

Statement of the case.

The case of the claimant is in some of its aspects worthy of consideration, but as it was not filed in the Court of Claims until barred by the statute, we are not at liberty to discuss its merits.

JUDGMENT REVERSED, and the cause remanded to the Court of Claims, with directions to

DISMISS THE PETITION.

KLINGER v. STATE OF MISSOURI.

Where the judgment of a State court might have been based either upon a State law repugnant to the Constitution or laws of the United States, or upon some other independent ground, and it appears that the court did, in fact, base it upon the latter ground, this court will not take jurisdiction of the case, even though it should think the decision of the State court erroneous; and so, also, where it does not appear on which of the two grounds the judgment was, in fact, based, if the independent ground was a good and valid one of itself to support the judgment, this court will not take jurisdiction; but if not, it will presume that the judgment was based on the State law in question, and will take jurisdiction.

By the constitution of Missouri, adopted in 1865, a test oath was prescribed to be taken by public officers, jurors, &c., which this court, in *Cummings v. Missouri* (4 Wallace, 277), decided to be unconstitutional. A juror, on a trial for murder in a State court, refused to take it; but on being examined as to the reason of his refusal, he alleged, not only that he had sympathized with the late rebellion, and, therefore, could not take it truthfully, but that those were his feelings still, and stronger than ever; whereupon the court discharged him. *Held*, that his avowed present disloyalty to the government was a sufficient cause in itself for his discharge, irrespective of his refusal to take the oath; and as it did not appear that he was discharged for the latter cause, the Supreme Court of the United States refused to take jurisdiction of the case.

ERROR to the Supreme Court of Missouri; the case being thus:

By the third section of the second article of the constitution of Missouri, adopted in April, 1865, it was declared in substance that no person who had ever engaged in the rebellion, or had manifested any sympathy therefor, in any

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way, should be deemed a qualified voter, or be capable of holding any office, or being a councilman, director, or trustee of any corporation, or of being a professor or teacher in any seminary of learning, or of holding property in trust for a church or congregation.

By the sixth section (one more particularly referred to in the present case), an oath was prescribed to be taken by all persons occupying, or entering upon, the positions referred to in section third, beginning as follows:

“I, A. B., do solemnly swear that I am well acquainted with the terms of the third section of the second article of the constitution of the State of Missouri, adopted in the year 1865, and have carefully considered the same; that I have never directly or indirectly done any of the acts in said section specified; that I have always been truly and loyally on the side of the United States against all enemies thereof, foreign and domestic, &c.

By the eleventh section it is declared “that every court in which any person shall be summoned to serve as a grand or petit juror shall require him, before he is sworn as a juror, to take the said oath in open court; and no person refusing to take the same shall serve as a juror.”

By the twelfth section, “If any person shall declare that he has conscientious scruples against taking an oath, or swearing in any form, the said oath may be changed into a solemn affirmation, and be made by him in that form.”

On the 25th of December, 1868, President Johnson issued his proclamation, by which he did

“Proclaim and declare, unconditionally, and without reservation, to all and to every person who directly or indirectly participated in the late insurrection or rebellion, a full pardon and amnesty for the offence of treason against the United States, or of adhering to their enemies during the late civil war, with *restoration of all rights, privileges, and immunities under the Constitution and laws which have been made in pursuance thereof.*”

The constitution of Missouri, above referred to, being in force, and the said proclamation of President Johnson having issued, one Max Klinger was indicted for the murder of

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Henry Werder, in the Criminal Court of the County of St. Louis, Missouri, and was convicted in October, 1869, and sentenced to be executed on the 16th of December, 1869; but having taken a bill of exceptions and a writ of error to the Supreme Court of Missouri, his sentence was respite.

The bill of exceptions taken on the trial of the case contained in its first paragraph what here follows; this paragraph being the *only* part of the bill which referred to the subject of any refusal to take the test oath:

“Be it remembered that this cause coming on to be heard and tried in said court, the marshal proceeded to call the jurors summoned in the same, and whilst empanelling the jury, it was found that one of said jurors, named Andrew Park, refused to take the oath of loyalty prescribed by the constitution of this State, whereupon the said Park was duly sworn to answer such questions as might be propounded to him, and being asked by the court why he refused to take said oath, he stated and declared that during the late rebellion he was a sympathizer with the Confederate cause, and earnestly desired its success; *that these were his opinions and sentiments then; that he thinks so stronger now than he did then; that he was born in the South; that his heart was with the Southern cause, and that for these reasons he could not conscientiously take the proffered oath;* thereupon the court of its own motion discharged the said juror, against the consent and objection of the defendant, to which action of the court the defendant excepted.”

Among the errors assigned before the Supreme Court of Missouri, of which there were ten, was this one (the only one cognizable here):

“That the court erred in excluding and discharging from the jury, the said Andrew Park, against the objections and consent of the defendant, *for no other reason* than that the said Andrew Park declined to take the oath prescribed in the *sixth section of the second article of the constitution of the State of Missouri.*”

The case is reported in the 43d volume of the Missouri Reports;* but it does not appear by the report there that this

* The State of Missouri v. Max Klinger, 43 Missouri, 127.

Argument in support of the jurisdiction.

point was raised or passed upon by the Supreme Court of Missouri. However, the judgment of the court below was affirmed, and the case was now brought here by the prisoner under an assumption of his counsel that it was within the 25th section of the Judiciary Act; a matter to the establishing of which, as a preliminary point, the attention of counsel for the plaintiff in error was directed on the calling of the case.

Mr. W. H. Russell, for the plaintiff in error:

Has this court jurisdiction under the 25th section? We think that it has. The Constitution of the United States declares that "the trial of all crimes, except of impeachment, shall be by jury."* The sixth amendment to the Constitution, that "the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district where the crime shall have been committed;" and the fourteenth amendment that no "State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law."

Right to trial by jury is thus sought by our organic law to be secured in absolute fulness and perfection.

Now the Criminal Court of St. Louis excluded Park *for no other reason* than that he declined to take the oath of loyalty prescribed by the sixth section of the second article of the constitution of Missouri. But that section is repugnant to the Constitution of the United States; and has by this court been so declared.† It was an *ex post facto* law, and therefore unconstitutional. Moreover, the proclamation of amnesty issued by President Johnson, was a complete pardon for all the acts specified in the third section of the second article of the constitution of Missouri, and relieved Park from all guilt, and restored him to all his rights, privileges, and immunities as a citizen.‡

* Art. III, § 2. † Cummings *v.* State of Missouri, 4 Wallace, 277.

‡ Ex parte Garland, 4 Wallace, 333; and see *supra*, 154-6; Armstrong *v.* United States; Pargoud *v.* United States.

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The decision of the Supreme Court of Missouri was in favor of the validity of the authority exercised by the Criminal Court under the constitution of Missouri, and against the right thus existing under the higher Constitution of the United States, and the President's pardon under it. Jurisdiction, therefore, exists in this court to re-examine. There has been drawn in question the validity of an authority exercised under a State, on the ground of its being repugnant to the Constitution or laws of the United States, and the decision has been in favor of such its validity.

No counsel appeared for the State of Missouri.

Mr. Justice BRADLEY delivered the opinion of the court.

Although it does not seem, from the report of this case in the Missouri Reports, that the point taken before us was raised or passed upon by the Supreme Court of that State, yet being found in the record, and arising out of the transactions at the trial, as exhibited in the bill of exceptions, it is our duty to examine it.

The oath referred to, which the juror, Park, declined to take, was what is known as the oath of loyalty, or test oath, prescribed by the sixth section of article second of the constitution of Missouri, adopted in April, 1865.

The plaintiff in error insists that this oath was unconstitutional, as declared by this court in the case of *Cummings v. The State of Missouri*, and that the imposition of it upon the juror, in obedience to the State constitution, against the plaintiff's protest, was an invasion of his rights as well as those of the juror; that to exclude the juror because he declined to take the oath was to decide in favor of the validity of a State law repugnant to the Constitution and laws of the United States, &c., and hence that this court has jurisdiction to review the decision of the Supreme Court of Missouri.

Conceding, for the sake of argument, all this to be true, still, before we enter upon that duty it is necessary to look carefully at the record and see whether the plaintiff's allegation is true, that the court below excluded the juror *for no*

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other reason than that he declined to take the oath referred to. For we do not assume jurisdiction to review the judgment of a State court, unless it clearly appears from the record that a question has been raised and passed upon which is within the cognizance of this court, as provided for in the 25th section of the Judiciary Act, or the corresponding act passed February 5th, 1867. If such a question was really raised and passed upon in this case, it is somewhat singular that no notice is taken of it in the report of the case before referred to.

The only portion of the bill of exceptions relating to this subject is the first paragraph of the bill. Now, it does not clearly appear from the statement there made that the juror was discharged "for no other reason than that he declined to take the oath." The reasons assigned by him for not taking the oath were twofold: first, that he was a rebel in his sympathies during the war; and, secondly, that he was so still, and even stronger than ever. A man who makes such an avowal as that, thus manifesting a settled hostility to his country and its government, may well have been deemed by the court, irrespective of his refusal to take the oath, an unfit person to act as a juryman, and a participant in the administration of the laws.

Had the juror refused to take the oath simply because he had sympathized with or aided the rebellion during the war, and had he been discharged on that account, then the questions would have fairly arisen of which this court could take cognizance. The repugnancy of the test oath to President Johnson's proclamation of amnesty, and to the prohibition against *ex post facto* laws, &c., would have been fairly brought into question. But as he also refused to take it because he was still a more bitter rebel than ever, the avowal of such a feeling was inconsistent with the upright and loyal discharge of his duties, as much so as if he had expressed his disbelief in the obligation of an oath, and had declined to take it for that reason. Surely, if he had done that, there could have been no doubt that his discharge was justifiable, whatever view might be taken of the constitutionality of the test oath.

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It certainly would have been in the discretion of the court, if not its duty, to discharge him. And so we think it was in this case.

The rules which govern the action of this court in cases of this sort are well settled. Where it appears by the record that the judgment of the State court might have been based either upon a law which would raise a question of repugnancy to the Constitution, laws, or treaties of the United States, or upon some other independent ground; and it appears that the court did, in fact, base its judgment on such independent ground, and not on the law raising the Federal question, this court will not take jurisdiction of the case, even though it might think the position of the State court an unsound one. But where it does not appear on which of the two grounds the judgment was based, then, if the independent ground on which it might have been based was a good and valid one, sufficient of itself to sustain the judgment, this court will not assume jurisdiction of the case; but if such independent ground was not a good and valid one, it will be presumed that the State court based its judgment on the law raising the Federal question, and this court will then take jurisdiction.*

In this case it appears that the court below had a good and valid reason for discharging the juror, independent of his refusal to take the test oath; and it does not appear but that he was discharged for that ground. It cannot, therefore, with certainty, be said that the Supreme Court of Missouri did decide in favor of the validity of the said clause of the State constitution, which requires a juror to take the test oath.

WRIT OF ERROR DISMISSED.

* *Maguire v. Tyler*, 8 Wallace, 650; *Neilson v. Lagow*, 12 Howard, 110; *Railroad Company v. Rock*, 4 Wallace, 177; *Railroad Company v. McClure*, 10 Id. 511; *Insurance Company v. Treasurer*, 11 Id. 204; *Crowell v. Randal*, 10 Peters, 368; *Suydam v. Williamson*, 20 Howard, 427; *Williams v. Oliver*, 12 Id. 123.