Ex Parte Matter of Hennen

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Appeal No. : 38 U.S. 230

Appellant : Ex Parte Matter of Hennen

Judgement :

Ex Parte Matter of Hennen - 38 U.S. 230 (1839)
U.S. Supreme Court Ex Parte Matter of Hennen, 38 U.S. 13 Pet. 230 230 (1839)

Ex Parte Matter of Hennen

38 U.S. (13 Pet.) 230

PETITION FOR MANDAMUS

SYLLABUS

Mandamus. Motion for a rule on the District Judge of the Eastern District of Louisiana to show cause why a mandamus should not be issued requiring him to restore Duncan N. Hennen to the office of the clerk of the district court. The petition states the appointment of the relator to the office of clerk of the district court in 1834; the full and complete performance of his duties as cleric of the court until May 1837; the acknowledgment of the fidelity and capacity with which the

duties of the office were performed, stated in writing by the district judge; and the appointment of another person to the office, from personal motives and the influence of friendship and a knowledge of the capacity of the person appointed to perform the duties of the office. The petition also states the performance of the duties of Clerk of the Circuit Court of the Eastern District of Louisiana under the appointment as clerk of the district court, and the offer to perform those duties after his asserted removal as clerk of the district court, and that, the judges of the circuit court being divided in opinion as to his right to exercise the office of clerk, the business of the circuit court was entirely suspended.

The appointment of clerks of courts properly belongs to the courts of law, and a clerk of the court is one of those officers contemplated by the provision in the Constitution giving to Congress the power to vest the appointment of inferior officers as they think proper. The appointing power designated by the Constitution in the latter part of the second section of the second article of the Constitution was no doubt intended to be exercised by the department of the government to which the officer to be appointed most appropriately belonged.

It cannot be admitted that it was the intention of the Constitution that those offices which are denominated inferior offices should be held during life. In the absence of all constitutional or statutory provision as to the removal of such officers, it would seem to be a sound and necessary rule to consider the power of removal as incident to the power of appointment.

The tenure of ancient common law offices and the rules and principles by which they are governed have no application to the office of the clerk of a district court of the United States. The tenure in those cases depends in a great measure upon ancient usage. But in the United States there is no ancient usage which can apply to and govern the tenure of offices created by the Constitution and laws. They are of recent origin, and must depend entirely on a just construction of our Constitution and laws, and the like doctrine is held in England, where the office is not an ancient common law office, but of modern origin, under some act of Parliament. In such a case, the tenure of the office is determined by the meaning and intention of the statute.

The law giving the district courts the power of appointing their own clerks does not prescribe any form in which this shall be done. The power vested in the court is a continuing power, and the mere appointment of a successor would *per se* be a removal of the prior incumbent, so far at least as his rights were concerned.

The Supreme Court can have no control over the appointment or removal of a clerk of the district court or entertain any inquiry into the grounds of the removal. If the judge is chargeable with any abuse of his power, the Supreme Court is not the tribunal to which he is answerable.

The Court having decided that the rule granted at the August term of the Court, held by MR. CHIEF JUSTICE TANEY, should be discharged, the counsel presented another petition to the Court setting forth the same facts as those stated in the petition, the matters of which are set forth in the report of the preceding case, with others.

The additional facts stated in the petition were that the petitioner is in the full and undisputed possession of the seal of the Circuit Court for the Eastern District of Louisiana, and of the records of the said circuit court.

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That there is now pending in said circuit court a cause in which the petitioner, a citizen of the State of Louisiana, is the plaintiff and Rezin D. Shepherd, a citizen of Maryland, is the defendant; that the value of the property in controversy between petitioner and said Shepherd exceeds in amount the sum of six thousand dollars in cash. That in consequence of the disagreement between the judges of the circuit court, and the refusal of Judge Lawrence to allow the petitioner, the true and lawful clerk of said court, to perform the duties thereof, the petitioner is prevented from proceeding in said cause, and the petitioner is prevented from bringing the said cause up to this Court for its final decision.

The petitioner further states that the judges of the said circuit court continue to differ in opinion as to the legal rights of the petitioner and said John Winthrop to

the offices of clerk of the district and circuit courts, so that no one does or can perform the duties of the office of clerk of the circuit court aforesaid, and that the suitors in said court are thereby delayed, and the administration of justice therein wholly suspended, and the appellate jurisdiction of the Supreme Court of the United States over the judgments and decrees of said circuit court wholly suspended and incapable of being exercised.

"All which evils are remediless at and by the ordinary proceeding before the said district or circuit courts and can only be terminated and redressed by the interposition of this Honorable Court by its extraordinary process of mandamus."

The petition prays that the court, after consideration, will award a writ of mandamus to be directed to the Honorable Philip K. Lawrence, Judge of the District court of the United States for the Eastern District of Louisiana, commanding him forthwith to restore the petitioner to his office of clerk of the District Court of the United States for the Eastern District of Louisiana.

By an agreement between the counsel for the relator and the judge of the District Court of Louisiana, the questions presented to the Court on the petition were argued, the usual notice being dispensed with.

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MR. JUSTICE THOMPSON delivered the opinion of the Court.

This is an application for a rule upon the Honorable Philip K. Lawrence, Judge of the District Court of the United States for the Eastern District of Louisiana, to show cause why a mandamus should not be issued against him requiring him to show cause why he should not restore Duncan N. Hennen to the office of clerk of the said district court.

The petition sets forth that the petitioner, Duncan N. Hennen, on 21 February in the year 1834, was duly appointed clerk of the said court by the Honorable Samuel H. Harper, judge of the said court. That a commission was duly issued under the hand and seal of the judge. That he accepted the appointment and gave the bond

with sureties required by law, and thereupon entered upon the duties of the office and continued to discharge the same, methodically, skillfully, and uprightly, and to the satisfaction of the district court. That by virtue of said appointment and of the provisions of the statute in such case made and provided, he was from the period of the organization of the Circuit Court of the United States for the said District of Louisiana, in like manner the clerk of the said circuit court, and performed all the duties of said office. That he continued to perform the said duties and receive the emoluments and in all respects to hold and occupy said offices until on or about 18 May in the year 1838, when he received a communication from the Honorable Philip K. Lawrence, then and now the judge of the said District Court of the United States for the said Eastern District of Louisiana, apprizing him of his removal from the said office of clerk and the appointment of John Winthrop in his place. And in this communication he states unreservedly that the business of the office for the last two years had been conducted promptly, skillfully, and uprightly and that in appointing Mr. Winthrop to succeed him, he had been actuated purely by a sense of duty and feelings of kindness towards one whom he had long known, and between whom and himself the closest friendship had ever subsisted. And that as his capacity to fill the office cannot be questioned, he felt that he was not exercising

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any unjust preference in bestowing on him the appointment. The petition further states that Judge Lawrence did, on or about 18 May in the year 1838, execute and deliver to the said John Winthrop a commission or appointment, as Clerk of the said District court for the Eastern District of Louisiana, and that he does to a certain extent execute the duties appertaining to the said office, and is recognized by the said judge as the only legal clerk of the said district court.

The petition further states that on or about 21 May, in the year 1838, the Circuit Court of the United States for the Eastern District of Louisiana met according to law, when the Honorable John McKinley, one of the Associate Justices of the Supreme Court of the United States, and the said Judge Lawrence appeared as judges of the said circuit court, and that the petitioner and John Winthrop severally

presented themselves, each claiming to be right fully and lawfully the clerk of the said circuit court; that the judges differed in opinion upon the said question of right, and being unable to concur in opinion, neither of said parties was admitted to act as clerk or recognized by the court as being rightful clerk, and no business was or could be transacted, and the court adjourned.

The petitioner claims that he was legally and in due form appointed clerk of said district court, and by virtue of said appointment became lawfully the clerk of said circuit court. And that he has never resigned the said offices or been legally removed from the same or either of them. But that he is illegally kept out of the said office of clerk of the said district court by the illegal acts and conduct of the said Philip K. Lawrence, judge as aforesaid, and the said John Winthrop, claiming to hold the said office under an appointment from the said Judge Lawrence, which he is advised and believes is illegal and void. And prays that the court will award a writ of mandamus directed to the said judge of the district court commanding him forth with to restore the petitioner to the office of clerk of the said District Court of the United States for the Eastern District of Louisiana.

The district judge has appeared by counsel to oppose this motion, and the facts set out in the petition have not been denied. And the question presented to the Court is whether the petitioner has shown enough to entitle him to a rule to show cause why a mandamus should not issue. If he has been legally removed from the office of clerk, there are no grounds upon which the present motion can be sustained.

By the Constitution of the United States, art. 2, s. 2, it is provided that the President shall nominate, and by and with the advice and consent of the Senate shall appoint certain officers therein designated and all other officers of the United States whose appointments are not herein otherwise provided for and which shall be established by law, but the Congress may by law vest the appointment of such inferior officers as it shall think proper in the President alone, in the courts of law, or in the heads of departments. The appointing

power here designated in the latter part of the section was no doubt intended to be exercised by the department of the government to which the officer to be appointed most appropriately belonged. The appointment of clerks of courts properly belongs to the courts of law, and that a clerk is one of the inferior officers contemplated by this provision in the Constitution cannot be questioned. Congress, in the exercise of the power here given by the Act of 24 September, 1789, establishing the judicial courts of the United States, 1 Story's Laws U.S. 56, s. 7, declared that the Supreme Court and the district courts shall have power to appoint clerks of their respective courts and that the clerk for each district court shall be clerk also of the circuit court in such district.

When this law was passed, Louisiana formed no part of the United States, and of course had no district court to which the act of 1789 would apply. But by the Act of 26 March, 1804, 2 Story's Laws 933, providing for the temporary government of Louisiana, a district court is established, and the law directs that the judge thereof shall appoint a clerk for the said district, who shall keep the records of the court and receive the fees provided by law for his services. And a like provision is made by the Act of April 8, 1812, 2 Story 1225, passed for the admission of Louisiana into the Union. And by the Act of 3 March, 1837, 4 Story 2538, extending the circuit court system and embracing Louisiana in the Ninth Circuit, it is declared, that the said circuit court shall be governed by the same laws and regulations as apply to the other circuit courts of the United States, and the clerks of the said courts respectively, shall perform the same duties and be entitled to receive the same fees and emoluments which are by law established for the clerks of the other circuit courts of the United States. The clerk of the district court therefore, in Louisiana, became the clerk of the circuit court, standing upon the same footing in all respects as the clerks of the other district courts. His rights or his duties were in no respect changed by the establishment of a circuit court in that state, except that the duties of a clerk of that court were superadded to those of a clerk of the district court. And this was by express provision of law, and required no act on the part of the circuit court to constitute him clerk of that court.

Such, then, being the situation in which the petitioner stood prior to 21 May, 1838, the question arises whether the district judge had the power to remove him and appoint another clerk in his place.

The Constitution is silent with respect to the power of removal from office where the tenure is not fixed. It provides that the judges both of the supreme and inferior courts shall hold their offices during good behavior. But no tenure is fixed for the office of clerks. Congress has by law limited the tenure of certain officers to the term of four years, 3 Story 1790, but expressly providing that the officers shall, within that term, be removable at pleasure, which, of course, is without requiring any cause for such removal. The clerks of courts are not included within this law, and there is

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no express limitation in the Constitution or laws of Congress upon the tenure of the office.

All offices the tenure of which is not fixed by the Constitution or limited by law must be held either during good behavior or (which is the same thing in contemplation of law) during the life of the incumbent, or must be held at the will and discretion of some department of the government, and subject to removal at pleasure.

It cannot for a moment be admitted that it was the intention of the Constitution that those offices which are denominated inferior offices should be held during life. And if removable at pleasure, by whom is such removal to be made? In the absence of all constitutional provision or statutory regulation, it would seem to be a sound and necessary rule to consider the power of removal as incident to the power of appointment. This power of removal was incident to a subject much disputed and upon which a great diversity of opinion was entertained in the early history of this government. This related, however, to the power of the President to remove officers appointed with the concurrence of the Senate, and the great question was whether the removal was to be by the President alone or with the concurrence of the Senate, both constituting the appointing power. No one denied the power of

the President and Senate jointly to remove, where the tenure of the office was not fixed by the Constitution, which was a full recognition of the principle that the power of removal was incident to the power of appointment. But it was very early adopted as the practical construction of the Constitution that this power was vested in the President alone. And such would appear to have been the legislative construction of the Constitution. For in the organization of the three great departments of state, war, and treasury in the year 1789, provision is made for the appointment of a subordinate officer by the head of the department who should have the charge and custody of the records, books, and papers appertaining to the office when the head of the department should be removed from the office of the President of the United States. 1 Story 5, 31, 47. When the Navy Department was established in the year 1798, 1 Story 498, provision is made for the charge and custody of the books, records, and documents of the department in case of vacancy in the office of Secretary, by removal or otherwise. It is not here said by removal by the President, as is done with respect to the heads of the other departments, and yet there can be no doubt that he holds his office by the same tenure as the other secretaries, and is removable by the President. The change of phraseology arose probably from its having become the settled and well understood construction of the Constitution, that the power of removal was vested in the President alone in such cases, although the appointment of the officer was by the President and Senate.

It all these departments, power is given to the Secretary to appoint all necessary clerks; 1 Story 48; and although no power to remove is expressly given, yet there can be no doubt that these clerks hold their office at the will and discretion of the head of the department.

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It would be a most extraordinary construction of the law that all these offices were to be held during life, which must inevitably follow, unless the incumbent was removable at the discretion of the head of the department; the President has certainly no power to remove. These clerks fall under that class of inferior officers the appointment of which the Constitution authorizes Congress to vest in the head

of the department. The same rule, as to the power of removal, must be applied to offices where the appointment is vested in the President alone. The nature of the power and the control over the officer appointed does not at all depend on the source from which it emanates. The execution of the power depends upon the authority of law, and not upon the agent who is to administer it. And the Constitution has authorized Congress in certain cases to vest this power in the President alone, in the courts of law, or in the heads of departments, and all inferior officers appointed under each by authority of law must hold their office at the discretion of the appointing power. Such is the settled usage and practical construction of the Constitution and laws, under which these offices are held. The tenure of ancient common law offices and the rules and principles by which they are governed have no application to this case. The tenure in those cases depends in a great measure upon ancient usage. But with us there is no ancient usage which can apply to and govern the tenure of offices created by our Constitution and laws. They are of recent origin, and must depend entirely upon a just construction of our Constitution and laws. And the like doctrine is held in the English courts, where the office is not an ancient common law office, but of modern origin under some act of parliament. In such a case the tenure of the office is determined by the meaning and intention of the statute. The case of *Smyth vs. Latham,* 9 Bing. 672, was governed by this rule. The office in question was that of paymaster, appointed under an act of parliament, and the court said:

"This is not an ancient common law office the tenure of which is to be governed by ancient usage, and the question is no more than an inquiry into the meaning and intention of the statute itself, and that by the legal construction of the act of parliament the tenure of the office was during pleasure, and that the new appointment was of itself a revocation of the first."

And the same rule has governed the decisions of the State courts in this country whenever the power of appointment and tenure of office has been drawn into discussion. The questions have been governed by the construction given to the constitution and laws of the state where they arose.

The case of *Avery v. Inhabitants of Tyringham,* 3 Mass. 177, falls within this class of cases. The Chief Justice there says it is a general rule that an office is held at the will of either party unless a different tenure is expressed in the appointment or is implied by the nature of the office or results from ancient usage. The office held by the petitioner clearly falls within neither of these exceptions, and of course comes within the general rule, and is held

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at the will of either party. The petitioner would doubtless claim the right to resign the clerkship if he chose so to do. And the court had a right to put an end to it, at its election.

The same principle governed the Supreme Court of Pennsylvania in the case of *Leghman v. Sutherland,* 3 Serg. & R. 145. The question there turned upon the construction of the Constitution and law of Pennsylvania. By the Constitution of 1790 it is provided that the governor shall appoint all officers whose office is established by the constitution or shall be established by law and whose appointments are not otherwise provided for. And the court said

"The Constitution is silent as to the removal of officers. Yet it has been generally supposed that the power of removal rested with the governor, except in those cases where the tenure was during good behavior,"

clearly recognizing the principle that the power of removal was incident to the power of appointment in the absence of all constitutional or legislative provision on the subject. The case of *Hoke vs. Henderson,* 4 Dev. 1, decided in the Supreme Court of North Carolina, is not at all in conflict with the doctrine contained in the cases referred to. That case, like the others, turned upon the Constitution and laws of North Carolina, and by the express terms of the law, the tenure of the office was during good behavior, and was, of course, governed by very different considerations from those which apply to the case now before the Court.

The law giving the district courts the power of appointing their own clerks does not prescribe any form in which this shall be done. The petitioner alleges that he has

heard and believes that Judge Lawrence did, on 18 May, 1838, execute and deliver to John Winthrop a commission or appointment as clerk of the District Court for the Eastern District of Louisiana, and that he entered upon the duties of the office and was recognized by the judge as the only legal clerk of the district court. And in addition to this, notice was given by the judge to the petitioner of his removal from the office of clerk and the appointment of Winthrop in his place, all which was amply sufficient if the office was held at the discretion of the court. The power vested in the court was a continuing power, and the mere appointment of a successor would, *per se,* be a removal of the prior incumbent, so far at least as his rights were concerned. How far the rights of third persons may be affected is unnecessary now to consider. There could not be two clerks at the same time. The offices would be inconsistent with each other, and could not stand together. If the power to appoint a clerk was vested exclusively in the district court and the office was held at the discretion of the court, as we think it was, then this Court can have no control over the appointment or removal or entertain any inquiry into the grounds of removal. If the judge is chargeable with any abuse of his power, this is not the tribunal to which he is amenable. and as we have no right to judge upon this matter or

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power to afford redress if any is required, we abstain from expressing any opinion upon that part of the case.

The motion is accordingly

Denied.

On consideration of this motion and of the arguments of counsel thereupon had as well in support of as against the motion, it is now here considered, ordered, and adjudged by this Court that the said motion be and the same is, hereby overruled, and that the said mandamus or rule prayed for be and the same is hereby denied.