No. 256 Office Docket

Thomas Hoffman

vs

The State of Md.

13 B. F. C

Opinion

Bond C. J.

Filed December 23rd 1863

Thomas Hoffman
vs
The State of Maryland

Court of Appeals of Maryland
December Term 1863

The plaintiff in error being indicted for murder, jointly with one Robert Miller, by the Jurors of the State of Maryland, for the City of Baltimore, and being arraigned, severed in his defence, and pleaded <u>not guilty</u>. On the 25th of Oct. 1859, a jury was impannelled and sworn. The States' witnesses being called did not answer; attachments were issued and the Court was adjourned to the 26th of Oct. 1859. The attachments being returned <u>non est</u>, the following proceedings were entered of record "And afterwards "to wit, on the said 26th day of October, in the year "1859, because it appears to the said Court here, that "after the said jury had been sworn, and the above "indictment had been read to them, and they had been "charged in the usual way by the Clerk of the Court here,

Mem. for Compositor.

The following are the reasons referred to at the bottom of p. 2. of the Courts opinion to be there inserted:

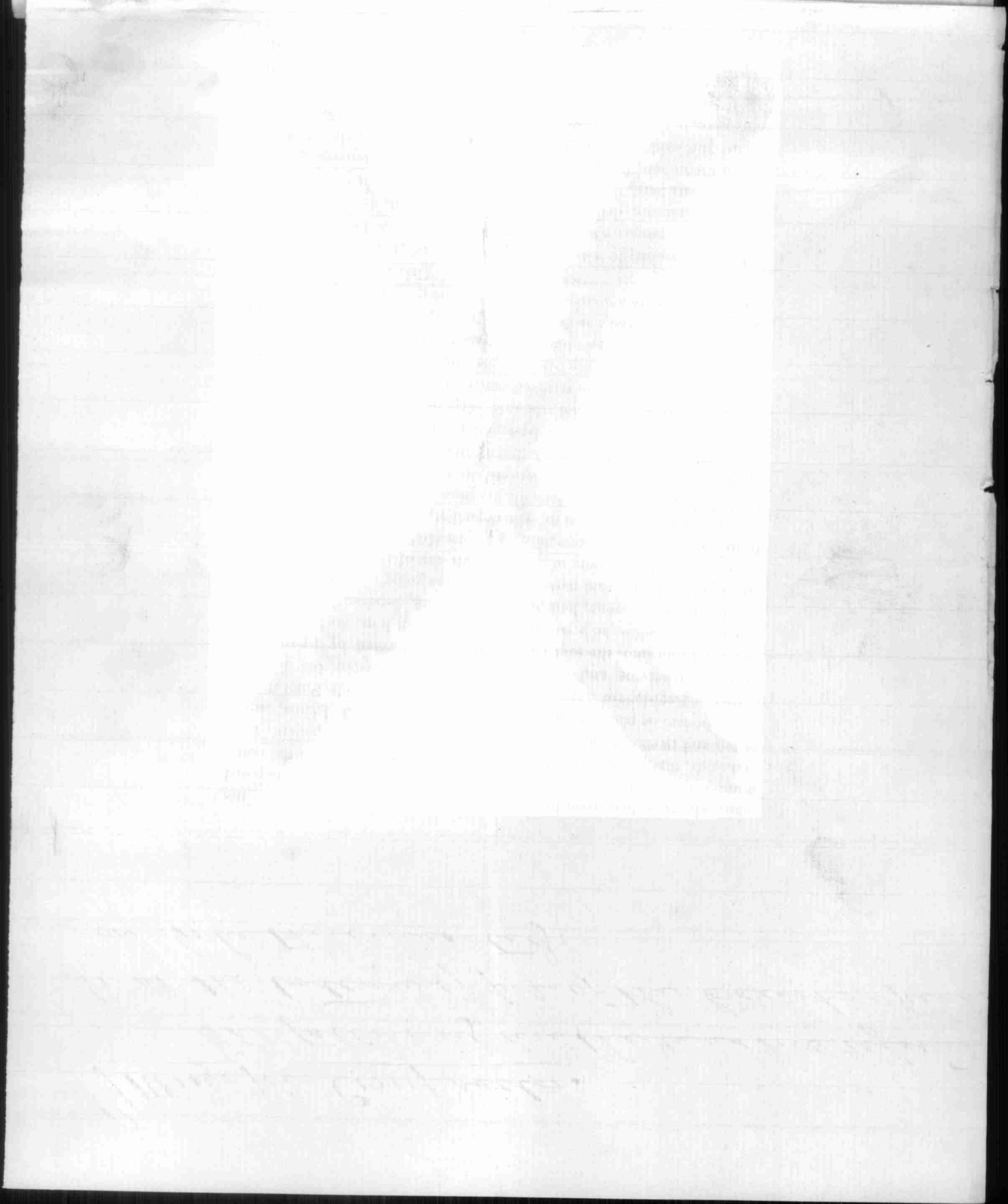
First.—Because heretofore, to wit, on the 25th day of October 1859, he was put upon trial under said Indictment, and a jury was regularly sworn, and charged to try said case, as will appear by the records of this court; and he cannot be put twice in jeopardy of life for the same alleged offence.

Second.—Because heretofore, on the 25 of October 1859, he was put upon trial under said Indictment, and a jury was regularly sworn, and charged, to try said case, and said jury was afterwards, on the 26th of October 1859, discharged by order of the court, but against the consent of this prisoner, as will appear by the records of this court; and he cannot, for the same alleged offence, be twice put in jeopardy of life.

Third.—Because heretofore, on the 25th of October 1859, this prisoner was put upon trial in this court, and a jury regularly sworn and charged, to try his said case; and afterwards, and without his consent, said jury was discharged, by order of the court, before they had agreed upon a verdict; as will appear by the records of this court; and he cannot be put again upon trial for the same alleged offence.

Fourth.—Because heretofore, on the 25th of October 1859, this prisoner after having been arrainged, and after having pleaded not guilty to said Indictment, was put upon trial in this court, and a jury was regularly sworn, and charged, in due form of law to try his said case, and after said jury was sworn and charged, but before they had agreed upon a verdict, they were discharged by order of the court, against the consent of this prisoner, and without any lawful necessity; wherefore he says that he cannot again be put upon trial for the same alleged offence.

Fifth.—Because heretofore, on the 25th of October 1859, this prisoner, after arraignment under said Indictment, and after having pleaded not guilty to the same, was put upon trial upon said Indictment, and a jury was regularly sworn, and charged, in due form of law to try said case; and after said jury had been so sworn, and charged, but before they had agreed upon a verdict, they were discharged by order of the court, against the consent of this prisoner, and without any absolute necessity; as will appear by the records of this court; wherefore he is advised that he cannot be again put in jeopardy of his life for the same alleged offence; and prays that at an order may be passed for his discharge from further imprisonment under said Indictment.



"Several witnesses for the State who had been in attendance
"up to that period, had been discovered to be absent, and
"that after adjournment to the next day, the said
"witnesses were still absent, which said witnesses had
"been duly summoned and put under security for
"their presence in Court upon the trial of the case and
"attachments against them having been issued and
"returned (*) non est, (*) No statement having been made or
"evidence offered to the Jury in the said case, therefore,
"by order of the said Court here, the said Jury are
"discharged, and are wholly discharged from giving
"any verdict of and upon the premises above mentioned
"in the said case of the said Thomas Hoffman, the said
"Thomas Hoffman by his attorney objecting to the said
"discharge of the Jury aforesaid". ~~Record p. 8.~~

Whereupon the plaintiff in error moved the Court to
discharge him from imprisonment for the following
reasons: (~~vide Record p 8, 9.~~ Now insert them)
which motion was overruled and the prisoner after continuing

the cause to a subsequent term, was again brought to the bar, a jury impannelled and sworn, and a verdict of guilty of Murder in the second degree rendered and recorded. Judgment and sentence having been passed, the prisoner prayed a writ of error.

The reasons assigned in support of the motion to discharge involve the proposition, that after a jury has been impannelled in a criminal case and charged with the prisoner, they cannot in this State, be discharged against the consent of the prisoner without some physical necessity or act of God. The motion is based upon a clause of Art. 5th. of Amendments to the Constitution of the United States, which provides

"Nor shall any person be subject for the same offence, to be twice put in jeopardy of life or limb."

Every right guaranted to a Prisoner by the Constitution and laws, should be jealously guarded and scrupulously observed by the Courts.

The importance and value of the principle on which

the motion to discharge is founded in this case, is shown in the fact, that although handed down by the common Law for centuries and recognized in innumerable instances it was thought proper to embody it in the Constitutions of Several of the States and engraft it by way of amendment, on that of the United States.

If this were a question of first impression, grave doubts might be entertained as to its proper solution. The constitutional prohibition, interpreted in its popular Sense, would seem to bear the construction, put upon Similar provisions, in Penn. North Carolina, Tennessee, and Alabama in the cases cited by the plaintiff in error. Chief Justice Gibson's language, in 3 Raw 498, of his opinion is a forcible expression of the meaning conveyed by the words "twice put in jeopardy of life or limb". "In the legal, as well as the popular Sense, says that Learned Judge, he is in jeopardy the instant he is called to stand on his defence; for from that instant every movement of the Commonwealth is an attack

upon his life." But these terms "twice in jeopardy" have a technical meaning, as a maxim of the Common Law they had acquired long anterior to their incorporation into the Federal Constitution, a certain and fixed sense. In the decisions of the English Courts antecedent to the Constitution they had been construed as equivalent to "autre fois acquit"

or "autre fois convict." Contemporaneous construction, is the true interpreter of language. Being transformed from a legal maxim, to a constitutional clause, does not, it is apprehended, change the meaning of words, although it makes the right they guaranty, more solemn and sacred. In this State, there has been no judicial interpretation of these terms by the Court of last resort. The case in 8th Gill of Price vs The State, was a question of venue; whether the right to change it, was lost by the stage, to which the cause had advanced; and there it was held, the trial was not commenced until the jury was sworn. In several of our sister States and in the Circuit, and Supreme Court of the United States, this question has been frequently adjudicated. The cases are collated in the excellent elementary treatise of Wharton on Crim: Law, under the title "once in jeopardy". It is there said: "In this Country the Constitutional provision, has in some instances, been construed to mean more than the Common law maxim and in

several of the States, it has been held that where a Jury in a capital case, has been discharged without consent before verdict, the defendant under certain limitations, may bar a second prosecution by a Special plea setting forth the fact, that his life has already been put in jeopardy for the same offence

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The cases may be placed in two general classes;

First, where any separation of the Jury, except by Consent, or in case of such violent necessity as may be considered the act of God, is held a bar to all Subsequent proceedings.

Secondly, where it is held, that the discharge of the Jury, is a matter of pure discretion for the Court, and that when, in the exercise of a sound discretion, it takes place, it presents no impediment to a second trial. The first rule has been taken by the Courts of Penn: North Carolina, Tennessee and Alabama," Wharton 447 After citing several cases from these States the author proceeds: "In each of the foregoing cases, the opinion

of the Court was founded on the assumption that to be on trial twice, within the meaning of the Constitution was to be in jeopardy. That such is not the case, but on the contrary, no man is in jeopardy until verdict rendered, has been held by the Supreme Court of the United States, by Washington J. Story J. and McLean J. sitting in their several circuits, and by the Courts of Massachusetts, New York and Mississippi. Wharton Crim: Law 130; citing United States v Perry: 9th Wheaton 379. Com vs Bowden 9 Mass 194 Com vs Purchase 2 Pick 521, People vs Goodwin, 18 John: Rep. 187 United States vs Gilbert 2 Summer 19. United States vs Shoemaker 2 McLean 114 United vs Coolidge 2 Gall: 364. + 13.

It is not denied that the power to discharge exists in Cases of necessity, whether the offence be capital or a mere misdemeanor; as if the Jury are so exhausted as not to be able to continue their deliberations; Where the prisoner has tampered with the Jury or some of them or has contrived to keep back the witnesses for the prosecution,

In the conflict of opinion between some of the
State Courts and other State and Federal tribunals
as to the construction of a clause of the Constitution
of the United States, we feel constrained to conform
to the decisions of those Courts which were especially
ordained and established by it, and invested
with authority to construe that instrument.
Hence we adopt the conclusion that the 5th clause of the
article of the Amendments of the Constitution
of the U S, viz "Nor shall any person be subject
for the same offence to be twice put in jeopardy of
life or limb" being "a maxim embedded in the
very elements of the Common Law" and incorporated
into that instrument, is properly interpreted by the
authorised exposition established at its adoption. "At
Common Law if meant nothing more than that where there had been
a final verdict either of acquittal or conviction, on an adequate
indictment, the defendant could not be a second time placed
in jeopardy for the same offence" 1 Whartons Crim Law & Cases there cited

Guided by this rule, we are of opinion that the prisoner in this Case, was not entitled to be discharged on the ground and for the reasons alleged in the Motion. He was not "for the same offence twice put in jeopardy of life or limb."

But it has been argued by the Counsel on behalf of the Plaintiff in Error, that the first jury empannelled for the trial of the prisoner had been discharged by the Criminal Court against his Consent and without sufficient cause; and for that reason he ought not to have been brought to Trial a second time. This raises the question Whether it is competent for this Court upon a writ of Error to review the action of an inferior Court in this respect, and to inquire into and decide upon the sufficiency of the reasons governing the inferior tribunal. A Majority of this Court are of opinion, that we have no such power for the reason that it is a matter

which rests entirely in the discretion of the Court exercising original jurisdiction and therefore its action is not a subject of review upon writ of Error.

In the case of the United States vs Haskell and Francois 4 Wash. C.C.R. p 403. Washington Justice says We consider the authority of the Court to discharge the jury to rest in the sound discretion of the Court. It can rest no where else. It is merely an incidental matter arising in the progress of the trial in no way connected with the question before the jury of guilty or not guilty. It is an incidental matter depending upon circumstances appearing to the satisfaction of the Court, as requiring them in the proper administration of justice to discharge the jury. It is surely as much a matter of discretion as granting a new trial after a verdict is rendered. See also Peoples Green 13 Wend 56.

Writ of Error dismissed.