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EDITOR.

JAMES S. ERWIN, ESQ.

"*Ignorantia legis neminem excusat.*"

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THE PRENDERGAST CASE. *

BY S. H. DENT, JR., ESQ.

As this case assumed a novel attitude, and as there are so many divergent opinions on its final outcome, the case being one of first importance to the community, a discussion of the questions involved may be of interest to the bar.

It is contended by some of the foremost lawyers, that the action of Judge Chetlain in setting aside the sentence until the question of the defendant's insanity, which was alleged to have come upon him since conviction, could be determined, was absolutely illegal and unauthorized. It was therefore asserted that the defendant was entitled to his liberty. That the day fixed for his execution having passed, and the execution having been stayed by a void order, he should have been released by means of a writ of *habeas corpus*. First, the discussion of this matter will involve a proper construction of the statute, which forms the basis of Judge Chetlain's action. Second, what court, the supreme court, or the criminal court of Cook County, had proper jurisdiction in the matter. Third, could the defendant be legally hanged after the day fixed for his execution had passed, and the execution postponed by an illegal and void order.

1st. The statute in question is evidently a remedial statute, and therefore must receive a liberal interpretation. It in substance requires the court, when a defendant is alleged to have become insane between the time of sentence and execution, to summon a jury to pass upon that question; and if the jury find the issue in his favor, to suspend sentence until the defendant recovers. It is a well known rule for the construction of statutes, that some effect should be given to them, rather than none; or in other words, that they should be con-

* On October 28, 1893, (American Cities' Day at the World's Fair,) Carter H. Harrison, Mayor of Chicago, after extending an official greeting to the Mayors of the cities of the United States, upon their visit to the White City, was shot and killed, shortly after his return to his home, by Patrick E. Prendergast. The assassin was caught, and in due time, indicted and tried for the murder, and on December 29, 1893, was found guilty, the jury fixing the death penalty, and Judge Brentano sentenced the prisoner to be hanged on March 23, 1894. The defense was insanity. The court of review having refused to interfere with the judgment, an application was made to Hon. Arthur Chetlain under a statute authorizing an order postponing execution, and for an inquiry and the appointment of a jury to investigate as to the insanity of a person convicted of a capital offence, when the insanity occurred between the trial and date of execution. The order was granted and the trial of such issue was begun on June 20, 1894, before Hon. John Barton Payne and a jury—(Judge Chetlain's term having expired.) On July 3, 1894, the jury found the prisoner sane, and on July 13, 1894, he was executed.—ED.

strued as operative rather than inoperative and of no effect, hence, it would be contrary to the spirit of the law, to hold that because it was impossible to get a jury and try the issue before the time for execution, no court could stay the execution for that purpose. But whether the authority is given in the statute or not, it is a part of the common law power of the court, as I think can be clearly demonstrated.

It seems to me, that the erroneous opinions upon this case have arisen from a misapplication of a well established legal principle, which is, that when judgment has been pronounced and the term has passed, it is no longer in the power of the court to change it, except in certain specified cases, which are not covered by the facts in this case. The misapplication of this principle consists in the failure to draw a distinction between the judgment and its execution. The judicial branch of our government determines what the judgment is, and after so determining, the judgment is placed in the hands of the executive branch for execution, but the judiciary always retains control over the executive, in the manner of its execution.

The judgment of the Criminal Court, properly speaking, in this case was a determination that the defendant was guilty of murder, and that he should be hung. This judgment cannot be changed after the term of the court, at which it was rendered, has expired. But the fixing of the time when this judgment shall be executed is a ministerial act, and is no part of the judgment proper, but the court retains the inherent power to control and direct the process which it issues. For instance, a judgment is rendered in a civil suit in favor of a plaintiff, that he have and recover of the defendant so many dollars; the clerk of the court issues the execution on that judgment, and it is placed in the hands of the sheriff, who is an executive officer, for execution. But the court retains control of the matter, so that if the sheriff violates some right of the defendant, the court can set aside the levy, and if the sheriff fails to execute the judgment on the first execution, the court can award another, etc., thus showing that the court retains control over its processes, and the officers charged with the execution of them. That a court will not allow its process to be abused, is a principle as old as our law itself, but how can it prevent the abuse, unless it retains control over it? Suppose that an officer should refuse to execute process, placed in his hands, would that nullify the judgment? If so, then we must denounce the above principle as false or nugatory.

At Common Law, the sentence to death, or any other corporal punishment, is generally silent as to time. 1 Bishop on Crim. Proc. Sec. 1312. The time when it is to be executed is left to the discretion of the officer or is fixed by a subsequent rule of court. It would neces-

surely follow that the time of the execution of the sentence is no part of the judgment proper. By Statute in this State, the court is required to fix the time, but it will hardly be contended that that makes the time a part of the judgment proper. In fact, the judgment proper is determined by the jury alone, in this State, as *they* must find the defendant guilty, and fix the punishment. The fixing of the time of punishment is merely a ministerial act, required of the court, just as the issuance of an execution by the clerk on a civil judgment, is. Fielden et al. *v.* The People, 128 Ill., 595. It is true that the time, within which the court must fix the punishment is limited by Statute, which must be strictly followed; but the time having been fixed by the court in accordance with the Statute, the Statute is strictly followed, even though the sentence may not be executed at that time. In other words, this Statute simply charges the court with the execution of a ministerial duty, which at Common Law developed upon the sheriff, and as all statutes, derogatory of the Common Law, must be strictly construed, it certainly cannot be contended that this Statute deprives the court of its Common Law powers to control and direct its own process. It follows, from these principles, that the Criminal Court has the power to regulate and control the process which has issued from it, so that it has the Common Law power to postpone the time of execution and the action of Judge Chetlain is legal, although he had no *express* authority from the Statute.

2d. The second question it seems is easily disposed of, by reference to the statutes. The Legislature has declared that a writ of error is not a writ of right in capital cases where the sentence is death. Sec. 520, Crim. Code. The Statute requires that in order to get a writ of error from the Supreme Court, in a case where the sentence is death, a transcript of the record must be presented to the court, and the court must be satisfied from an inspection of the record, that, first, there are reasonable grounds for allowing the writ; and second, there is reasonable doubt of the defendant's guilt, before it shall grant the writ, and if it does grant it, it shall endorse the order on the back of the transcript with the order, that the same shall be a *supersedas*. Id. Sec. 518. So that the granting of a writ of error *ipso facto* grants a *supersedas* and the refusal of the writ leaves the case as it stood in the lower court. I am not familiar with the criminal practice in this State, and have not examined the order made in this case, but from a fair construction of the Statute, it seems to me that the case is not, and never has been in the Supreme Court. But whatever may have been the order in regard to the writ of error, it has been decided by the Supreme Court of this State in the case of Perteet *v.* The People, 70 Ill., 171, that a writ of error does not oust the jurisdiction of the lower Court,

and *supersedas* being denied, there was nothing to prevent the lower court from acting in the matter.

3d. This branch of the subject has been trespassed upon in discussing the first question. It is needless to repeat the arguments there advanced; suffice it to say that the fixing of the time of sentence being merely a ministerial duty, and being no part of the judgment proper itself, but being a necessary order in the execution of the process of the court in effectuating its judgment, the power remains in the court to control and direct it, so that it will not be abused, to the damage of either party, or to the loss of the power of the court. It therefore follows that if the judgment is not executed at the time appointed, whether it be postponed by a valid or void order, or negligence of the officer, or otherwise, the court can set another day, and so it has been uniformly held. 1 Bishop, Crim. Proc. Sec. 1311, and authorities cited. That the Statute in this State, requiring the court to direct the time of punishment, does not change the Common Law rule by making that a part of the judgment, is clear. A judgment is merely an affirmation of liability, the right to use the process of the court for its enforcement, is a *consequence*, which the law attaches to, and is not an integral part of the judgment. 1 Black on Judgments, Sec. 4. The judgment in this case was an affirmation, that the defendant is guilty of murder and shall be hung. Upon the judgment, the People had the right to have process issued to the sheriff, commanding him to execute it. The act of the court, in fixing the time, was a ministerial act, which at Common Law, as we have seen, devolved upon the sheriff. In order to determine whether an act is ministerial or judicial, we must look to the character of the act, and *not* to that of the party, whose duty it is to perform it. A ministerial act is one required to be done in a prescribed manner, in obedience to the mandate of legal authority without regard to, or the exercise of, the judgment of the party charged with performance, upon the propriety of the act to be done. Black's Dictionary, 776. This being a peremptory requirement of law, and it being a duty that devolved upon an executive officer at Common Law, the character of the act is clearly ministerial. Whether the failure of the court to follow the positive command of the law in fixing the time would release the prisoner, is not material to this case, as it is admitted that it was complied with. If we admit then that Judge Chetlain's action in staying execution was absolutely void, it follows that the time of execution can again be fixed and the judgment carried out, for the reason that the fixing of the time of execution is no part of the judgment itself, but is merely a ministerial act, subject to the control of the court, *and* because the court will not allow its process to be abused, to the extent of destroying the rights of either party, or of

nullifying its own judgment. If Judge Chetlain's action is void, then the case stands just as if no order had been made at all, and the sheriff for some reason had failed to carry out the sentence at the time appointed. To hold in such case that the act of the officer would release a prisoner, would be contrary to the first principles of jurisprudence. It may be properly suggested in conclusion that as this Statute changes the Common Law, to the extent of requiring a court to practically set aside its judgment entirely, in case the defendant is found insane upon the second trial of his insanity, it is a very unwise exercise of the legislative power. As the law gives the Governor the authority to commute a sentence, as well as to grant an absolute pardon, under this Statute, there might arise a serious conflict between the Executive and the Judiciary. An application might be made to the Governor for the exercise of his power by some of the friends of the accused, while at the same time, other friends make application to the court, under this Statute. The Governor might make one order and the court another, and thus there might arise an irreconcilable conflict. It might be that this Statute is an infringement upon the Constitutional powers of the Executive.

In the foregoing part of this article I have discussed the question upon the assumption that the statute in question is constitutional, but that assumption is by no means an absolutely correct one. In fact, if we follow up the deductions that necessarily follow from well established principles, it seems that we will reach the irresistible conclusion that the statute is an act of legislation contrary to the letter and spirit of the constitution. The constitution of this state gives to the executive, the power to grant pardons, commutations, etc., and it is one of the first principles of constitutional law, that whenever a particular power is expressly conferred upon one department of the government, the other departments are excluded from its exercise. If then the statute in question in effect gives to the judiciary the power to pardon or commute, it would be an invasion of the constitutional rights of the executive, and consequently null and void. While the time of the execution of the sentence, in a capital case is a part of the *execution* of the judgment, rather than of the judgment *itself*, and while a court retains the power to control its process after it has passed into the hands of an executive officer, and may make all necessary orders in effectuating its judgment and in protecting the rights of the parties, it cannot in the exercise of such powers make any order that would nullify its judgment or damage the rights of either party *as declared* in the judgment. In other words the court, after the term has expired, could not suspend sentence entirely because the right to have execution on a judgment is a right which the *law* attaches as a conse-

quence to the judgment. To change then the effect of a judgment after it has become final, would be contrary to that very wise principle of law which prevents a court from tampering with its judgments after they have by virtue of the law, created what might be called vested rights, so far as the judiciary is concerned, in favor of one or more of the parties. But the sovereign power in this state has deemed it wise to place the authority to change the effect of judgments in criminal cases, after conviction, in the hands of the executive. The suspension of sentence until the defendant recovers, practically amounts to a pardon or commutation, for the reason that no provision is made for ascertaining when there is a recovery. The statute does not say whether the defendant is to be confined in the jail or in an asylum, or whether he is to be confined at all, after suspension of sentence, nor does it provide any proceedings for a subsequent trial of the question of the defendant's recovery, and as it is a special statutory proceeding, entirely unknown to the common law, the authority of the court is at an end when it once suspends sentence in accordance with the terms of the statute, and if the statute is constitutional, the effect of the former judgment is destroyed, and the defendant pardoned by the court in which he was convicted. If the court should now, at a subsequent term, enter an order setting aside the sentence entirely, the evident effect would be a pardon—a power the court is prohibited from exercising, and yet it is clear that the entry of an order that the sentence be set aside until the defendant recovers his sanity, with no means of ascertaining when that event will take place, would have the same effect.

To summarize, the unconstitutionality of the statute would seem to follow from the following considerations:

1st. The pardoning power, or the power to relieve a party from the effects of a judgment rendered against him, is by the constitution, placed in the hands of the executive department of the government.

2nd. A court can make no order after a judgment has become final, changing its effect or relieving a party against whom it is rendered, the latter power being in the executive.

3rd. The suspension of sentence until the defendant recovers his sanity, is practically a relief from the effects of a judgment, especially as no provision is made in the statute for ascertaining when that recovery has taken place.

If these conclusions are correct, then the proceedings instituted for the purpose of testing the insanity of the defendant, were illegal and should have been dismissed, and as the court still retained the power to control its process and effectuate its judgments, the defendant could be re-sentenced and hung, in accordance with the original judgment.