

Summers Vs. United States

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Appeal No. : 231 U.S. 92

Appellant : Summers

Respondent : United States

Judgement :

Summers v. United States - 231 U.S. 92 (1913)

U.S. Supreme Court Summers v. United States, 231 U.S. 92 (1913)

Summers v. United States

No. 502

Argued October 22, 23, 1913

Decided November 10, 1913

231 U.S. 92

CERTIORARI TO THE CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

SYLLABUS

The court will if possible avoid construing a code of procedure as establishing a dual instead of a single procedure in the prosecution of crimes committed within the same territorial jurisdiction.

The fact that the courts of Territories may have such jurisdiction of cases arising under the Constitution and laws of the United States as that vested in the circuit and district courts does not make them circuit and district courts of the United States.

The Alaskan Code of Criminal Procedure is very complete and circumstantial. It covers every step in a criminal proceeding, including the form of indictment of all crimes whether specifically defined therein or not.

Prior to the amendment of 1913, 43 of Title II of the Alaskan Code of Criminal Procedure, providing that the indictment must charge but one crime and in one form only applied to the indictment for any offense, whether specifically defined in that Code or not.

It is a substantial right, and not a mere matter of procedure, to have the indictment confined to one offense and in one form only, and the amendment of 1913 to such 43, permitting the joinder of several offenses, did not have retrospective operation.

The principle that one good count will support a judgment of conviction does not apply where the accused has the right to defend against the validity of the indictment for joining the counts and this right has not been lost by failure to plead the defect.

Fault cannot be imputed by the appellate court to the accused for standing on a right under the law as it existed at the time of the trial because the law has been so amended meanwhile as to eliminate such right.

This Court, having sustained appellant's contention that the indictment was insufficient, refrains from expressing any opinion on other contentions of appellant.

20 F. 457 reversed.

The facts, which involve the validity of an indictment

Page 231 U. S. 93

charging more than one offense, found in Alaska, are stated in the opinion.

Page 231 U. S. 98

MR. JUSTICE Mc KENNA delivered the opinion of the Court.

Petitioner was indicted under 5209 of the Revised Statutes, relating to national banks, and was charged with fifty-six separate violations of the section. He demurred to the indictment on the ground, among others, that it violated 43 of the Criminal Code of Alaska, known as Carter's Code, in that more than one crime was charged.

The demurrer was overruled, to which ruling petitioner excepted. He then gave written notice

"of election to stand upon the said demurrer and not further plead, and to take advantage of the provisions of 97 of the Alaskan Code of Criminal Procedure, and to submit to judgment thereunder, and forthwith take his appeal to the Circuit Court of Appeals for the Ninth Circuit."

The government objected to the entry of judgment until the cause had been submitted to a jury for trial and a verdict rendered, urging that 97 of the Code of Alaska did not apply, but that 1026 and 1032 [[Footnote 1](#)] of the Revised Statutes governed the procedure. After argument, the court ruled that the federal procedure prevailed in all proceedings in the cause, but that the defendant

Page 231 U. S. 99

(petitioner) might waive trial by jury, if he so elected, and have judgment entered against him pursuant to the provisions of 97. [[Footnote 2](#)]

The court then asked petitioner if he was guilty or not guilty of the crime. Petitioner stood mute, refused to plead, elected to stand on his demurrer and have judgment rendered against him in accordance with 97. He was then adjudged guilty and sentenced to imprisonment for five years for each of the offenses, to run concurrently, the entire sentence to be completed at the end of five years.

Judgment was affirmed by the circuit court of appeals. 202 F. 457.

The first question in the case is whether 43 of the Alaskan Criminal Code applies, or 1024 of the Revised Statutes. They read, respectively, as follows:

"SEC. 43. That the indictment must charge but one crime, and in one form only, except that, where the crime may be committed by use of different means, the indictment may allege the means in the alternative."

30 Stat. 1290, c. 429.

"SEC. 1024. When there are several charges against any person for the same act or transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offenses, which may be properly joined, instead of having several indictments, the whole may be joined in one indictment in separate counts, and if two or more indictments are found in such cases, the court may order them to be consolidated."

The trial court and the circuit court of appeals held, as we have seen, that 1024 applied, and this is the contention

Page 231 U. S. 100

of the government. Petitioner asserts the applicability of 43 of the Alaskan Code.

The trial court expressed its recognition of the difference between a district and circuit court of the United States and a territorial court, such as the district court of Alaska was expressed to be, but was of opinion that, when the latter court exercises jurisdiction to enforce the laws of the United States, "not only the substantive law, but the machinery, the procedure which enables the court to

enforce the substantive law" applied. The circuit court of appeals, in a circumstantial opinion, reached the same general result and considered that the Alaskan Code, by its title and some of its provisions, explicitly specialized the crimes relating to Alaska and the procedure applicable to them. The title of the act is, it was said, "An Act to Define and Punish Crimes in the District of Alaska, and to Provide a Code of Criminal Procedure for Said District;" the enacting clause is, "That the penal and criminal laws of the United States of America, and the procedure thereunder relating to the District of Alaska, shall be as follows:" and 2, c. 1, Title 1, provides: "That the crimes and offenses defined in this act, committed within the District of Alaska, shall be punished as herein provided." It was hence concluded that, as the offense charged in the indictment was not one mentioned in the Alaskan Code, it was not one to be governed by the local procedure, but was left under the procedure prescribed in 1024 of the Revised Statutes. The conclusion was fortified by a consideration of the genesis of the respective provisions. The result of the conclusion will be the existence of a dual procedure in the prosecution of different crimes committed within the same territorial jurisdiction. The result may have examples, but it is certainly undesirable, and the systematic character of the Alaskan Code indicates a contrary intention.

Section 43 is a continuation of the procedure that had

Page 231 U. S. 101

been prescribed for Alaska. The act providing a civil government for that territory, passed in 1884, 23 Stat. 25 and 26, c. 53, made the general laws of Oregon applicable to it, and those laws require "that the indictment must charge but one crime and in one form only." It is contended, however, that the laws of Oregon were declared to be the law of Alaska only insofar as they were applicable and not in conflict with the laws of the United States, and that necessarily the provision above-quoted in regard to the indictment was in conflict with 1024 of the Revised Statutes. And it is further contended that the conflict is not reconciled, or rather, that the difference in procedure is not removed, by 43 of the Alaskan Code. We concede strength to these considerations, but there are countervailing ones.

The Alaskan Code is quite an elaborate code of substantive and adjective law, the former containing twelve chapters of definitions of offenses against the person and property, the public safety and the public peace, the other containing elaborate and circumstantial provisions for the indictment and trial of offenders, their sentence and punishment, and a provision for appellate review. It seems to omit nothing of circumstance or detail necessary to a careful and advanced procedure. But its enumeration of offenses does not include all crimes against the United States, does not include the one under review, and it is hence contended that the procedure prescribed does not apply to the crimes not enumerated, and therefore does not apply to the crime under review. In other words, it is contended that the procedure prescribed is complementary only to the crimes defined, and has no broader application, leaving all other crimes to be governed by 1024 of the Revised Statutes.

It is established that the courts of the territories may have such jurisdiction of cases arising under the Constitution and laws of the United States as is vested in the circuit

Page 231 U. S. 102

and district courts, but this does not make them circuit and district courts of the United States. It has been hence decided that the manner of impaneling grand juries prescribed for the circuit and district courts does not apply to the territorial courts. *Reynolds v. United States*, [98 U. S. 145](#) , [98 U. S. 154](#) . See, as to trial juries, [Clinton v. Englebrecht](#), 13 Wall. 434. In the latter case, it was said "that the whole subject matter of jurors in the territories is committed to territorial regulation." P. [80 U. S. 445](#) .

This principle was applied to the mode of challenging petit jurors, *Miles v. United States*, [103 U. S. 304](#) ; to give defendants the right to separate trials and for the regulation of peremptory challenges to jurors, *Cochran v. United States* (Circuit Court of Appeals, Eighth Circuit), 147 F. 206, 207. In *Fitzpatrick v. United States*, [178 U. S. 304](#) , [178 U. S. 307](#) -308, it was said that the laws of Oregon must be looked to for the requisites of an indictment for murder, rather than the rules of the

common law. And this by virtue of the act providing a civil government for Alaska, presently referred to. See also *Thiede v. Utah*, [159 U. S. 510](#) .

In the case at bar, there is direct legislation by Congress. Does the principle apply in such case? The first legislation for Alaska was an Act of May 17, 1884, entitled, "An Act Providing a Civil government for Alaska," 7 of which was as follows:

"That the general laws of the State of Oregon now in force are hereby declared to be the law in said district so far as the same may be applicable and not in conflict with the provisions of this act or the laws of the United States."

23 Stat. 25, 26, c. 53. But what constitutes conflict? Mere difference, the court of appeals decided, citing *Kie v. United States*, 27 F. 351, 356. That, however, depends upon the purpose. Congress was legislating directly for Alaska, manifestly intended to distinguish it, and intended the laws of Oregon to be its laws, regarding them as more suitable to its conditions

Page 231 U. S. 103

than general laws determined by or addressed to different conditions. See *United States v. Pridgeon*, [153 U. S. 48](#) . And this appears to have been the view taken by the court in other cases.

In *Endleman v. United States*, 86 F. 456, the laws of Oregon were referred to to sustain an indictment to which a demurrer had been filed on the ground that it contained only one count, and that several distinct offenses were charged in that count. The case, however, may be said to have only negative value in the discussion. It referred to the Criminal Code as constituting the law of the district, but did not refer to or base the decision on that provision which required an indictment to charge "one crime and in one form only." The law of Oregon necessarily was decided to be controlling.

In *Jackson v. United States*, 102 F. 473, 477, the court resorted to the laws of Oregon to determine the qualifications of grand jurors, considering them as applicable under the organic act providing a civil government for the territory.

In *Corbus v. Leonhardt*, 114 F. 10, the court refused to apply 858 of the Revised Statutes, which provides that, in actions by or against executors and administrators, neither party shall be allowed to testify against the other, and applied instead the law of Oregon permitting such testimony. And this by virtue of the provision of the act already cited, making the laws of Oregon the laws of Alaska.

In *Ball v. United States*, 147 F. 32, 36, it was assigned as error that the trial court overruled the motion of Ball to require the district attorney to furnish him a list of all of the witnesses to be produced against him on the trial, in accordance with 1033 of the Revised Statutes. It was held that the section applied only to the trial of treason and capital cases in the courts of the United States. The court said:

"The present case was

Page 231 U. S. 104

tried in a territorial court under the Penal Code and Code of Criminal Procedure of Alaska. Those Codes contain no requirement that a list of witnesses be furnished the accused upon demand or otherwise."

Thiede v. Utah, [159 U. S. 510](#) , [159 U. S. 515](#) , was cited as holding that 1033 does not control practice and procedure in territorial courts.

These cases in the court of appeals apply the principle of the cases in this Court, which we have cited, that Congress, by its legislation, intends always special regulations for the territories, to be exercised, it may be, through territorial legislatures, or, as in the case of Alaska, by making the laws of Oregon the laws of Alaska, and subsequently by the Code enacted for that territory.

It is, however, the contention, as we have seen, that the limitations of the title of the Alaskan Codes, and the omission from them of the crime under review, make 1024 applicable, or, to state it differently, make 43 of the Code, which provides that "the indictment must charge but one crime and in one form only," applicable only to the crimes and offenses specifically defined in the act. If it be true that

there is such limitation, it would follow that, if the laws of Oregon were, before the enactment of the Codes, applicable to other offenses in Alaska, they are still applicable. But we are not disposed so to limit the procedure in Alaska. It is, as we have said, very complete and circumstantial. It covers every step in a criminal proceeding, the first accusation, arrest, preliminary inquiry of guilt, duties of officers and magistrates, formation of grand juries, the indictment, trial, and its conduct, verdict, sentence, and judgment. The reason given for denying its application seems to us not adequate. It is said that 1024 was originally contained in the Act of February 26, 1853, to regulate the fees of clerks, marshals, and attorneys of the courts of the United States, and finally became 823 of the Revised Statutes, and by it made applicable to all of the states and

Page 231 U. S. 105

territories. And it is said that the purpose of the Act of 1853 and its continuance was to prevent the officers of the United States from increasing their fees by filing separate indictments when the offenses might be properly charged in one. But such a general purpose might easily be considered as yielding to the special provisions for Alaska expressed in the laws of Oregon and declared to be the law of Alaska, and in the repetition of the provisions of those laws in the Code of Alaska, that but one offense shall be charged in the indictment. We cannot suppose that the purpose of regulating the fees of officers was more essential and dominant than that special provision, to have no effect as to the great body of crimes of ordinary and everyday commission defined in the Code, and yet apply to offenses less frequent.

By an act of the territorial legislature, approved April 26, 1913, 43 was amended so as to permit the joinder of two or more offenses or crimes of the same class in one indictment in separate counts, and it is hence contended by the government that the act makes valid the indictment in the case at bar. It is therefore insisted that

"the only result of a reversal will therefore be that petitioner will be retried under the present indictment, or under a new indictment identical in form."

If the trial court erred, it is further insisted, the error has become immaterial.

We are not disposed to give the act retrospective operation, so as to give validity to indictments found before its enactment, assuming for the argument's sake that it could have been given such operation. The evil of so considering it is manifest. Petitioner stood on his demurrer in reliance upon the then-existing law, and fault cannot be imputed to him for doing so. Had the law been different, his pleading might have been different, and instead of submitting to judgment, he might have contested the charges against him. This is certainly a substantial right. The government

Page 231 U. S. 106

seems to urge that he was in fault for not contesting the charges, and by not doing so took all chances of the change of the law, and that besides, it is urged, he received no greater sentence than must have been imposed on a conviction of one crime only, as the minimum sentence under 5209 is five years. It is contended that the principle that one good count will support a judgment is applicable. But this overlooks the right of petitioner to have defended against the indictment -- the right which, we repeat, he did not lose by pleading its defects under the then-existing law.

It is contended by petitioner that the trial court, in imposing sentence and judgment upon him, denied him the constitutional right of trial by jury, and that, the offenses charged against him being felonies, he was without power to waive a jury trial. Of this contention we are not required to express opinion, having found the indictment against him insufficient.

Judgment reversed and cause remanded to the District Court for the District of Alaska, Division No. 1, with directions to sustain the demurrer to the indictment.

[[Footnote 1](#)]

"SEC. 1026. In every case in any court of the United States where a demurrer is interposed to an indictment or to any count or counts thereof, or to any information, and the demurrer is overruled, the judgment shall be *respondeat ouster*, and thereupon a trial may be ordered at the same term, or a continuance may be ordered as justice may require."

"SEC. 1032. When any person indicted for any offense against the United States, whether capital or otherwise, upon his arraignment stands mute, or refuses to plead or answer thereto, it shall be the duty of the court to enter the plea of not guilty on his behalf, in the same manner as if he had pleaded not guilty thereto. And when the party pleads not guilty, or such plea is entered as aforesaid, the cause shall be deemed at issue, and shall, without further form or ceremony, be tried by a jury."

[[Footnote 2](#)]

"SEC. 97. That if the demurrer be disallowed, the court must permit the defendant at his election, to plead, which he must do forthwith, or at such time as the court may allow; but if he do not plead, judgment must be given against him."

30 Stat. 1295, c. 429.