expects to have to pay,

Given under my hand the 23^d day of March 1857,

A. St. C. Sprinkel clk

Smith
vs } Sup^r. Bond,
Gilmer }

filed March 23^d 1857.

Gilmer } Papers
vs } writ error
Conrath }
Bond writ error

1857 March 23^d Bond given
and writ error issued
May docketed & rem'd Oct.
dismissed at Piff's costs

Conrath's costs \$6.61

Att's fees 1.61

Attorney 5.00
\$6.61

