The Clinton-Engelbrecht Decision.

SUPREME COURT OF THE UNITED STATES.

No. 379.--December Term, 1871.

Jeter Clinton, J. D. T. McAllister, A. Burt, Brigham Y. Hampton, C. Ringwood, W. G. Phillips, Wm. Hyde, Charles Livingston, Charles Crow, J. Reading, J. Toms, A. Burt, F. Curtis, D. W. Leaker, J. McRae, J. W. Sharp, P. McKennon, Thomas Burchell and R. Smith, plaintiffs in error, *vs.* Paul Englebrecht, Christian Rehmke and Frederick Lutz. In error to the supreme court of the Territory of Utah.

Mr. Chief Justice Chase delivered the opinion of the court.

The principal question for consideration in this case is 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 twenty-two thousand dollars. The statute gave an action against any person who should wilfully and maliciously injure or destroy the goods of another for a sum equal to three times the value of the property injured or destroyed. Under this statute the plaintiffs claimed this three-fold 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 that 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 of summons in case of non-attendance or excuse from service, upon challenge, or for other reason.

For the trial of the cause the record shows that the court orginally 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 shows that under an order subsequently made an open venire was issued to the federal marshal, which was served and returned with a pannel of eighteen petit jurors annexed. These jurors 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 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 fifty-nine thousand and sixty-three dollars and twenty-five cents ($59,063.25), and on appeal was affirmed by the supreme court of the Territory. A writ of error to that court brings the cause here.

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 the People *vs.* McKay (18 Johnson, 217) as an authority for this proposition. But that case appears to be an authority for the opposite conclusion. "We are not of opinion," say the court, "that the prisoners' peremptory challenge of jurors was a waiver of his right to object now to the want of 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 nto 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 any one of the States, and provision was made for their ultimate admission by delegates into the cong ess 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 of the river Ohio--the only territory which had been actually ceded to the United States.

It provided for the appointment of the governor and three judges of the court, who were 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 elect five to constitute a legislative council; and the house and council thus selected and appointed were thenceforth to constitute the legislature of the Territory, which was authorized to elect a delegate to 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 179 ; [1 U. S Stat., 123;] of Mississippi, in 1789; [*Ibid*, 549;] of Indiana, in 1800; [2 U. S. Stat., 58;] of Michigan, in 1805; [*Ibid.*, 309;] of Illinois, in 1809; [*Ibid.*, 514;] were organized upon the same plan, except that the prohibition of slavery, embodied in the ordinance of 1789, 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 the courts of the territory was instituted. [2 U. S. Stat., 283.] The rest of the territory was called the district of Louisiana, and was placed under the government of the governor and judges of Indiana. [*Ibid*, 287.]

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. [2 U.S. Stat., 338.] The Territory of Missouri was organized in 1812, [2 U. S. Stat., 743,] and upon the same plan as the Territories acquired by cession 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 sixteenth 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 court should prescribe.

The Territory of Alabama, in 1817, [3 Stat., 371,] 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, [3 Stat., 493] 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 of the Territorial government of Missouri.

In all the Territories full power was given to the legislature 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 non-residents 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 can not be said that any legislation upon this subject is consistent 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, impaneling and summoning jurors is left to the Territorial legislature.

The action of the legislatures of all the Territories has 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.* And it is worth while to remark that in three of the Territories, Nevada, New Mexico and Idaho, the judge of 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 anulled 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 can not, 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 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 first 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 can not 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 can not 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 impanneling 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.

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 in-

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