

United States v. Bailey.

extend its provisions by construction, from motives of policy which may be supposed to have influenced the legislature.

If state and federal officers, as such, may exercise their functions within the jurisdiction of either government, to any extent, I see no principle by which their powers shall be limited. Such a course would blend the jurisdictions of the federal and state governments, and be likely to lead to the most serious collisions. I consider this question as one of great importance, and differing, as I do, from the opinion of the court, I have felt bound to give the reasons for my opinion.

*266] THIS cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of Kentucky; and on the point on which the judges of the said circuit court were opposed in opinion, and which was certified to this court for its opinion, agreeable to the act of congress in such case made and provided; and was argued by counsel: On consideration whereof, it is ordered and adjudged by this court, that it be certified to the said circuit court, as the opinion of this court, that the said Josiah Reed, named in the certificate of division, being a justice of the peace of the commonwealth of Kentucky, authorized by the laws of that state to administer oaths, had authority and jurisdiction to administer the oath and take the affidavit in the said certificate of division mentioned, and that if the facts stated therein were falsely sworn to, the case is within the act of congress of the 1st day of March 1823, referred to in the same certificate.

*267]

*UNITED STATES v. JOHN BAILEY.

Criminal law.—Certificate of division.

Indictment upon the act of congress of March 3d, 1823, for the punishment of frauds committed against the government of the United States. After the whole case had been laid before the circuit court, by the United States, the counsel for the prisoner moved the court to instruct the jury, that the evidence did not conduce to prove the offence charged under the act of congress; which was opposed by the United States; and on this question the judges were divided, and their opinions opposed; the question and disagreement were stated, and ordered to be certified to the supreme court.

The language of the sixth section of the act to amend the judicial system of the United States, which provides for the removal of cases from the circuit court to the supreme court, when the judges of the circuit court are opposed in opinion, shows conclusively, that congress intended to provide for a division of opinion on single points, which frequently occur in the trial of a cause; not to enable a circuit court to transfer an entire cause into the supreme court, before a final judgment. A construction which would authorize such transfer, would counteract the policy which forbids writs of error or appeals, until the judgment or decree be final.

The certificate of the judges leaves no doubt, that the whole cause was submitted to the circuit court by the motion of the counsel of the prisoner. It has been repeatedly decided, that the whole cause cannot be adjourned, on a division of the judges; and this is a case of that description.¹

CERTIFICATE of Division from the Circuit Court of Kentucky. The defendant was indicted under the act of March 3d, 1823, entitled "an act

¹ Nor can the whole case be broken up into points, and separately certified. *White v. Turk*, 12 Pet. 238; *Nesmith v. Sheldon*, 6 How. 41, *Luther v. Borden*, 7 Id. 1; *Webster v. Cooper*, 10 Id. 54.

United States v. Bailey.

for the punishment of frauds committed on the government of the United States." The act provides, "that if any person or persons shall falsely make, alter, forge or counterfeit, or cause or procure to be falsely made, altered, forged or counterfeited, or willingly aid or assist in the false making, altering, forging or counterfeiting, any deed, power of attorney, order, certificate, receipt or other writing, for the purpose of obtaining or receiving, or of enabling any other person or persons, either directly or indirectly, to obtain or receive, from the United States, or of any of their officers or agents, any sum or sums of money; or shall alter or publish as true, or cause to be altered or published as true, any such false, forged, altered or counterfeited deed, power of attorney, order, certificate, receipt or other writing as aforesaid, with *intent to defraud the United States, knowing the same to be [*268 false, altered, forged or counterfeited; or shall transmit to, or present at, or cause or procure to be presented at, any office or offices of the government of the United States, any deed, power of attorney, order, or certificate, receipt or other writing, in support of, or in relation to, any account or claim, with intent to defraud the United States, knowing the same to be false, altered, forged or counterfeited: every such person shall be decreed and adjudged guilty of felony."

On the 5th of July 1832, an act was passed, entitled "an act to provide for liquidating and paying certain claims of the state of Virginia. The third section of the act directs and requires the secretary of the treasury to adjust and settle the claims, the payment of which the United States thus assumed; and among them certain claims to half-pay of the officers of the Virginia line; and to pay the same out of the treasury.

The defendant and his brothers presented a claim under this act, asserting themselves to be the representatives of John Bailey, deceased, a captain in the regiment commanded by Colonel Clerk; and received by their attorney, under powers delegated to him, a large sum of money from the United States, as and for the half-pay of John Bailey.

The paper presented at the treasury in support of the claim, was in the following words and figures:

"The Commonwealth of Kentucky, county of Bath, to wit: The affidavit of John Bailey, one of the executors of Captain John Bailey, deceased, states, that he is not interested in said estate; that Warren Bailey, Jun., and James C. Bailey, who have joined with him in a power of attorney, to the Honorable Richard M. Johnson, to draw any moneys that may be due them, from the government of the United States, are the residuary legatees, and solely interested; that he is—years of age, and the son of said John Bailey, deceased, who, from his earliest recollection, was reputed a captain in the revolutionary army, and in the Illinois regiment; that he has seen his father's commission, and thinks there were two; of that fact, he will not be certain, but it is his strongest impression, and is perfectly confident, that the commissions, if two, both *were signed by Thomas Jefferson; that [*269 his father's papers fell into his hands, as executor, and he has made many fruitless searches for them, and can in no wise account for their loss, unless they were given to General Thomas Fletcher, deceased, while a member of congress, to see if he could get anything, as affiant knows that his father applied to said Fletcher to do something for him, and understood after-

United States v. Bailey.

wards, the law had made no provision for cases situated like said John Bailey's. As witness my hand and seal, this — day of November 1832.

JOHN BAILEY." [SEAL.]

"State of Kentucky, Bath county, to wit: The foregoing affidavit was signed and sworn to, before me, by John Bailey, Jun., and I further certify that said John Bailey, Jun., is a man of truth and respectability, and to be strictly relied on when on oath. Given under my hand and seal, as a justice of the peace for Bath county, and commonwealth aforesaid, this 25th day of November 1832.

J. REED, J. P., B. C." [SEAL.]

"State of Kentucky, Bath county, to wit: I, William M. Suddeth, clerk of the Bath county court, do certify, that the aforesaid Josiah Reed, whose name is subscribed to the foregoing certificate, is a justice of the peace in and for the county aforesaid, duly commissioned and sworn, and the handwriting is genuine and well known to the aforesaid William M. Suddeth as witness my hand and seal of office this 26th November, 1832.

W. M. SUDDETH." [SEAL.]

The indictment which set forth this writing, contained four counts, charging respectively the false making of the said writing, purporting to be an affidavit, and feloniously causing the *jurat* of the justice of the peace to be annexed to it; the uttering as true the whole paper; the causing it to be transmitted to the treasury department; and causing it to be presented at the department, in support of the claim.

In the record, the following case was stated, and the division *of *270] the judges of the court on the same, in the circuit court.

The attorney of the United States read in evidence to the jury the paper set out in the indictment, purporting to be the affidavit of the prisoner and the certificates of Josiah Reed and William Suddeth thereto attached, and proved that the signature of John Bailey, to the writing purporting to be his affidavit, was in the handwriting of him, the prisoner; that the signature to the certificate of Josiah Reed was in his handwriting, and that he was a justice of the peace of Kentucky, for the county of Bath, at the date thereof; that the certificate of William Suddeth was made and signed by him, and that he was clerk of the county court of Bath, as he certifies, and then gave satisfactory evidence that John Bailey, the father and testator of the prisoner, was not the John Bailey who was a captain in the Illinois regiment, as represented, and gave evidence conducing to prove that the prisoner had signed the paper purporting to be his affidavit, and aided in procuring the said Reed to sign his certificate, without he, the prisoner, ever having been sworn by the said Reed; that said Bailey fraudulently signed the said paper, and aided in procuring the certificate of Reed, and caused the said paper to be transmitted and presented at the treasury department of the United States, and there used in support of the claim, fraudulently made by the prisoner, as executor of his father, for the half-pay due to John Bailey, as a captain in the Illinois regiment, under the act of congress of the 5th of July 1832; that on this paper presented and received at the treasury, as the affidavit of the prisoner, and other documents, the claim was allowed, and the money paid to the attorney of the prisoner, and a part thereof paid over to him; this being all the evidence given on the part of the prosecution, the counsel for the prisoner moved the court to instruct the jury, that

United States v. Bailey.

the evidence did not conduce to establish the offence denounced by the first section of the act of congress of the 3d of March 1823, entitled "an act for the punishment of frauds committed on the government of the United States," nor any other act of congress under which the indictment was framed, which motion the attorney of the United States opposed, and on this question the judges were decided, and their opinions opposed. Where-
upon, on motion *of the attorney of the United States, the said ques- [*271
tion and agreement are stated and ordered to be certified to the supreme court.

The case was argued by the *Attorney-General*, and *Loughborough*, for the United States ; no counsel appeared for the defendant.

For the United States, it was contended :—

1. That the writing set forth in the indictment is within the act of congress of 1823, for the punishment of frauds. 3 Inst. 169, 171 ; 2 East P. C. 920 ; *King v. Lyon*, 1 Russ. & Ry. 255 ; Dyer 302.

2. That the evidence shows a fraud committed on the government by the prisoner.

3. That the act of 1823 is not against forgeries only, but is an act for the punishment of frauds. It should be construed so as to effectuate the intention of the legislature, as expressed, not only in the title of the act, but by its words, taken in their ordinary sense ; and cases should not be excluded which, thus construed, the act embraces. *United States v. Wittberger*, 5 Wheat. 95 ; 1 Bl. Com. 59, 60, 89.

4. That the first count in the indictment is sustained, the writing having been "falsely made," in the sense in which these words in the act should be taken. 3 Inst. 169 ; *Taverner's Case*, Dyer 322 ; 3 Leon. 108 ; Moore 655 ; Hawk. P. C. ch. 70 ; 2 East 920 ; 13 Vin. Abr. 464 ; *King v. Maddox*, 2 Russ. on Crimes 458.

5. That the subsequent counts, founded upon the use of the paper, were sustained by the proof ; and the writing which the prisoner fraudulently uttered, and caused to be transmitted and presented at the treasury, was such a false writing and certificate, as is meant by the act of congress. *Elsworth's Case*, 2 East P. C. 986, 988 ; 2 Russ. on Crimes 1513.

6. That the construction of the act contended for, will create no new offence, the acts shown against the prisoner amounting to an offence at common law, which would be punishable in the circuit court, if it had a common-law criminal jurisdiction. 2 Russ. on Crimes 1361, 1366, 1373 ; 4 East 171 ; 2 *Chitty's Bl. Com. 158, note ; Hawk. P. C. 323 ; 2 Str. [*272
1144 ; 7 Mod. 379.

7. That if the act of 1823 be regarded as an act against forging and counterfeiting only, still an offence is shown against the prisoner, because : 1st. A writing may be falsely made, *i. e.*, forged, in the party's own name. Hawk. P. C. ch. 70 ; *Lewis's Case*, Forster 117 ; *Case of Parks and Brown*, 2 East P. C. 963 ; 6 Cow. 72. 2d. The writing, though in the prisoner's own name, was made as in a character which he did not bear, and without the assumption of which the fraud could not have been perpetuated. Cases, *supra* ; 1 Leach 110. 3d. The writing purports to be, and was used as, an affidavit or writing sworn to, not being so in fact. The credit which was given to it, was that which was due to a sworn paper

United States v. Bailey.

only ; a paper not sworn to being, in the particular case, unavailing as an instrument of fraud. There was, therefore, given to the writing the false appearance of that, without which, it could not have imposed upon the secretary of the treasury ; wherefore, it is a counterfeit. *United States v. Turner*, 7 Pet. 132.

MARSHALL, Ch. J., delivered the opinion of the court.—This is a case certified to this court from the circuit court of the United States, for the seventh circuit and district of Kentucky, on which the judges of that court were divided in opinion.

An indictment had been found against John Bailey, upon the act of March 3d, 1823, for the punishment of frauds committed against the United States. After the attorney for the prosecution had laid his whole case before the court and jury, the counsel for the prisoner moved the court to instruct the jury, that the evidence did not conduce to establish the offence denounced by the first section of the act of congress of the 3d of March 1823, entitled "an act for the punishment of frauds committed on the government of the United States," nor any other act of congress under which the indictment was framed ; which motion the attorney for the United States opposed, and on this question the judges were divided and their opinions opposed. *273] Whereupon, *on motion of the attorney for the United States, the said question and disagreement were stated and ordered to be certified to the supreme court.

The sixth section of the act "to amend the judicial system of the United States," enacts, "that whenever any question shall occur before a circuit court, upon which the opinions of the judges shall be opposed, the point upon which the disagreement shall happen, shall, during the same term, upon the request of either party or their counsel, be stated, under the direction of the judges, and certified, under the seal of the court, to the supreme court, at their next session, to be held thereafter ; and shall by the said court be finally decided." The act also contains a provision, that, "nothing herein contained shall prevent the cause from proceeding ; if, in the opinion of the court, farther proceedings can be had without prejudice to the merits." (2 U. S. Stat. 159.)

The language of the section shows, we think, conclusively, that congress intended to provide for a division of opinion on single points, which frequently occur in the trial of a cause ; not to enable a circuit court to transfer an entire cause into this court, before a final judgment. A construction which would authorize such transfer, would counteract the policy which forbids writs of error or appeal, until the judgment or decree be final. If an interlocutory judgment or decree could be brought into this court, the same case might again be brought up after a final decision ; and all the delays and expense incident to a repeated revision of the same cause, be incurred. So, if the whole cause, instead of an insulated point, could be adjourned, the judgment or decree which would be finally given by the circuit court, might be brought up by writ of error or appeal, and the whole subject be re-examined. Congress did not intend to expose suitors to this inconvenience ; and the language of the provision does not, we think, admit of this construction. A division on a point, in the progress of a cause, on which the judges may be divided in opinion—not the whole cause—is to be certified to this court.

Boyce v. Grundy.

The certificate of the judges leaves no doubt that the whole cause was submitted to the circuit court, by the motion of the counsel for the prisoner. The whole testimony in support of the prosecution had been submitted to the court, and *upon this whole testimony, the counsel for the prisoner moved the court to instruct the jury, that the evidence did not [*274 conduce to establish the offence denounced by any act of congress, under which the indictment was framed. This instruction necessarily embraced the whole cause. Had it been given, the prisoner must have been acquitted. Had the court declared, that the testimony did not support the indictment, the whole law of the case would have been decided against the prisoner; and the jury must have convicted him, or have disregarded the instruction of the court. It has been repeatedly decided, that the whole cause cannot be adjourned on a division of the judges; and as this is, we think, a case of that description, we cannot decide it in its present form. The case is remanded to the circuit court; this court not having jurisdiction over the question as stated.

THIS cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of Kentucky, and was argued by counsel: On consideration whereof, it is the opinion of this court, that the whole case has been certified to this court; and as it has been repeatedly decided by this court, that the whole case cannot be adjourned on a division of the judges, the court cannot decide this case in its present form. Whereupon, it is ordered and adjudged by this court, that this case be and the same is hereby remanded to the said circuit court, for further proceedings to be had therein, according to law and justice, this court not having jurisdiction over the question as stated.

*JAMES BOYCE'S Executors, Appellants, v. FELIX GRUNDY. [*275

Rescission of contract.—Interest on affirmance.

On the hearing of the case of Boyce's Executors v. Grundy, at January term 1830, on an appeal from the decree of the circuit court of West Tennessee (3 Pet. 210), the decree of the circuit court was affirmed; by which, after decreeing a rescission of a contract made between Felix Grundy and James Boyce, the intestate, for the purchase, by the former from the latter, of a tract of land lying in the state of Mississippi; the court also decreed, that Robert Boyce, the administrator of James Boyce, of the goods, &c., of James Boyce, deceased, do pay the sum of \$2065.21, to be levied on the goods of the said James Boyce, in his hands to be administered: and execution issue therefor as at law; in this decree, nothing was said as to any allowance of damages or interest. A mandate was issued in the usual form, to the circuit court, to carry the same into effect; on filing the mandate in the circuit court, in 1830, the cause was referred to the clerk, as master, to take an account of the assets of James Boyce, in the hands of the administrator; who reported, that no assets appeared in the hands of the administrator, but that Robert Boyce had, under an agreement with the appellee, received for rents of the land in Mississippi, before the 1st of January 1824, \$2100, which, with interest thereon, \$1120, to the 1st of September 1830, would amount to \$3220; and that the land in Mississippi was devised by James Boyce, the intestate, to his son Robert Boyce. The report was confirmed, except as to the \$1120 interest; the circuit court decreed, that the plaintiff recover of Robert Boyce, \$2100, with interest from the decree; to be levied on his proper goods and chattels; and for the balance due the plaintiff, \$496.46, with interest, in case the same was not paid by him; the plaintiff had for the whole amount of the decree, a lien on the lands in the state of Mississippi; and that the same should be sold to satisfy the same, by the clerk of the court, acting as a commissioner.