

United States Vs. Smith

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Court : US Supreme Court

Decided On : Feb-06-1888

Appeal No. : 124 U.S. 525

Appellant : United States

Respondent : Smith

Judgement :

United States v. Smith - 124 U.S. 525 (1888)

U.S. Supreme Court United States v. Smith, 124 U.S. 525 (1888)

United States v. Smith

Argued January 16, 1888

Decided February 6, 1888

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CERTIFICATE OF DIVISION OF OPINION FROM THE CIRCUIT COURT

OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

SYLLABUS

Section 3639 of the Revised Statutes does not apply to clerks of a collector of customs.

Clerks of a collector of customs are not appointed by the head of a department, and are not officers of the United States in the sense of the Constitution.

The Court stated the case as follows:

This case comes from the Circuit Court for the Southern District of New York on a certificate of division of opinion between its judges. The defendant was a clerk in the office of the collector of customs for the collection district of the City of New York, and in 1886 was indicted for the unlawful conversion to his own use of public money, an offense designated in the Revised Statutes as embezzlement of such money. The indictment contains seventy-five counts, each charging the defendant with a separate act of embezzlement. The counts were all in the same form, and the objections to one are equally applicable to the whole of them. The first one is as follows:

"The jurors of the United States of America, within and for the district and circuit aforesaid, on their oath present that Douglas Smith, late of the City and County of New York, in the district and circuit aforesaid, heretofore, to-wit, on the eleventh day of October, in the year of our Lord 1883 at the Southern District of New York, and within the jurisdiction of this court, he, the said Douglas Smith, being then and there a person charged by an

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act of Congress with the safekeeping of the public moneys, to-wit, a clerk in the office of the collector of customs for the collection district of the City of New York, appointed by the collector of customs, with the approbation of the Secretary of the Treasury, and having then and there in his custody a large sum of public money, to-wit, the sum of ten and 50/100 dollars, did unlawfully fail to keep the same, but the same did unlawfully convert to his own use, against the peace of the United States and their dignity, and contrary to the statute of the United States in such cases made and provided."

The indictment is rounded on 5490 of the Revised Statutes, which is as follows:

"Every officer or other person charged by any act of Congress with the safekeeping of the public moneys who fails to safely keep the same without loaning, using, converting to his own use, depositing in banks, or exchanging for other funds than as specially allowed by law, shall be guilty of embezzlement of the money so loaned, used, converted, deposited, or exchanged, and shall be imprisoned not less than six months, nor more than ten years, and fined in a sum equal to the amount of money so embezzled."

The law providing for the safekeeping of the public moneys is found in 3639 of the Revised Statutes, which is as follows:

"The Treasurer of the United States, all assistant treasurers, and those performing the duties of assistant treasurer, all collectors of the customs, all surveyors of the customs, acting also as collectors, all receivers of public moneys at the several land offices, all postmasters, and all public officers of whatsoever character are required to keep safely without loaning, using, depositing in banks, or exchanging for other funds than as specially allowed by law all the public money collected by them or otherwise at any time placed in their possession and custody, till the same is ordered, by the proper department or officer of the government, to be transferred or paid out, and when such orders for transfer or payment are received, faithfully and promptly to make the same as directed, and to do and perform all other duties as fiscal agents of the government which may be imposed by any law, or by any regulation

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of the Treasury Department made in conformity to law. The President is authorized, if in his opinion the interest of the United States requires the same, to regulate and increase the sums for which bonds are or may be required by law of all district attorneys, collectors of customs, naval officers, and surveyors of customs, navy agents, receivers and registers of public lands, paymasters in the army, commissary general, and by all other officers employed in the disbursement

of the public moneys, under the direction of the War or Navy Departments."

The law providing for the employment of clerks by collectors of customs is found in 2634 of the Revised Statutes, which is as follows:

"The Secretary of the Treasury may from time to time, except in cases otherwise provided, limit and fix the number and compensation of the clerks to be employed by any collector, naval officer, or surveyor, and may limit and fix the compensation of any deputy of any such collector, naval officer, or surveyor."

To the indictment the defendant filed a demurrer, and upon its hearing the following questions occurred, upon which the judges were divided in opinion:

"1. Does the indictment sufficiently charge an offense under 5490, Revised Statutes?"

"2. Is a clerk in the office of the collector of customs for the collection district of the City of New York, appointed by the collector of customs, with the approbation of the Secretary of the Treasury, by virtue of 2634 of the Revised Statutes, a person charged by any act of Congress with the safekeeping of public moneys?"

"3. Was the defendant appointed by the head of a department, within the meaning of the constitutional provisions (Art. II, Sec. 2), upon the subject of the appointing power?"

Thereupon, on the request of the district attorney, the questions were certified to this Court, with a copy of the indictment and an abstract of the record, for final decision.

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MR. JUSTICE FIELD, after stating the facts as above, delivered the opinion of the Court.

The indictment in this case is in form sufficiently full and specific in its averments to embrace the offense prescribed by the statute, and yet the defendant charged is

not within its provisions. He is designated as a clerk in the office of the collector of customs, and is thus shown not to be charged by an act of Congress with the safekeeping of the public moneys, contrary to the averments of the indictment. The courts of the United States are presumed to know the general statutes of Congress, and any averment in an indictment inconsistent with a provision of a statute of that character must necessarily fail, the statute negating the averment. No clerk of a collector of customs is, by 3639 of the Revised Statutes, charged with the safekeeping of the public moneys. That section requires the Treasurer of the United States, assistant treasurers, and those performing the duties of assistant treasurer, collectors of customs, surveyors of customs, acting also as collectors, receivers of public moneys at the several land offices, postmasters, and all public officers of whatsoever character, to keep safely all public money collected by them or otherwise at any time placed in their possession and custody till the same is ordered by the proper department or officer of the government to be transferred or paid out. They are also required to perform all other duties as fiscal agents of the government which may be imposed by law or by any regulation of the Treasury Department made in conformity to law. A clerk of the collector is not an officer of the United States within the provisions of this section, and it

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is only to persons of that rank that the term public officer, as there used, applies. An officer of the United States can only be appointed by the President, by and with the advice and consent of the Senate, or by a court of law or the head of a department. A person in the service of the government who does not derive his position from one of these sources is not an officer of the United States in the sense of the Constitution. This subject was considered and determined in *United States v. Germaine*, [99 U. S. 508](#) , and in the recent case of *United States v. Mouat*, *ante*, [124 U. S. 303](#) . What we have here said is but a repetition of what was there authoritatively declared.

The number of clerks the collector may employ may be limited by the Secretary of the Treasury, but their appointment is not made by the Secretary, nor is his approval thereof required. The duties they perform are as varied as the infinite

details of the business of the collector's office, each taking upon himself such as are assigned to him by the collector. The officers specifically designated in 3639 are all charged by some act of Congress with duties connected with the collection, disbursement or keeping of the public moneys, or to perform other duties as fiscal agents of the government. A clerk of a collector, holding his position at the will of the latter, discharging only such duties as may be assigned to him by that officer, comes neither within the letter nor the purview of the statute. And we are referred to no other act of Congress bearing on the subject making a clerk of the collector a fiscal agent of the government or bringing him within the class of persons charged with the safekeeping of any public moneys.

The case of [*United States v. Hartwell*](#), 6 Wall. 385, does not militate against this view. The defendant there, it is true, was a clerk in the office of the assistant treasurer at Boston, but his appointment by that officer under the act of Congress could only be made with the approbation of the Secretary of the Treasury. This fact, in the opinion of the court, rendered his appointment one by the head of the department within the constitutional provision upon the subject of the appointing power. The necessity of the Secretary's

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approbation to the appointment distinguishes that case essentially from the one at the bar. The Secretary, as already said, is not invested with the selection of the clerks of the collector, nor is their selection in any way dependent upon his approbation. It is true the indictment alleges that the appointment of the defendant as clerk was made with such approbation, but as no law required this approbation, the averment cannot exert any influence on the mind of the court in the disposition of the questions presented. The fact averred, if it existed, could not add to the character or powers or dignity of the clerk. The Constitution, after providing that the President shall nominate, and, by and with the advice and consent of the Senate, shall appoint, ambassadors, other public ministers, and consuls, judges of the Supreme Court, and all other officers of the United States whose appointments are not otherwise provided for, which should be established by law, declares that

"The Congress may by law vest the appointment of such inferior officers as they think proper in the President alone, in the courts of law, or in the heads of departments."

There must be therefore a law authorizing the head of a department to appoint clerks of the collector before his approbation of their appointment can be required. No such law is in existence.

Our conclusion, therefore, is that 3639 of the Revised Statutes does not apply to clerks of the collector, and that such clerks are not appointed by the head of any department within the meaning of the constitutional provision.

It follows that our answers to the second and third questions certified to us must be in the negative. An answer to the first question is therefore immaterial.

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