EX PARTE FRANCOIS.

Case No. 5,047.
{3 Woods, 367.}[1]

Circuit Court, W. D. Texas. Aug. Term, 1879.

MARRIAGE BETWEEN CAUCASIAN AND NEGRO—PROHIBITORY STATUTE—CONSTITUTIONALITY.

1. A statute of the state of Texas, passed February 12, 1858, and unrepealed, prohibited a white person from marrying a negro, and for its violation inflicted a penalty upon the white person, but none on the negro. *Held,* that the law was still in force.

2. It was not in violation of the fourteenth amendment to the constitution of the United States.

The relator [Emile Francois], who was alleged to be of the white race, and a citizen of Texas, was indicted in the district court of Travis county, Texas, for having unlawfully intermarried with a colored female who was of the African race. He was tried, convicted and sentenced to the penitentiary for five years.

The act under which the indictment was framed was passed February 12, 1858, when slavery still existed in Texas, and this act constitutes article 386 of Penal Code of Texas (Pasch. Dig. art. 2016), and reads thus: "If any white person shall, within this state, knowingly marry a negro, or a person of mixed blood, descended from negro ancestry, to the third generation inclusive, though one ancestor of each generation may have been a white person, or having so married in or out of this state, shall continue within this state to cohabit with such negro, or such descendant of a negro, he or she shall be punished by confinement in the penitentiary not less than two or more than five years."

Before being sent to the penitentiary, the relator made application for a writ of habeas corpus to the United States district judge, on the ground that his conviction was in violation of the constitution of the United States. On a previous occasion, in Ex parte Brown,[2] Judge Duval held the act in question to be no longer in force by reason of the changes wrought by the amendments to the constitution of the United States, and discharged the relator. After the decision of that case, the court of appeals of Texas, in Frasher v. State, 3 Tex. App. 263, held the act under consideration to be still in force. The legislature of Texas, at its session in April, 1879, changed the above act so as to punish both parties for the commission of the offense named in it, and the law on that subject now reads as follows: "If any white person and negro shall knowingly intermarry with each other within this state, or having so intermarried in or out of the state, shall continue to live together as man and wife within this state, they shall be punished by confinement in the penitentiary for a term not less than two nor more than five years." But the latter act above cited does not take effect until September, 1879.

C. J. Garland, for relator.

D. G. Wooten, for the State.

DUVAL, District Judge. An application similar to the present one was made to me some two years ago, in behalf of one Lou Brown, a white woman who had married a negro man. In her case the writ was granted and the petitioner was discharged. On that occasion no argument was had. The ease was submitted to the court upon the facts as they appeared from the petition and the return of the officer, and with what seemed to be a tacit understanding of counsel on each side, that the prisoner ought to be discharged. Such at least is my recollection of the case. My impression then was that the act of the Texas legislature of February 12, 1858, which made it a penitentiary offense for a white person to marry a negro, was obsolete and inoperative, as having been passed when the

negro was a slave, and not regarded in law as a "citizen of the United States." And if not obsolete, that it was in contravention of the fourteenth amendment of the federal constitution, and of the civil rights bill, because it inflicted a penalty upon the white person alone. At a subsequent period, the precise question came before the Texas court of appeals, in the case of Frasher v. State, 3 Tex. App. 263. That court held that the statute in question was still in force, and was not invalidated by the adoption of the constitutional amendments, or by the civil rights bill. The reasoning of the court in this case, and a more thorough consideration of the case, induce me to doubt the correctness of my first impressions when acting in the case of Ex parte Brown.[3]

The subject of marriage is one exclusively under the control of each state. Each one may pass such laws as it deems proper regulating the institution. One may forbid marriage for some causes, which would be no impediment in another, and may prescribe different penalties for a violation of the same prohibition. If a state thought proper to do so, I am not satisfied that she would be prohibited by any express provision of the federal constitution, or of the civil rights bill, from passing a law forbidding a marriage, among white persons, between an uncle and his niece, or between a Christion and a Jew, and imposing a penalty for its violation upon the man alone. If it could do this, then it could certainly forbid the marriage between a white person and a negro, and affix a penalty for the act upon the former alone. If the Texas statute punished the negro in such case and not the white person, then it would be clearly opposed to the civil rights bill, which expressly provides that the negro shall only be subject to the like pains and penalties as the white race. But is the converse of this proposition to be held as true in all cases? Upon mature consideration, I doubt whether it is so.

That the law in question is unwise and unjust—that it is repugnant to the spirit of the constitution, and of the civil rights bill, both of which contemplate the equality of all persons before the law, and the equal protection of the law to all—I have no doubt. At the same time, I am not satisfied that it violates

the letter of either. Unless it did so, I would not feel justified in declaring it to be unconstitutional.

As respects intermarriage between the white and black races, it is very certain that such a connection would rarely occur but for the influence of the former over the latter—an influence resulting from the superior education and intelligence of the whites, and the subordinate position so long held by the colored race. For such unnatural marriages, the whites are mainly to blame, and this may furnish some excuse, if not a justification, for punishing them alone, as a means of prevention. The learned counsel of petitioner has referred me to a newspaper report of a decision lately made by the circuit court of the United States in San Francisco, as supporting this application for a writ of habeas corpus. It is the case of Ho Ah How v. Nunan [Case No. 6,546], sheriff of the city and county of San Francisco. Without attempting to analyze the facts of the case, it seems to me they are so wholly different from the present as to render the decision of the court therein wholly inapplicable.

As before stated, I regard the acts of the Texas legislature as being unjust in its discrimination against the white race, and as contrary to the spirit of the constitution; but inasmuch as it relates to a subject over which the state has complete and exclusive control, and because I doubt whether it can be properly held to be a violation of the letter of the constitution, or of any law made in pursuance thereof, the application for the writ of habeas corpus must be refused.

NOTE. The opinion of Judge Duval in the case of Ex parte Brown, above referred to, was as follows: "So far as I have been able to discover, there has been no law passed by the state of Texas since the abolition of slavery prohibiting marriage between, the white and black races. The only question, therefore, presented before me is, whether this act of 1858 is now in force and operative? My conclusion is, that it is not, for the following reasons, among others: Because it was passed in the interest and for the protection of slavery before the institution had been abolished, and when the negro was not a citizen of the United States, and because it fixes a penalty upon the white persons alone. It is a prohibition based solely upon color, and operating on the white race alone. To say that this statute is now in force would be as it seems to me, to disregard the effect of the 14th and 15th amendments of the constitution of the United States, and the first section of the civil rights bill. I think it infringes on both. It is unfair and unequal in its operation, because it would visit a heavy penalty on a white citizen and none whatever upon a colored citizen for doing a certain act. Marriage between the two races is wholly abhorrent to my sense of fitness and propriety, and I presume it would be no violation of the constitution and laws of the United States—inasmuch as marriage is but a civil contract to be regulated by the laws of the several states—were the state of Texas now to pass a law forbidding such marriages, under penalties extending to both races alike. But until this is done, I think the

matter must be considered as one of taste merely, and left for its control to the potent influence of public opinion."

[1] {Reported by Hon. William B. Woods, Circuit Judge, and here reprinted by permission.}

[2] {See note at end of case.}

[3] {See note at end of ease.}