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Selection Federal Jury Panel

SUPREME COURT

SELECTION FEDERAL JURY PANEL

Petitioner was injured when he jumped from moving train operated by respondent. Suit in a California court alleging negligence, was removed to federal court in San Francisco where petitioner moved to strike jury panel as it represented "mostly business executives or those having the employer's point of view. . ." Evidence showed the jury commissioners excluded day laborers from the jury list since this group probably would have been excused by the trial judge anyway on grounds of financial hardship. Motion denied. Court of appeals

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29. See n. 10 supra.
30. U.S. v. Anderson, 269 U.S. 422 (1926). See U.S. v. SouthEastern Underwriters Ass'n, 322 U.S. 533 (1944) (Dissenting opinion by Stone, C.J.).
31. See n. 10 supra.
32. Manley v. Mayor, 68 Kan. 377, 75 Pac. 550 (1904); U.S. v. Elgin J. & E. Ry., 298 U.S. 492 (1935). Contra: Rosse v. St. Paul & D. Ry., 68 Minn. 216, 71 N.W. 20 (1897). See Sutherland, "Statutory Construction" (3d ed. 1943) § 5109.
33. See Sutherland, "Statutory Construction" (3d ed. 1943) § 5109. For a discussion of this problem in the field of tax and administrative law, see Alford, "Treasury Regulations with the Wilshire Oil Case" (1940) 40 Col. L. Rev. 252; Brown, "Regulations, Reenactment, and the Revenue Acts" (1941) 54 Harv. L. Rev. 377; Feller, "Addendum to the Regulations Problem" (1941) 54 Harv. L. Rev. 1311; Griswold, "A Summary of the Regulations Problem" (1941) 54 Harv. L. R. 398; Paul, "Use and Abuse of Tax Regulations in Statutory Construction" (1940) 49 Yale L. J. 660; Surrey, "The Scope and Effect of Treasury Regulations under the Income, Estate and Gift Taxes" (1940) 88 U. of Pa. L. Rev. 556; "If there has been a series of uniform decisions on the same point they ought to have the force of law, because in this case they become conclusive evidence of the law. . . " Lieber, "Hermeneutics" (3d ed. 1880).
34. Radin, "Statutory Interpretation" (1930) 43 Harv. L. Rev. 863.

affirmed.[1] Certiorari granted. Held, reversed. The court, through Mr. Justice Murphy stated, inter alia, that "such exclusion cannot be justified by state or federal law." *Thiel v. Southern Pacific Co.*, 66 S. Ct. 984 (1946).[2]

Jurors in federal courts are qualified according to the law of the state in which the court is sitting.[3] The state may provide quailfications and exemptions so long as it doesn't discriminate against persons because of their race, color, or previous condition of servitude.[4] The California code makes provision for specific exemptions in the interests of the community,[5] but there are no provisions for exemption of day laborers as such. Yet, it further provides that the jury lists shall be made of such only as are not exempt and who are otherwise qualified.[6] Still, the California code provides that prospective jurors may be *excused by the court* for other than trivial reasons, when material injury or destruction to that person's property is threatened.[7] Thus the court was faced with an exemption of a particular class not specifically provided for by the California code. The proposition is now apparent that this is a violation of federal law by reference to the state law.

But the court went further than the above proposition by stating that this was also violative of the American tradition of trial by jury. The courts conception of this jury, by analogy to the cases arising under the Fourteenth Amendment, is that it be a body truly representative of the community and be drawn from a cross-section thereof.[8] Yet, an arbitrary exclusion of members of a particular race is a denial of equal protection of the laws.[9] Even though the cases in the past have confined themselves to the issue of racial discrimination,[10] it is apparent that the court is extending the principle of those cases to cover the circumstance here.

Since the United States Supreme Court exercises supervisory powers over the lower federal courts, it may reverse a judgement when something less than a constitutional issue is involved.[11] The court condemned the practice of the jury commissioners as not only viola-

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1. Thiel v. Southern Pacific Co., 149 F. (2d) 783 (C.C.A. 9th, 1945).
2. Mr. Justice Frankfurter, with whom Mr. Justice Reed concurred, dissented.
3. 28 U.S.C.A. (1942) § 411.
4. Id. § 411 (8).
5. Calif. Code of Civ. Proc. (1941) §§ 198-200.
6. Id. § 205.
7. Id. § 201.
8. Smith v. Texas, 311 U.S. 128 (1940); accord, Dixon v. State, 67 N.E. (2d) 138 (Ind. 1946).
9. Smith v. Texas, 311 U.S. 128 (1940); Hill v. Texas, 316 U.S. 400 (1942); Pierre v. Louisiana, 306 U.S. 354 (1938); Hale v. Kentucky, 303 U.S. 613 (1938); Norris v. Alabama, 294 U.S. 587 (1935); Carter v. Texas, 177 U.S. 442 (1900); Gibson v. Mississippi, 162 U.S. 565 (1896); Neal v. Delaware, 103 U.S. 370 (1881).
10. See n. 9 supra.
11. McNabb v. United States, 318 U.S. 332 (1943).

tive of law but also of the American standards of justice and equality. Submitted, that the judgment in this case was not prejudicial to the petitioner since the trial court orally found that five members of the jury did tend toward the laboring class.[12] The court appears to be closing the door to a practice, which if not controlled, could serve substantial injustice in future litigation.

TAXATION

EMBEZZLED FUNDS AS INCOME

Taxpayer, employed as a bookkeeper, embezzled over $12,000 during 1941. He was convicted in 1942, sentenced for the crime, and paroled in 1943. The Commissioner determined that the taxpayer was required to report the embezzled funds as income received in 1941 and asserted a tax deficiency. The Tax Court sustained the Commissioner[1] and the circuit court of appeals reversed.[2] Held: affirmed. The embezzled money did not constitute income to the taxpayer in 1941 under Sec. 22 (a) of the Internal Revenue Code. *Commissioner v. Wilcox*, 66 Sup. Ct. 546 (1946).[3]

This decision holds that embezzled funds *per se* are not as a matter of law taxable income,[4] reversing the previous administrative interpretation of Sec. 22 (a)[5] approved by the Tax Court.[6] The decision has been criticized as a departure from the previous approach that illegal gains are taxable as a matter of public policy, that the "test" proposed is irreconcilable with other decided cases, and that the decision ignores the practical gains to the embezzler.[7]

Mr. Justice Burton took sharp issue with the majority opinion, summing up his position as follows: "Because of the legislative history of Sec. 22 (a), the breadth of the language used by Congress in that section, the attempt of Congress to use the full measure of its

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12. Mr. Justice Frankfurter did not understand why the judgment wasn't free from any inherent infirmity in that it was "too large an assumption on which to base judicial action that those workers who are paid by the day have a different outlook psychologically than those who earn weekly wages . . ." Principal case at p. 990.
1. T.C. Memo. Dec., 3 C.C.H. 1944 Fed. Tax Serv. T.C. Dec. 14,107 (M)
2. 148 F. (2d) 933 (C.C.A. 9th, 1945).
3. Dissenting opinion Burton, J., principal case at p. 550.
4. The Treasury Department's interpretation of the decision is as follows: "The mere act of embezzlement does not of itself result in taxable income to the embezzler for federal income tax purposes. If the owner condones the taking of the property and forgives the indebtedness, taxable income may result to the embezzler, depending on the facts in the particular case." 4 C.C.H. 1946 Fed. Tax Serv. ¶ 6230, G.C.M. 24945, 1946-13-12335.
5. G.C.M. 16572, XV-1 Cum. Bul. 82 (1936).
6. See Spruance, 43 B.T.A. 221 (1941), rev'd sub nom., McKnight v. Comm'r, 127 F. (2d) 572 (C.A.A. 5th, 1942); Kurrle v. Comm'r, P.H. 1941 Fed. Tax Serv. B.T.A. Memo. Dec. 41,085, aff'd, 126 F. (2d) 723 (C.C.A. 8th, 1942).
7. (1946) 44 Mich. L. Rev. 885; (1946) 34 Calif. L. Rev. 449,