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LEWDNESS PROTECTED BY THE FEDERAL COURTS.

The Crimes that Were "left to the Regulation of the Local Authorities" Cannot Now be "Regulated,"

Because U. S. Officials will not Permit It.

The following is the full text of the decision of the Territorial Supreme Court in the Yearian prohibition proceedings, whereby justices of the peace are forbidden to act under the statutes authorizing them to punish those guilty of gross lewdness. The opinion was rendered on Saturday afternoon, as noted in our issue of that date:

IN THE SUPREME COURT OF THE TERRITORY OF UTAH, JANUARY TERM, 1886.

WILLIAM H. YEARIAN, Petitioner,
vs.
ADAM SPEIRS, Justice of the Peace, Defendant.

[On Application of a Writ of Prohibition.]

Boreman, Justice, delivered the opinion of the Court:

This is an application for a writ of prohibition. The petitioner was arrested on warrant issued by the defendant, a justice of the peace, upon a complaint charging him with having resorted to a house of ill-fame for lewdness. Upon being taken before the justice, the petitioner applied to have the matter submitted to the Grand Jury, which was then in session, but the justice decided that he had jurisdiction of the case, and required the petitioner to enter into bond in the penalty of $1,000 for his appearance to answer the charge in the Justice's Court, and a time for the trial was fixed. Prior to the time set for the trial, the petitioner, upon his affidavit, made application for a writ of prohibition to restrain and prohibit the justice from further proceeding in the case, on the ground of want of jurisdiction and excess of jurisdiction in the justice to hear, try and determine the matter. An alternative writ was issued returnable into this court. The defendant filed his demurrer and answer to the petition. The demurrer and the case made by the petition and answer, were argued together, by the counsel for the respective parties, and we shall consider them together.

The demurrer was based upon the grounds that this court had no original jurisdiction of the subject of the action, and that the writ or petition did not state facts sufficient to constitute a cause of action.

This court can have no power to issue the writ of prohibition, unless it be conferred by the Organic Act or some other act of Congress, or by some Territorial statute within the power of the Legislature to pass.

The Organic Act of the Territory (9 Statutes at Large, p. 453, sec. 9,) provides that "the said Supreme and District Courts respectively shall possess chancery as well as common law jurisdiction," and the Supreme Court of the United States says that this language "includes almost every matter, whether of civil or criminal cognizance, which can be litigated in a court of justice." Ferris vs. Higley, 20 Wall, 375.

We do not understand it to be denied that this court would have jurisdiction to issue the writ in aid of its appellant powers. The denial seems to go only to its power to issue the writ as an independent, original writ. This court, possessing appellate powers, has as a part thereof a superintending control over the inferior tribunals of justice throughout the Territory, and has likewise a right to protect and enforce its appellate powers. The Supreme Court of the United States, although authority to issue writs of this class otherwise than as part of its appellate jurisdiction, is denied to it by the Constitution which forbids its exercising any other than appellate powers generally, yet it is held to be empowered to use these writs in aid of its appellate powers. In Marbury vs. Madison, a mandamus case, that court recognized that mandamus could be used as part of its appellate powers, and it declared that "it is the essential criterion of appellate jurisdiction, that it revises and corrects the proceedings in a cause already instituted and does not create the cause." 1 Cranch, 175.

The same court again, upon certain applications for writs of *habeas corpus*, through Chief Justice Marshall, in the opinion of the court, seemed to place *habeas corpus* and *mandamus* in the same class, and referred to the case of Marbury vs. Madison, and held that in the matter then before the Court, the appellate powers alone of the Court were sought to be exercised—that in granting the writs of *habeas corpus*, it was the purpose to reviewe the decisions of an inferior court, by which a citizen had been committed to jail and that such revision was simply the exercise of appellate jurisdiction.—*Ex parte* Bollman, 4 Cranch 75-101.

In the case at bar it is likewise sought to revise and correct the proceeding in a cause already instituted and not one created by this Court, and to prevent further action where the Court before is claimed to be acting without authority of law, and which, without authority, may commit a citizen to prison.

The writ of prohibition is sometimes resorted to in aid of the appellate power of the Court, for the purpose of preventing unauthorized action by an inferior court and to control the action of the lower court.—1 Alb., W. S. Pr., p. 341—2 Id., p. 214.

We are therefore inclined to think that it is unnecessary to invoke the appellate powers of this Court in order to obtain sufficient authority for issuing the writ in the case at bar.

It seems clear then that authority in this court to issue these writs—at least in aid of the appellate jurisdiction of the court, is conferred under and by the general language of the Organic Act granting chancery and common law jurisdiction, and authorizing appeals to this court. But the more consideration we give to this general language, "chancery and common law jurisdiction," the more strongly are we inclined to hold that, under it, this court has full power to issue these writs, not only in aid of the appellate jurisdiction of the court, but also as an independent, original proceeding, apart from appellate powers. From the reasoning of the Supreme Court of the United States we are inclined to think that that court would have to hold in regard to its own powers and is not been for the prohibiting clause of the Constitution. (Constitution, article III, section II, clause II.) There is no such prohibition upon the original jurisdiction of this court. It is evident that if the language of the original act was to cover those writs at all, they were to cover the writs as known at the common law.

At common law the writ of prohibition and the other writs were used not only in aid of appellate jurisdiction but also as original, independent writs, aside from appellate power of the court issuing the same.

The question as to the power of this court to issue the writ of prohibition has never heretofore been presented to this court, but the authority to issue suits of *certiorari* and *mandamus*, which belong to the same general class of special proceedings as prohibition, has been passed upon.

In the case of Sheppard vs. Second District Court, it was held that this court could issue the writ of *mandamus* in aid of its appellate jurisdiction, and not otherwise—1 Utah, 340.

In the case of Young vs. Cannon, it was held that this court had jurisdiction to issue the writ of *certiorari* under the Territorial Statute.—(3 Utah, 560, Civil Procedure Act, Section 491, Compiled Laws, 521) similar to Section 951 of present Code of Civil Procedure.—(Laws of 1884, p. 322):

In the case of Maxwell vs. Burton, (2 Utah, 595) it was held that this court had jurisdiction to issue the writ of *mandamus*, under Territorial Statutes, and that such provision was not in conflict with the Poland Act, giving exclusive jurisdiction to the District Courts in certain matters, and that the case of Sheppard vs. Second District in so far as it held a contrary doctrine, was disapproved.—Civil Procedure Act, Section 445, (Compiled Laws, 523). Poland Act in supplement to United States Revised Statutes Volume 1, ch. 469, page 105. The conclusion to be drawn from these decisions, is that whether this court has, under the Organic Act and subsequent acts of Congress, original jurisdiction, or not, to issue the writ of this class, is not material, as the Legislature of the Territory was authority to give such jurisdiction and has done so. If the Legislature has such authority and has exercised it, and has in clear and plain terms conferred upon this court such original jurisdiction, then this court has such authority in any phase of the case in which it may be viewed.

The Organic Act (Section 6) provides: "That 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."

The question of jurisdiction, so long as the action therein is consistent with the Constitution of the United States and the laws of Congress, is held to be a rightful subject of legislation.—Ferris vs. Higby, 20 Wall, 375.

Our attention has not been called to any provision of the Constitution, or of the Organic Act, or any other act of Congress with which such legislation would be inconsistent, nor do we know of any such provision or believe that any exists. There being then no known inconsistency, the conclusion is inevitable that the Legislature has the power to confer the jurisdiction on this court to issue the writ as an original independent writ, aside from any appellate jurisdiction possessed by the court.

The code of civil procedure declares that the writ may be issued "by any court, except probate and justices' courts."—Laws of 1884, p. 326, Section 983. And in Utah it further provides (Idaho, p. 158) as to the Supreme Court as follows: "Section 19.—The jurisdiction of this court is of two kinds: First, original; second, appellate. Section 20.—Its original jurisdiction extends to the issuance of writs of mandate, certiorari, *prohibition*, *habeas corpus*, and all writs necessary to the complete exercise of its appellate jurisdiction."

When the decisions of this court already referred too were made, these two sections had not been enacted. The authority to this court to issue the writ of prohibition as an original writ could not well have been couched in broader terms. The jurisdiction is as complete as the Legislature could make it.

The courts therefore of the opinion that it is, beyond doubt, within the power of this court to issue the writ, either as an original writ, independent of the appellate powers of the court, or as a writ in aid of such appellate powers.

The authority of the court to issue the writ being established, we are next to consider whether a proper case has been made for the issuance of the writ.

At common law the writ was issued upon a suggestion that either the cause originally, or some collateral matter arising therein, does not belong to that jurisdiction, but to the cognizance of some other court;" and it could be issued where there was a total want of jurisdiction in the inferior court to hear, try and determine the case, or when there was an excess of jurisdiction in proceeding in the case.—3 Bl. Com. 112; 3 Bac. Abr. 206.

The office of the writ is to prevent an unlawful assumption of jurisdiction, and the writ lies when the inferior court acts in excess of, or is taking cognizance of matters not arising within its jurisdiction.—*Ex parte* Gordon, 104. U. S. 515.

Our Territorial statute says that the writ "arrests the proceedings of any tribunal," etc., "when such proceedings are without or in excess of the jurisdiction of such tribunal," etc., and that it may be issued "in all cases where there is not a plain, speedy and adequate remedy in the ordinary course of law."—Law of 1884, page 326, section 986.

It is well settled that the writ can never issue for error or irregularity in the exercise of jurisdiction. There must be a total want or an excess of jurisdiction.

Is the case under consideration were the proceedings of the justice, "without or in excess of the jurisdiction" of such justice?

The provision of the Territorial statute under which the complaint against the petitioner, before the justice, was made reads as follows: "Every person who keeps a house of ill-fame for the purpose of prostitution or lewdness, or who willfully resides in such house, or resorts thereto for lewdness, is guilty of a misdemeanor."—Comp. Laws, p. 403, Section 1996.

The penalty for such offense if prescribed in Section 1947 of the Compiled Laws, as amended so as to read: "Except in cases where a different punishment is prescribed by this code, every offense declared to be a misdemeanor is punishable by imprisonment in a county jail not exceeding six months, or by a fine in any sum less than $300, or by both."—Laws of 1878, p. 38.

As there is no different punishment anywhere in the statute prescribed for the offense charged in the complaint against the petitioner, of resorting to a house of ill-fame for lewdness, the punishment specified in the last section of the statute above quoted, applies to it. The Territorial Statute further provides, in bracket section (2304) of the Compiled Laws, as amended in the Laws of 1878, page 6, as follows:—"2291. Magistrates have jurisdiction to hear, try and determine all public offenses arising in their respective counties, wherein the punishment prescribed by law does not exceed six months' imprisonment in a county jail, or aline in any sum less than $300, or by both." The term "magistrates" as used in the statutes includes justices of the peace.—Laws of 1878, page 74, section 56. In regard to justice's courts, the statute further provides that they shall have jurisdiction of "Breaches of the peace, committing a wilful injury to property, and all misdemeanors punishable by a fine less than $300 or imprisonment in the county jail or city prison, not exceeding six months, or by both such fine and imprisonment."—Laws of 1884, page 162, section 48.

The Territorial Statute in regard to "criminal cases in justices' courts provides that a fine may be paid in proportion of one day's imprisonment for every dollar of fine and costs.—Laws of 1884, page 148, section 86.

If therefore, the justice sentence a party to imprisonment for six months and to pay a fine of $200-99-100 and costs, as is done sometimes, and the party be unable to pay the fine and costs, his imprisonment would be extended to about eighteen months. This certainly is an extraordinary power to confer, in a summary proceeding upon a justice of the peace, and it ought not to be upheld unless expressly conferred by some competent authority. This competent authority in a Territory must be a law of Congress or else Territorial statute enacted within the limits prescribed by act of Congress. The Poland act (section 3) confers upon justices of the peace in civil matters, jurisdiction to the extent of any sum less than $300. But it does not, nor does any act of Congress speak of the jurisdiction of justices of the peace, in criminal matters. It would seem therefore that we would not be authorized in assuming that Congress, in conferring this extended jurisdiction in civil matters, contemplated that justices of the peace could, without a like express authority of Congress, be invested by the Territorial Legislature with criminal jurisdiction to a much greater extent than Congress had given them in civil matters. It does not seem reasonable that Congress should confer the civil jurisdiction and prescribe its limits, and by leaving the criminal jurisdiction unprovided for, authorize and license the giving, by the local Legislature, of a more extended jurisdiction in criminal matters.

The only authority given by law of Congress of the Legislature to confer any jurisdiction whatever in criminal matters is to be found in the name or title of the office. The judicial power of the Territory is vested in a Supreme Court, District Courts, Probate Courts and Justices of the Peace. General common law and chancery jurisdiction is given to the Supreme and District Courts alone, yet justices of the peace and Probate Courts are depositories of part of the judicial power of the Territory, and the question now is, what part?

Jurisdiction is, as we have seen, a rightful subject of legislation by the Territorial Legislature, provided that such legislation must be considered with the Constitution of the United States and the laws of Congress. Within these boundaries, the extent of the judicial power of the Territory that is vested in justices of the peace as well as Probate Courts, must "be as limited by law."

The petitioner maintains that the above mentioned sections of the Territorial statute, purporting to confer upon justices of the peace the power to punish for misdemeanors to the extent of imprisonment for six months and by fine in any sum less than $300, are in violation of the Organic Act and "Poland" Act, and therefore void, as being beyond the power of the Legislature to confer—that the Legislature could invest said officers with no power not enhanced in the name or title of the office.

In the Organic Act, the jurisdiction of probate courts was likewise not otherwise designed or defined than by the name or title of the courts, but declared that in them was vested a part of the judicial power of the Territory, and the Supreme Court of the United States, in speaking upon the question as to what jurisdiction can be conferred by the Territorial Legislature upon the probate courts, said: "The answer to this must be sought in the general nature and jurisdiction of such courts as they are known in the history of the English law, and in the jurisprudence of this country." Ferris vs. Higley, 20 Wall, 375.

Similar views were held by the supreme courts of some of the Territories prior to its announcement by the Supreme Court of the United States—Cast vs. Cast, 1 Utah 127; Golding vs. Jennings, 1 Utah 135; People vs. Du Bell, 1 Idaho, 44, 142; Lockman vs. Martin, McCulas R., Kansas 60; Dewey vs. Dyer, Id. 77; Ottis vs. Jenkins, Id. 87.

If in order to ascertain what jurisdiction can be exercised by Probate Courts, we must thus look to the general nature and jurisdiction of such courts, for the reason that there was no specification of their jurisdiction in the Organic Act, further than a simple naming of the courts, we are, as a logical result, in order to ascertain the jurisdiction that can be exercised by justices of the peace in criminal matters, in a like manner to look to the general nature and jurisdiction of such offices "as they are known in the history of the English law and in the jurisprudence of this country." And this is the view held by the Supreme Courts of some of the Territories when considering the question as to the jurisdiction of justices of the peace.—Moore vs. Konbly, 1 Idaho, 50. Territory vs. Flowers, 2 Montana, 681.

And this seems to be the general rule.—Byers vs. Com. 42 Penn., section 89. Sedgwick's Construction of Stats. etc., p. 491, note.

If in endeavoring to ascertain what jurisdiction can be conferred upon justices of the peace by Territorial Statute, we were guided wholly by what such jurisdiction was at common law, we would be forced to conclude that justices of the peace had no jurisdiction whatever of this class of offenses, for at common law they were not cognizable before a justice of the peace, but were indictable offenses, and infamous.—4 Bl. Com., 64, 167. People vs. Sponsler, 1 Dak., 259.

But subsequently in England and in the United States such offenses have been by statute committed in many instances to justices of the peace, and such was the common practice in this country at the time when the laws of Congress referred to, in regard to this Territory, were enacted, but the penalties were generally limited to petty fines and short imprisonments.

We do not find it to have been a practice to invest them with power to inflict punishments as extensive and extraordinary as are sought to be conferred upon such officers by the Territorial statutes we have referred to, and especially to grant to justices of the peace greater jurisdiction in criminal cases than in civil cases. If there were any such instances, they were exceptions to the general rule. It would hardly be claimed that the Legislature could have invested justices of the peace with civil jurisdiction to the extent of $300, or of any sum approaching it, had not Congress in express language authorized it. Neither do we think that the Legislature could do so in criminal matters, without some such express authority by Congress. Yet it is claimed in the case before us that the Legislature can not only confer such jurisdiction in criminal matters, but can go further and add imprisonment for a period of six months. We cannot think than Congress ever intended to allow such legislation by the Territorial Legislature.—People vs. Maxon, 1 Idaho, 339.

It is, however, claimed that admitting the justice had no jurisdiction, yet that the writ of prohibition is not the proper process to reach the defect, as there was a remedy in the ordinary course of law, by appeal, and that this remedy was plain, speedy and adequate. An appeal could be resorted to only after final judgment. It could not have stopped the proceeding in the justice's court. It could not have prevented the justice from forcing the petitioner into an unauthorized and illegal trial, nor from compelling him, if convicted, to take an appeal and give bond in at least double the amount of the fine, with at least two sureties, in default thereof, to go to jail. And yet upon the appeal, the whole proceeding would have to be dismissed on the ground that the justice had no jurisdiction to hear the case, and as a consequence the appellate court could have none. There could be no trial of the merits in the district court because no such trial was authorized in the court below.—S. C. R. R. Co. vs. Sup. Ct., 59 Cal., 471. Peacock vs. Leonard, 8 Nev., 84; 2 J. J. M. (Ky.) 29. Braudberg vs. Hallett, 14 Nev. 519. Walcott vs. Territory, 1 Wyoming, 67. Cohn vs. Bryant, 30 Wis., 595. Felt vs. Felt, 19 Wis., 193. Stringhamvs. Sup., 24 Wis., 584. 2 Hill, 257.

To compel a party to submit to being forced through this tedious and harassing routine of illegal proceeding and usurped jurisdiction, is not only expensive and troublesome, but also vexatious in the extreme, and ought not to be allowed if it can be prevented.

If there be no remedy by writ of prohibition in a misdemeanor case, by reason of there being an appeal, there is none in a felony case. In both, the justice act *coram non judice*, but the statute allows repeals from judgments of a justice in *all cases*. But an appeal would not be either a speedy or adequate remedy in either a misdemeanor or a felony case. A party charged with any offense has the right to have it investigated in a proper court and in a legal manner, and cannot be compelled to an illegal and unauthorized investigation. He has the right to a legal investigation—not only because the illegal investigation is in itself unjust, but also because the party is entitled to have a judgment that he may plead in any subsequent proceedings upon the the same charge. No citizen should be arrested and prosecuted before a court having no authority to hear, try or determine the case.

It will be observed that this is not a case where the justice has acted within the scope of his general jurisdiction, and in doing so has merely exceeded his jurisdiction, but it is one where he has acted wholly "without" his jurisdiction. There is a total want of jurisdiction in him to hear, try and determine the case—Clary vs. Hoagland, 5 Cal. 476.

Where a justice has general jurisdiction of the subject matter, but has simply exceeded his jurisdiction, an appeal might be an adequate remedy, for in the appellate court the merits of the case could be examined into and the matter legally settled. Ex parte Pennsylvania 109 W. S. 174. Ex parte Gordon 104 W. S. 515. See also ex parte Ferry Co. 104 W. S. 519, and ex parte Hays 104 W. S. 520. Hanstow vs. Supervisors 19 Cal. 150. Clark vs. Supreme Court, 59 Cal. 199.

But as we have already seen, this cannot be done when the justice acts wholly without jurisdiction, for in that case the appellate court can have no more authority to try the merits of the case on appeal than the justice from whose judgment the appeal was taken. The trial then in the justice's court would be a solemn mockery of justice. The punishment of the party could only be hoped for where he would be unable to take an appeal for if an appeal be taken, the proceedings would be dismissed by reason of the want of jurisdiction in the justice. The judgment would not shield the party charged from subsequent arrest and prosecution for the same offense. No good purpose could be served. It would be a fruitless work. A justice of the peace cannot be given unlimited power. Nothing is presumed in favor of his jurisdiction. It must be shown affirmatively.

It is no satisfaction to a citizen, when arrested and forced upon his trial before a court upon a criminal charge, to be told that although the proceedings are wholly illegal and void, he will have to submit to it, because when it is all through with he can take an appeal to the district court, and there have the proceedings dismissed. If an injury would be then done him, why not dismiss at once, and save him from being harassed and criminally dealt with upon unauthorized prosecutions? It would seem to be the duty of an appellate court to check such proceedings at the earliest possible moment.

If a party desired a trial *de novo*, and that can be had in the appellate court, an appeal might be deemed an adequate remedy, but where there cannot be a trial *de novo*, a trial on the merits in the appellate court, an appeal would be vain and fruitless. It would settle nothing concerning the subject matter of the action.—Golding vs. Jennings, 1 Utah, 135; Dillon's Munic. Corp., sec. 744 n. (2.)

The law does not limit a party to a process that will be fruitless, when there is one that may prove available.—Paul vs. Armstrong, 1 Nev., 95-6.

The remedy, in the ordinary course of law, must not only be specific, adequate and legal, but it must be competent to afford relief upon the very subject matter of the petition.—Fremont vs. Crippin, 10 Cal., 211. Babcock vs. Goodrich, 47 Cal., 508. North Bloomfield G. M. Co. vs. Keyser, 58 Cal., 315.

An appeal in the case at bar would not be either a speedy or an adequate remedy. When all the proceedings should be gone through with, in the justice's court and in the district court, on appeal, the petitioner would be left just where he stands when he makes this application for the writ of prohibition. It would not relieve him from the stain of the charge, and yet would afford him no relief by a lawful investigation. The charge made against the petitioner is one that can be investigated by a grand jury, and if he be deemed guilty, he should be indicted and punished. But whether guilty or innocent, the law guarantees to him a legal investigation and trial, and these cannot be had in a court or before an officer acting wholly without authority of law.

A party charged with an indictable criminal offense is, by the Constitution, guaranteed also, a trial by jury. A pretended jury of six men is not a jury as known at common law, nor as contemplated by the Constitution and laws of the United States. Such a jury is composed of 12 men—2 Blake's Com., 352. Work vs. State, 2 Ohio Statute, 296. Winchaner vs. People, 13, New York, 378. State vs. Everett, 14 Minnesota, 439. Vaughan vs. Scade, 69 Missouri, 600. Bowis vs. State, 6 Speed, 360.

The prevailing doctrine now is that, although there be no jury in the inferior court, yet if by appeal a party may have a trial by jury, the constitutional guaranty of trial by jury is not violated.—Dillon's Municipal Corporations, 867. (Sedjwick's Construction, etc., 491, (notes) and cases cited.

Where, however, a justice acts wholly without his jurisdiction, and there be no provision for a jury trial in his court, nor in the appellate court, the objection that there is no jury trial in the justice's court, is not satisfied by the appeal. In the present case, no jury is authorized in the justice's court and none can be had in the District Court, as the case would have to be dismissed in the appellate court, without trial. No jury would be authorized in the District Court, for the reason that no trial could be had there, upon the merits. The justice having no jurisdiction to try the case, the District Court could acquire none by the appeal, as we have already seen.

Upon the whole case, therefore, we conclude that the justice was acting, and proceeding to further act, wholly without his jurisdiction, and that the petitioner had no plain, speedy and adequate remedy in the ordinary course of law, and is, therefore, entitled to his writ of prohibition.

As the points we have considered are decisive of the case, it is unnecessary for us to examine the other questions raised by the petition.

The peremptory writ of prohibition is by the court allowed, with costs.

POWERS, A. J., concurs.

Zane, C. J., dissents.

SUPREME COURT, TERRITORY OF UTAH.

THE PEOPLE,
on the petition of Wm. H. Yearian,
vs.
Adam Speirs, Justice of the Peace.

POWERS, J., concurring.

Accusations (of criminal conduct are tried at the common law by jury; and wherever this right is guaranteed by the Constitution without qualification or restriction, it must be understood as retained in all these cases which were triable by jury at the common law, and with all the common law incidents to a jury trial, so far, at least, as they can be regarded as tending to the protection of the accused. A petit jury is a body of twelve men who are sworn to try the facts of a case as they are presented in the evidence placed before them. Any less than this number of twelve would not be a common law jury, and not such a jury as the Constitution guarantees to accused persons.

In the case at bar I think that the accused was entitled to a common law jury. That is, a jury of twelve men, and I agree with Judge Blatchford, (Dana's Case,) Benedicts Rep.) that to require a defendant to be convicted by a judge, or by six men, in order to have a trial in another court upon appeal, is too much a mockery to be regarded as in any just sense a compliance with the Constitutional guaranty. I do not think that the objection to the proceedings of the Justice's Court is removed by the fact that a man can appeal his case, and secure a jury trial in the court above. It does not seem to me to be good reason or good law, to compel a man accused of crime to submit to the proceedings of an unauthorized tribunal, saying to him in the meanwhile, although you are being tried unlawfully, if you do not like the result you can have a trial before a higher court. I agree with counsel for the petitioner, that "it is not an answer to say that a justice has jurisdiction without the means to enforce it, by reason of not being supplied with a jury. A court cannot be said to have a jurisdiction which it cannot constitutionally exercise." Jurisdiction is the power to hear, try and determine. A justice has no inherent power to summon a jury. He cannot summon one unless the statute authorizes the act. The statute directing a justice to summon a jury of six is a denial of his power to impanel any other number. It is in fact the exclusion of any jury, because six men are not a jury in a case where a common law jury is required.

The writ of prohibition in the present case, is asked to prevent an illegal trial of the case, to prevent the injury resulting therefrom. An appeal, after the injury sought to be prevented is committed is no remedy. For these reasons and others stated in the opinion of the court I concur.

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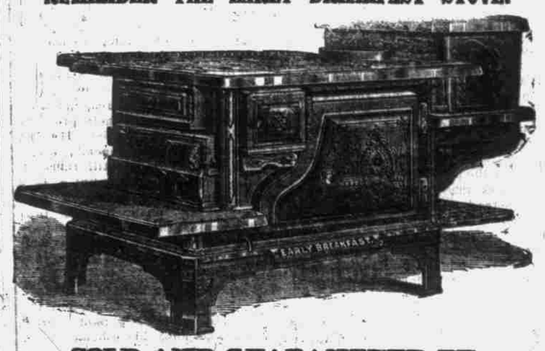

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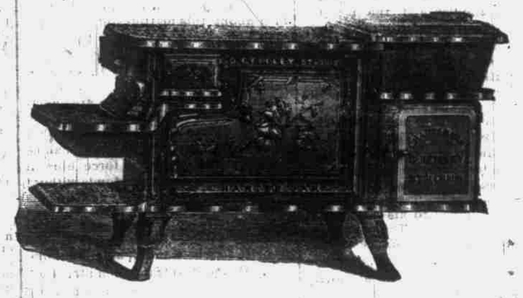

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