Clinton Vs. Englebrecht

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SooperKanoon Citation : sooperkanoon.com/82099

Court : US Supreme Court

Decided On : 1871

Appeal No. : 80 U.S. 434

Appellant : Clinton

Respondent : Englebrecht

Judgement :

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Clinton v. Englebrecht

80 U.S. (13 Wall.) 434

ERROR TO THE SUPREME COURT

OF THE TERRITORY OF UTAH

SYLLABUS

1. The effort of a defendant to secure, so far as he can, by peremptory challenges and challenges for cause, a fair trial of his case, does not waive an inherent and fatal objection to the entire panel.

2. The fact that judges of the district and supreme courts of the territories are appointed by the President, under acts of Congress, does not make the courts which they are authorized to hold "courts of the United States." Such courts are but the legislative courts of the territory, created in virtue of the clause which authorizes Congress to make all needful rules and regulations respecting the territories belonging to the United States. Accordingly, jurors summoned into them under the acts of Congress, applicable only to the courts of the United States, *i.e.,* courts established under the article of the Constitution which relates to the judicial power, are wrongly summoned, and a judgment on their verdict cannot, if properly objected to, be sustained.

3. The theory upon which the various governments for portions of the territory of the United States have been organized has ever been that of leaving to the inhabitants all the powers of self-government consistent with the supremacy and supervision of national authority, and with certain fundamental principles established by Congress.

4. This view illustrated by reference to the various acts, from the earliest dates till 1864, organizing the territories of the United States.

5. The Utah jury law of 1859 examined and considered in the light of this view and this history, and certain objections to it declared to be without foundation.

The principal question for consideration in this case was raised by the challenge of the defendants to the array of the jury in the Third District Court of the Territory of Utah.

The suit was a civil action for the recovery of a penalty for the destruction of certain property of the plaintiffs by the defendants. The plaintiffs were retail liquor dealers in the City of Salt Lake, and had refused to take out a license as required by an ordinance of the city. The defendants, acting under the same ordinance, thereupon proceeded to the store of the plaintiffs and destroyed their liquors to the value, as alleged, of more than $22,000. The statute gave an action against any person who should willfully and maliciously injure or destroy the goods of another

for a sum

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equal to three times the value of the property injured or destroyed. Under this statute, the plaintiffs claimed this threefold value.

The act of the territorial legislature, passed in 1859 and in force when the jury in this cause was summoned, required that "the county court" in each county should make out from the assessment rolls, a list of fifty men qualified to serve as jurors, and that thirty days before the session of the district court, "the clerk of said court" should issue a writ to the territorial marshal or any of his deputies, requiring him to summon twenty-four eligible men to serve as petit jurors. These men were to be taken by lot, in the mode pointed out by the statute, from the lists previously made by the clerks of the county courts, and their names were to be returned by the marshal to the clerk of the district court. Provision was further made for the drawing of the trial panel from this final list and for its completion by a new drawing or summons in case of nonattendance or excuse from service upon challenge, or for other reason.

For the trial of the cause, the record showed that the court originally directed a venire to be issued in conformity with this law, and that a venire was issued accordingly, but not served or returned. The record also showed that under an order subsequently made, an open venire was issued to the federal marshal, which was served and returned with a panel of eighteen petit jurors annexed, the court, in making this order, acting apparently on the theory that it was a court of the United States, and to be governed in the selection of jurors by the acts of Congress. The jurors thus summoned were summoned from the body of the county at the discretion of the marshal. Twelve jurors of this panel were placed in the jury box, and the defendants challenged the array on the ground that the jurors had not been selected or summoned in conformity with the laws of the territory and with the original order of the court. This challenge was overruled. Exception was taken, and the cause proceeded. Both parties challenged for cause. Each of the defendants claimed six peremptory challenges. This claim was also overruled,

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and exception was taken. Other exceptions were also taken in the progress of the cause. Under the charge of the court, a verdict was rendered for the plaintiffs, under which judgment was entered for $59,063.25, and on appeal was affirmed by the supreme court of the territory. A writ of error to that court brought the cause here.

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THE CHIEF JUSTICE delivered the opinion of the Court.

It is plain that the jury was not selected or summoned in pursuance of the statute of the territory. That statute was, on the contrary, wholly and purposely disregarded, and the controlling question raised by the challenge to the array is whether the law of the territorial legislature prescribing the mode of obtaining panels of grand and petit jurors is obligatory upon the district courts of the territory.

It was insisted in argument that the challenge to the array was waived by the defendants through the exercise of their right to challenge peremptorily and for cause, and we were referred to the judgment of the supreme court of New York in the case of *People v. McKay,* [Footnote 1] as an authority

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for this proposition. But that case appears to be an authority for the opposite conclusion. "We are not of opinion," says the court, "that the prisoner's peremptory challenge of jurors was a waiver of his right to object now to the want of a venire." In that case, there had been no venire, but the jury had been summoned in a mode not warranted by law. In the case before us there was a venire, but if it was not authorized by law it was a nullity; and we are not prepared to say that the efforts of the defendants to secure as far as they could, by peremptory challenges and challenges for cause, a fair trial of their case, waived an inherent and fatal objection to the entire panel.

We are therefore obliged to consider the question whether the district court, in the selection and summoning of jurors, was bound to conform to the law of the territory.

The theory upon which the various governments for portions of the territory of the United States have been organized, has ever been that of leaving to the inhabitants all the powers of self-government consistent with the supremacy and supervision of national authority, and with certain fundamental principles established by Congress. As early as 1784, an ordinance was adopted by the Congress of the Confederation providing for the division of all the territory ceded or to be ceded, into states, with boundaries ascertained by the ordinance. These states were severally authorized to adopt for their temporary government the constitution and laws of anyone of the states, and provision was made for their ultimate admission by delegates into the Congress of the United States. We thus find the first plan for the establishment of governments in the territories, authorized the adoption of state governments from the start, and committed all matters of internal legislation to the discretion of the inhabitants, unrestricted otherwise than by the state constitution originally adopted by them.

This ordinance, applying to all territories ceded or to be ceded, was superseded three years later by the Ordinance of 1787, restricted in its application to the territory northwest

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of the River Ohio -- the only territory which had then been actually ceded to the United States.

It provided for the appointment of the governor and three judges of the court, who are authorized to adopt, for the temporary government of the district, such laws of the original states as might be adapted to its circumstances. But as soon as the number of adult male inhabitants should amount to five thousand, they were authorized to elect representatives to a house of representatives, who were required to nominate ten persons from whom Congress should select five to

constitute a legislative council; and the house and the council thus selected and appointed were thenceforth to constitute the legislature of the territory, which was authorized to elect a delegate in Congress with the right of debating, but not of voting. This legislature, subject to the negative of the governor and certain fundamental principles and provisions embodied in articles of compact, was clothed with the full power of legislation for the territory.

The territories south of the Ohio in 1790, [Footnote 2] of Mississippi in 1798, [Footnote 3] of Indiana in 1800, [Footnote 4] of Michigan in 1805, [Footnote 5] of Illinois in 1809, [Footnote 6] were organized upon the same plan, except that the prohibition of slavery, embodied in the Ordinance of 1787, was not embraced among the fundamental provisions in the organization of the territories south of the Ohio, and the people in the Territories of Michigan, Indiana, and Illinois were authorized to form a legislative assembly as soon as they should see fit, without waiting for a population of five thousand adult males.

Upon the acquisition of the foreign Territory of Louisiana in 1803, the plan for the organization of the government was somewhat changed. The governor and council of the Territory of Orleans, which afterwards became the State of Louisiana, were appointed by the President, but were invested with full legislative powers, except as specially limited. A district court of the United States distinct from

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the courts of the territory was instituted. [Footnote 7] The rest of the territory was called the District of Louisiana, and was placed under the government of the governor and judges of Indiana. [Footnote 8]

Jurisdiction of cases in which the United States were concerned, subject to appeal to the Supreme Court of the United States, was for the first time expressly given to a territorial court in 1805. [Footnote 9] The territory of Missouri was organized in 1812, [Footnote 10] and upon the same plan as the territories acquired by cessions of the states. In the act for the government of this territory appears for the

first time a provision concerning the qualifications of jurors. The 16th section of the act provided that all free white male adults, not disqualified by any legal proceeding, should be qualified as grand and petit jurors in the courts of the territory, and should be selected, until the General Assembly should otherwise direct, in such manner as the courts should prescribe.

The Territory of Alabama, in 1817, [Footnote 11] was formed out of the Mississippi Territory, and upon the same plan. The superior court of the territory was clothed with the federal jurisdiction given by the act of 1805. The Territory of Arkansas was organized in 1819, [Footnote 12] in the southern part of Missouri Territory. The powers of the government were distributed as executive, legislative, and judicial, and vested respectively in the governor, general assembly, and the courts. The governor and judges of the superior court were to be appointed by the President, and the governor was to exercise the legislative powers until the organization of the general assembly. The act for the organization of the territorial government of Florida made the same distribution of the powers of the government as was made in the Territory of Arkansas, and contained the same provision in regard to jurors as the act for the territorial government of Missouri.

In all the territories, full power was given to the legislature

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over all ordinary subjects of legislation. The terms in which it was granted were various, but the import was the same in all.

Except in the acts relating to Missouri and Arkansas, no power was given to the courts in respect to jurors, and the limitation of this power until the organization of the general assembly indicates very clearly that after such organization, the whole power in relation to jurors was to be exercised by that body.

In 1836, the Territory of Wisconsin was organized under an act, which seems to have received full consideration, and from which all subsequent acts for the organization of territories have been copied, with few and inconsiderable variations. Except those in the Kansas and Nebraska Acts in relation to slavery

and some others growing out of local circumstances, they all contained the same provisions in regard to the legislature and the legislative authority, and to the judiciary and the judicial authority, as the act organizing the Territory of Utah. In no one of them is there any provision in relation to jurors.

The language of the section conferring the legislative authority in each of these acts is this:

"The legislative power of said territory shall extend to all rightful subjects of legislation, consistent with the Constitution of the United States, and the provisions of this act, but no law shall be passed interfering with the primary disposal of the soil. No tax shall be imposed upon the property of the United States, nor shall the lands or other property of nonresidents be taxed higher than the lands or other property of residents."

As there is no provision relating to the selection of jurors in the constitution or the organic act, it cannot be said that any legislation upon this subject is inconsistent with either. The method of procuring jurors for the trial of cases is therefore a rightful subject of legislation, and the whole matter of selecting, empanelling, and summoning jurors is left to the territorial legislature.

The action of the legislatures of all the territories has

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been in conformity with this construction. In the laws of every one of them from that organized under the Ordinance of 1787 to the Territory of Montana are found acts upon this subject. [Footnote 13] And it is worthwhile to remark that in three of the territories, Nevada, New Mexico, and Idaho, the judge of the probate has been associated with other officials in the selection of the lists for the different counties.

This uniformity of construction by so many territorial legislatures of the organic acts in relation to their legislative authority, especially when taken in connection with the fact that none of these jury laws have been disapproved by Congress,

though any of them would be annulled by such disapproval, confirms the opinion, warranted by the plain language of the organic act itself, that the whole subject matter of jurors in the territories is committed to territorial regulation.

If this opinion needed additional confirmation, it would be found in the Judiciary Act of 1789. The regulations of that act in regard to the selection of jurors have no reference whatever to territories. They were framed with reference to the states, and cannot, without violence to rules of construction, be made to apply to territories of the United States. If, then, this subject were not regulated by territorial law, it would be difficult to say that the selection of jurors had been provided for at all in the territories.

It is insisted, however, that the jury law of Utah is defective in two material particulars: first that it requires the jury lists to be selected by the county court, upon which the organic law did not permit authority for that purpose to be conferred; second that it requires the jurors to be summoned by the territorial marshal, who was elected by the

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legislature, and not appointed by the governor. We do not perceive how these facts, if truly alleged, would make the mode actually adopted for summoning the jury in this case legal. But we will examine the objections.

In the first place, we observe that the law has received the implied sanction of Congress. It was adopted in 1859. It has been upon the statute book for more than twelve years. It must have been transmitted to Congress soon after it was enacted, for it was the duty of the secretary of the territory to transmit to that body copies of all laws on or before the 1st of the next December in each year. The simple disapproval by Congress at any time would have annulled it. It is no unreasonable inference, therefore, that it was approved by that body.

In the next place, we are of opinion that the making of the jury lists by the county courts was not a judicial act. Conceding that it was not in the power of the territorial legislature to confer judicial authority upon any other courts than those

authorized by the organic law, and that it was not within its competency to organize county courts for the administration of justice, we cannot doubt the right of the territorial legislature to associate select men with the judge of probate, and to call the body thus organized a county court and to require it to make lists of persons qualified to serve as jurors. In making the selection, its members acted as a board, and not as a judicial body.

Nor do we think the other objection sound -- *viz.* that the required participation of the territorial marshal in summoning jurors invalidated his acts because he was elected by the legislature, and not appointed by the governor. He acted as territorial marshal under color of authority, and if he was not legally such, his acts cannot be questioned indirectly.

But we repeat that the alleged defects of the Utah jury law are not here in question. What we are to pass upon is the legality of the mode actually adopted for empanelling the jury in this case. If the court had no authority to adopt that mode, the challenge to the array was well taken, and should have been allowed.

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Acting upon the theory that the supreme and district courts of the territory were courts of the United States, and that they were governed in the selection of jurors by the acts of Congress, the district court summoned the jury in this case by an open venire. We need not pause to inquire whether this mode was in pursuance of any act of Congress, for if such act was not intended to regulate the procuring of jurors in the territory, it has no application to the case before us. We are of opinion that the court erred both in its theory and in its action.

The judges of the supreme court of the territory are appointed by the President under the act of Congress, but this does not make the courts they are authorized to hold courts of the United States. This was decided long since in *American Insurance Company v. Canter* [Footnote 14] and in the later case of *Benner v. Porter.* [Footnote 15] There is nothing in the Constitution which would prevent Congress from conferring the jurisdiction which they exercise if the judges were

elected by the people of the territory and commissioned by the governor. They might be clothed with the same authority to decide all cases arising under the Constitution and laws of the United States, subject to the same revision. Indeed, it can hardly be supposed that the earliest territorial courts did not decide such questions, although there was no express provision to that effect, as we have already seen, until a comparatively recent period.

There is no Supreme Court of the United States, nor is there any district court of the United States, in the sense of the Constitution, in the territory of Utah. The judges are not appointed for the same terms, nor is the jurisdiction which they exercise part of the judicial power conferred by the Constitution or the general government. The courts are the legislative courts of the territory, created in virtue of the clause which authorizes Congress to make all needful rules and regulations respecting the territories belonging to the United States. [Footnote 16]

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The supreme court of the territory was doubtless misled by the inadvertent use of the words "marshal of the District Court of the United States for the Territory of Oregon" in the organic law. This act defines the duties, liabilities, and fees of the marshal for the territory by reference to those of the marshal of the District Court of the United States for the Territory of Oregon. On reference to the act organizing that territory, we find that the duties of the marshal were to be the same as those of the marshal for the District Court of the United States for the Territory of Wisconsin. On reference to the act organizing the last-named territory, the duties, liabilities, and fees of the marshal were described to be the same as those of the "Marshal of the District Court of the United States for the Northern District of New York." Hence, the words "marshal of the District Court of the United States" have crept into the various acts organizing these territories. But the description of the court which was proper in a state would be improper in a territory.

The organic act authorized the appointment of an attorney and a marshal for the territory, who may properly enough be called the attorney and marshal of the

United States for the territory, for their duties in the courts have exclusive relation to cases arising under the laws and Constitution of the United States.

The process for summoning jurors to attend in such cases may be a process for exercising the jurisdiction of the territorial courts when acting, in such cases, as circuit and district courts of the United States, but the making up of the lists and all matters connected with the designation of jurors are subject to the regulation of territorial law. And this is especially true in cases arising, not under any act of Congress but exclusively, like the case in the record, under the laws of the territory.

There is nothing in this opinion inconsistent with the cases of *Orchard v. Hughes* [Footnote 17] or of *Hunt v. Palao,* [Footnote 18] properly

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understood. The first of these cases went upon the ground that the chancery jurisdiction conferred upon the courts of the territories by the organic act was beyond the reach of territorial legislation, and the second, in which the territorial court of appeals was called a court of the United States, was only intended to distinguish it from a state court.

Upon the whole, we are of opinion that the jury in this case was not selected and summoned in conformity with law, and that the challenge to the array should have been allowed. This opinion makes it unnecessary to consider the other questions in the case.

Judgment reversed.

[Footnote 1]

18 Johnson 217.

[Footnote 2]

1 Stat. at Large 123.

[Footnote 3]

Ib., 549.

[Footnote 4]

2 *id.* 58.

[Footnote 5]

Ib., 309.

[Footnote 6]

Ib., 514.

[Footnote 7]

2 Stat. at Large 283.

[Footnote 8]

Ib., 287.

[Footnote 9]

Ib., 338.

[Footnote 10]

Ib., 743.

[Footnote 11]

3 *id.* 371.

[Footnote 12]

Ib., 493.

[Footnote 13]

Wisconsin, organized April 20, 1836, 5 Stat. at Large 10; Iowa, June 12, 1838, *ib.,* 235; Oregon, August 14, 1848, 9 *id.* 323; Minnesota, March 3, 1849, *ib.,* 403; New Mexico, September 9, 1850, *ib.,* 446; Utah, September 9, 1850, *ib.,* 453; Nebraska, May 30, 1854, 10 *id.* 277; Kansas, May 30, 1854, *ib.,* 277; Washington, March 2, 1853, *ib.,* 172; Colorado, February 28, 1861, 12 *id.* 172; Nevada, March 2, 1861, *ib.,* 209; Dakota March 2, 1861, *ib.,* 239; Arizona, February 24, 1863, *ib.,* 664; Idaho, March 3, 1863, *ib.,* 808; Montana, May 26, 1864, 13 *id.* 85.

[Footnote 14]

26 U. S. 1 Pet. 546.

[Footnote 15]

50 U. S. 9 How. 235.

[Footnote 16]

American Insurance Company v. Canter, 1 Pet. 545.

[Footnote 17]

68 U. S. 1 Wall. 73.

[Footnote 18]

45 U. S. 4 How. 589.