UNITED STATES v. HILL ET AL.

Case No. 15,364.
{1 Brock. 156.}[1]

Circuit Court, D. Virginia. May Term, 1809.

GRAND JURIES—PRESENTMENT AND INDICTMENT—POWERS OF DISTRICT COURTS.

1. An individual is presented by the grand jury, for a particular offence, and a bill of indictment for the same offence is sent to the grand jury, by the attorney for the U. S., which they find "A true bill." At a subsequent term of the court, the attorney enters a nolle

prosequi. It seems: That the indictment was but an amendment of the presentment, that the presentment was embodied with the indictment, and perished with it.

2. It has been the practice of the courts in this country, to take no notice of presentments, on which the prosecuting attorney does not think proper to institute proceedings, and upon this principle, a motion to quash a presentment after a nolle prosequi entered, will be overruled.

3. No act of congress confers on the United States courts, the right to summon grand juries, or describes their powers. The laws of congress have invested the courts of the U. S. with criminal jurisdiction, and since this jurisdiction can only be exercised through the instrumentality of grand juries, the power to direct them results by necessary, implication. Hence, the powers of grand juries are co-extensive with, and are limited by, the criminal jurisdiction of the courts of which they are an appendage. Hence, too, a presentment by a grand jury in the circuit court of the U. S., of an offence of which that court has no jurisdiction, is coram non judice, and is no legal foundation for any prosecution, which can only be instituted on the presentment or indictment of a grand jury, to be carried on in another court, unless that court has no right to direct grand juries. But the district courts of the U. S. have that power, as completely as the circuit courts, to the extent of their criminal jurisdiction.

[Cited in U. S. v. Antz, 16 Fed. 122; Clawson v. U. S., 114 U. S. 487, 5 Sup. Ct. 954; Ex parte Wilson, 114 U. S. 425, 5 Sup. Ct. 939.]

[Cited in Heard v. Pierce, 8 Cush. 345; Oshoga v. State, 3 Pin. 59; Territory v. Harding (Mont.) 12 Pac. 754.]

On the 13th day of December, 1808, the grand jury presented John K. Hill and others, in this court, for a violation of the embargo laws of the United States, alleged to have been committed in March, 1808, by carrying the schooner Penelope into the port of St. Bartholomews, beyond the limits of the United States, although cleared from the port of Tappahannock, in Virginia, for the port of Savannah, in Georgia. On the following day, the attorney for the United States sent to the grand jury a bill of indictment, founded upon the said presentment, which they found "A true bill." At the June term, 1809, the attorney for the United States entered a nolle prosequi, as it seems, for want of jurisdiction, as to the whole class of indictments, founded upon presentments for violations of the embargo laws, including the indictment against the defendant Hill. A motion was then made on behalf of the defendant, Hill, to quash the presentment of the grand jury, and a cross motion was made by the attorney for the United States, for an order to certify this presentment to the district court

MARSHALL, Circuit Justice. I shall not quash the presentment for two reasons. 1st I am not certain, that the presentment has at this time any legal existence. I am much inclined to the opinion, that the two presentments of the same offence, which were made by the grand jury, the first on their own motion, which was informal, and the second, at the instance of the attorney for the United States, which is precisely the first presentment, corrected in point of form, are to be considered as one and the same act, and that the second is only to be considered as an amendment of the first. If this be correct, the presentment was embodied in the indictment and perished with it. I am, also, much inclined to the opinion, that the idea of a discontinuance, which was suggested at the bar, is correct.

2dly. The usage of this country has been, to pass over, unnoticed, presentments on which the attorney does not think it proper to institute proceedings. This usage is convenient, because it avoids the waste of time, which would often be consumed in the inquiry, whether the court could take jurisdiction of the offence presented. I am not disposed to disturb it, unless strong reasons should require my interposition. Without deciding whether this presentment retains any legal force, I shall not quash it.

A more material question grows out of the motion, for an order to certify this presentment to the district court. This order is not essential to the verification of the presentment. The record, certified by the clerk, would be as authentic as if certified under an order of this court. The motion, therefore, can only be made for the purpose of conveying to the district court, the opinion of this court that it is the duty of the judge below, to proceed upon the presentment ordered to be certified to him. The order can be required for no other purpose,—indeed, this is the avowed purpose for which it is asked. Consequently, I ought not to make the order, unless it should be my opinion, that the presentment here is a legal foundation for proceedings in the district court. In making this inquiry, I shall, for the present, discharge from my consideration those subsequent events, which appear to me to make it at least doubtful, whether the presentment is at this time in such legal force as to communicate validity to proceedings now to be instituted on it, and shall treat the question as if the presentment had been made during the present term. The order is required by the attorney for the United States, for the purpose of facilitating proceedings in the district court, against certain persons, charged with the violation of the embargo laws, and to obviate the objections drawn from the 7th amendment to the constitution, which ordains, "that no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury."

Without meaning to indicate any opinion on the necessity of a presentment or indictment in this case, I shall inquire whether, if it be necessary, I can transmit this presentment to the district court, as being, under the constitution, a legal commencement of a prosecution to be carried on in that court It has been truly stated, that no paper, purporting to be a presentment, can,

in contemplation of the constitution and the law, be a presentment, unless made on oath. That circumstance is admitted to be essential to its legal efficacy. The oath of a grand juror is not, as has been supposed, to inquire into every offence against the United States which may be committed within the district, but to inquire into such as may be given them in charge, or may otherwise come to their knowledge, "touching the present service." Their oath, their power, and their duty, are limited by the words, "touching the present service." We are therefore to inquire what the service is which they are sworn to perform.

It has been justly observed, that no act of congress directs grand juries, or defines their powers. By what authority, then, are they summoned, and whence do they derive their powers? The answer is, that the laws of the United States have erected courts which are invested with criminal jurisdiction. This jurisdiction they are bound to exercise, and it can only be exercised through the instrumentality of grand juries. They are, therefore, given by a necessary and indispensable implication. But, how far is this Implication necessary and indispensable? The answer is obvious. Its necessity is co-extensive with that jurisdiction to which it is essential. Grand juries are accessories to the criminal jurisdiction of a court, and they have power to act, and are bound to act, so far as they can aid that jurisdiction. Thus far, the power is implied, and is as legitimate as if expressly given. To suppose the powers of a grand jury, created, not by express statute, but by the necessity of their aiding the jurisdiction of a court to transcend that jurisdiction, would be to consider grand juries once convened, to be clothed with powers not conferred by law, but originating with themselves. This has never been imagined. It follows then, that, in the general, the grand juries which are summoned to attend the courts of the United States, possess powers and duties co-extensive with the jurisdiction of the courts which they attend. Is there any thing which shall take the present case out of this general principle? It is said, that under the constitution, the offender in this case can only be held to answer on a presentment or indictment of a grand jury, and that by law, the prosecution can be carried on in the district court alone. Hence is inferred the liability of proceeding in the district court, on a presentment made in this court. It will not be denied, that the legislature may enable grand juries to make presentments in one court, of offences to be prosecuted in another; nor will it be denied, that if these laws can be executed in no other manner, this power must be implied. But these admissions do not affect the present case. It is not pretended that this power is expressly given. If it exists, then, it must be implied. It cannot be implied, unless it be necessary to the execution of the law. It is not necessary to the execution of the law, unless the prosecution is to be carried on in a court which has no power to inquire into offences, by a grand jury. But it is incontestable, that a district court possesses, in this respect, precisely the same power with a circuit court. The power, then, of inquiring into offences of which this court has no jurisdiction, is no more given by implication than by express words. It follows, that the presentment in this case, was

not within the oath, or the power of the grand jury, was coram non judice, and is no legal foundation for any prosecution which can only be instituted on the presentment or indictment of a grand jury. If departing from this course of reasoning, we look for aid to the usages of other courts, we shall be brought, I think, to the same conclusion.

In England, whence we derive our grand juries, I believe the idea has never been suggested, that the power of the grand jury exceeded the jurisdiction of the court to which it is an appendage. In Virginia, I believe the idea would be equally novel. There is not only no case in either country in which proceedings have been instituted in one court, on a presentment or indictment, found in a court having no jurisdiction of the offence, but there is no ease on which proceedings have been instituted in one court, on a presentment or indictment found in another court. In Virginia, the county courts and superior courts have, in many cases, concurrent jurisdiction. In those cases, a grand jury, either in the superior or county court, may present the offence. The idea has never been suggested, that a presentment or indictment may be made in one court, and prosecuted in another.[2]

It is well worthy of consideration, whether

the words of the constitution do not connect the presentment with the subsequent proceedings, so as to make the whole one entire prosecution. "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury." Is it the indictment or presentment, he is to answer? I do not say that it is. Perhaps it is not. But if it be, how singular would be the proceedings which should commence in one court, especially in a court without jurisdiction, and be carried on in another, without being removed by those means provided by the law for transferring causes from one court to another?

Motion to quash overruled, and the order to certify the presentment to the district court, refused.

[1] {Reported by John W. Brockenbrough, Esq.}

[2] There is, however, one exception in Virginia, to the universality of the position taken by the chief justice, that the presentment of a grand jury in one court, is no legal foundation, for a prosecution, against the individual elsewhere, and is an absolute nullity, so far as it exceeds the jurisdiction of the court in which it is made. In Virginia, the superior courts of law have no original jurisdiction in cases of felony, but it frequently happens, in the criminal practice of this state, that an individual is presented by a grand jury in a superior court for a felony, before he has been tried by an examining court of his county. In such cases, the law makes it the duty of the judge, in whose court the presentment is made, to issue his warrant, directed to any sheriff or constable, for apprehending the person so charged, and commit him to the jail of the county where the presentment charges the felony to have-been committed; and upon the apprehension and commitment of the individual, the jailor is required to notify some justice of the peace of" the fact, whose duty it then becomes to issue his warrant to the sheriff of his county, directing him to summon an examining court as in ordinary cases. 1 R. C. c. 169, § 20, p. 605; Tate, Dig. p. 157, § 25.